

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA

In the matter of an Application for mandates in the nature of Writs of Certiorari and Prohibition under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 383/2017

1. H. D. P. Anthony,
President,
Negombo Businessmen Association,
No. 53/1, Grand Street, Negombo.
2. Mohan De Silva,
Secretary,
Negombo Businessmen Association,
Appollo Colour Lab,
near Railway Station, Negombo.
3. Negombo Businessmen Association,
Appollo Colour Lab,
near Railway Station, Negombo.
4. Nimal Abeysinghe,
President of the Negombo Municipal
Shopping Complex Trade Association,
No. 511/07, Finco State,
Dalupatha, Negombo.
5. Nilan Fernando,
Secretary, Negombo Municipal
Shopping Complex Trade Association,
Archbishop Nicholas Marcus
Fernando Mawatha,
Kadolkale, 2nd Stage, Negombo.

6. Negombo Municipal Shopping Complex Association,
39C, B Block, Shopping Complex,
Greens Road, Negombo.
7. Rohan Fernando,
President,
Daily Fair Welfare & Funeral Assistance Society,
No. 33, Kopi Watta Janapadaya,
Ambalayaya, Katana.
8. A. R. Sampath Rathnayake,
Secretary,
Daily Fair Welfare & Funeral Assistance Society
No. 109, Kos atadeniya, Meerigama.
9. Daily Fair Welfare & Funeral Assistance Society,
No. 39/C, B Block Shopping Complex,
Negombo.

Petitioners

Vs.

1. Municipal Council of Negombo,
Office of the Municipal Council,
Negombo.
2. K. S. C. Sugath Kumara,
Municipal Commissioner,
Negombo Municipal Council,
Negombo.

3. B. N. V. Fernando,
Deputy Municipal Commissioner,
Negombo Municipal Council,
Negombo.
4. Secretary,
Negombo Municipal Council,
Office of the Municipal Council,
Negombo.
5. Lal Fernando,
No. 4, Alas Road, Negombo.
6. Commissioner of Local Government,
(Western Province),
Department of Local Government,
(Western Province),
No. 2, Cambridge Terrace,
Colombo 7.
7. Assistant Commissioner of Local
Government
(Western Province),
Department of Local Government,
(Western Province), Gampaha.
No. 223, Kandy Road,
Henpitamulla,
Yakkala.
8. Mahinda Weerasekera,
Senior Investigation Office,
Department of Local Government,
Western Province) Gampaha,
No. 223, Kandy Road,
Henpitamulla,
Yakkala.

Respondents

Before: Arjuna Obeyesekere, J

Counsel: Dr. Sunil Cooray with Ms. Sudarshani Cooray for the Petitioners

Rohan Sahabandu, P.C., with Ms. Sayonara Wickremasinghe for the 1st – 4th Respondents

Suranga Wimalasena, Senior State Counsel for the 6th and 7th Respondents

Written Submissions: Tendered on behalf of the Petitioners on 1st July 2019 and 4th September 2019

Tendered on behalf of the 1st – 4th Respondents on 16th October 2019

Tendered on behalf of the 6th and 7th Respondents on 3rd July 2019 and 4th September 2019

Decided on: 13th March 2020

Arjuna Obeyesekere, J

When this matter was taken up for argument on 17th July 2019, the learned Counsel for the Petitioners, the learned President's Counsel for the 1st – 4th Respondents and the learned Senior State Counsel for the 6th and 7th Respondents moved that this Court pronounce its judgment on the written submissions that have already been filed of record. When this matter was mentioned on 14th February 2020, all learned Counsel agreed to this Court sitting alone and delivering judgment.

The facts of this matter very briefly are as follows.

The Petitioners are engaged in trading businesses in premises situated within the Municipal Council limits of Negombo. The Petitioners state that by an advertisement placed in the English and Sinhala newspapers of 27th October 2017, annexed to the petition marked 'X2' and 'X3' respectively, the 2nd Respondent, the Municipal Commissioner, Negombo called for quotations for the *'lease of the pavement for the selling of Christmas Cards, Goods and Decorations from 1st December 2017 – 31st December 2017'*. It is clear that the effect of leasing out portions of the pavement was to create a market place during Christmas, on public streets.

The Petitioners state that leasing out of pavements is contrary to the provisions of the Municipal Councils Ordinance (the Ordinance), and is *ultra vires* the powers of the 1st Respondent, Municipal Council of Negombo.

The Petitioners have alleged that the leasing of pavements would result in a loss of business to the Petitioners who are carrying out their business from permanent buildings situated on either side of the pavements, as their business establishments would be obstructed by the temporary structures that would be erected on the pavement by would-be lessees of the pavements. The Petitioners have stated further that leasing out of pavements to carry out trading activity causes severe congestion on the streets resulting in grave inconvenience to the general Public.

In this background, by letters annexed to the petition marked 'X4' and 'X5', the Petitioners had objected to the leasing of the pavements. However, as the 1st and 2nd Respondents did not respond positively, the Petitioners have filed this application, seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the decision to lease pavements for the sale of goods during the month of December;
- b) A Writ of Prohibition restraining the 2nd – 4th Respondents from leasing out pavements.

The issue that this Court must decide in this application is whether the 1st Respondent, the Municipal Council, Negombo and the 2nd Respondent, the Municipal Commissioner, Negombo has the power to lease out pavements situated within the Municipality of Negombo.

The learned Senior State Counsel, appearing for the 6th and 7th Respondents, namely the Commissioner and Assistant Commissioner of Local Government (Western Province) submitted that *the Municipal Council Ordinance does not contain provisions for the lease of pavements.*¹ He submitted further that upon representations made by the Petitioners, the 6th Respondent had initiated an inquiry, and thereafter, by a letter dated 5th December 2017 marked '**R1**', the 7th Respondent had informed the 2nd Respondent as follows:

“නත්තල් සමයේ මගමුව පදික වෙළෙඳුන්ට ටෙන්ඩර් දීම සම්බන්ධව

උක්ත කරුණු සම්බන්ධයෙන් ඔබගේ අංක නාග/ආලි 03/02/1 හා 2017/11/29 දිනැති ලිපිය හා බැඳේ. එම ලිපියේ කරුණු සලකා බලා අවශ්‍ය ඉදිරි කටයුතු පිළිබඳව උපදෙස් ඉල්ලා ඇත.

ඒ අනුව මගමුව මහ නගර සභාව සතු ඉඩම් හෝ ගොඩැගිලි තාවකාලිකව හෝ දිර්ඝකාලීන පදනම මත බදු දීමට නිර්දේශයක් ඉදිරිපත් කිරීමට හැකි වුවත් ටෙන්ඩර් දැන්වීම පරිදි වේදිකා බදු දීමට නිර්දේශ ඉදිරිපත් කිරීමට නොහැකි බව දන්වම.”

¹ Vide paragraph 13 of the Statement of Objections of the 6th and 7th Respondents.

The Petitioners have produced with their Counter Affidavit, a further letter dated 20th November 2017 marked 'X8' issued by the 7th Respondent, informing the 2nd Respondent as follows:

“මගමුව නගරයේ පදික වේදිකාව මගමුව මහ නගර සභාව සතු දේපලක් නොවන බැවින් ටෙන්ඩර් මගින් හෝ වෙනත් ආකාරයට බදු දීමට මහ නගර සභාවට මහා නගර සභා පනතේ ප්‍රතිපාදන නොමැති නිසා දැනට ක්‍රියාත්මක කිරීමට යන මෙම වැඩපිළිවෙල නතර කිරීමට අදාළ පියවර ගැනීමට මගමුව නගර සභාවට උපදෙස් ලබාදීමට කටයුතු කළයුතු බව නිර්දේශ කරමි.”

It is an admitted fact that pursuant to the above letters being sent, the 2nd Respondent did not proceed with the advertisement to lease the pavements, and that the process had been abandoned. In this background, the learned Senior State Counsel submitted that proceeding with this application is futile, and moved that this application be dismissed. This Court observes that the Writ of Certiorari that has been sought in this application is to quash the decision taken to lease out the pavements in the month of December. Although a year has not been specified, it is clear to this Court that the Writ of Certiorari that has been sought was to quash 'X2' and 'X3', which is limited to the period 1st December – 31st December 2017. This Court is therefore in agreement with the submission of the learned Senior State Counsel that it would be futile for this Court to issue a Writ of Certiorari under the above factual circumstances, and for that reason, is of the view that the Petitioners are not entitled to the Writ of Certiorari prayed for.

Although this Court is not inclined to grant the Writ of Certiorari, and even though the Petitioners have not placed any material before this Court to establish that the 1st – 4th Respondents have sought to lease out pavements

after the issuance of 'X8' and 'R1', this Court is of the view that it must decide on the aforementioned Writ of Prohibition, for two reasons.

The first is that Certiorari and Prohibition are but two sides of the same coin. This is illustrated by the following passages from Administrative Law by Wade and Forsyth²:

“The quashing order and the prohibiting order are complementary remedies, based upon common principles, so that they can be classed together. A quashing order issues to quash a decision which is ultra vires (or, formerly vitiated by error on the face of the record). A prohibiting order issues to forbid some act or decision which would be ultra vires. The quashing order looks to the past, a prohibiting order to the future. In this way they are respectively comparable to the declaration and injunction in the sphere of private law remedies. Like private law remedies, they may be sought separately or together. Unlike private law remedies, they have never been dependent on the applicant showing a specific personal right. Nominally they are granted to the Crown, and the Crown always has sufficient interest to call upon public bodies to act lawfully.”

“The prohibiting order developed alongside the quashing order as part of the system of control imposed by the Court of King’s Bench. It was a similar remedy, but was prospective rather than retrospective”.³

² H.W.R. Wade and C.F. Forsyth, *Administrative Law* (11th Edition), Oxford University Press, at page 509.

³ *Ibid*, page 510.

*“Quashing and prohibiting orders frequently go hand in hand, as where a quashing order is sought to quash the decision and a prohibiting order to restrain its execution.”*⁴

The second reason is the submission of the learned Senior State Counsel that the *Municipal Council Ordinance does not contain provisions for the lease of pavements*, and the response by the learned President’s Counsel for the 1st – 4th Respondents that in terms of Section 86 of the Ordinance, read together with Sections 327(1) and 37(1)(b) thereof, the 1st Respondent has the power to lease out *property* under the control and direction of the Municipal Council.

It would therefore be appropriate for this Court to consider at this stage, the provisions of the Municipal Councils Ordinance. Section 4 of the Ordinance presents a broad spectrum of the powers vested in a Municipal Council, and reads as follows:

“The Municipal Council constituted for each Municipality shall, subject to the powers reserved to or vested in any other authority by this Ordinance or by any other written law, be the local authority, within the administrative limits of the Municipality, charged with the regulation, control and administration of all matters relating to the public health, public utility services and public thoroughfares, and generally with the protection and promotion of the comfort, convenience and welfare of the people and the amenities of the Municipality.”

⁴ Ibid. page 511.

The starting point in considering the issue before this Court is to ascertain what is meant by a *pavement*. The following definition of 'street' in Section 327 of the Ordinance makes it clear that a pavement is part of the street:

*“‘street’ includes any road, square, court, alley, lane, or passage, river or canal, whether a thoroughfare or not, over which the public have a right of way, **together with the land** (not being State property or private property), **whether covered or not by any pavement**, verandah, or other structure, **which lies between the roadway and the main wall of any house adjacent thereto**, as well as all drains, embankments, and ditches belonging or appertaining thereto, also all public open places, and also the roadway over any public bridge or causeway within a Municipality, and such waste land adjoining any street or road as may have been reserved for its protection or benefit;”*

Section 37(1)(b) of the Municipal Councils Ordinance provides as follows:

“There shall be further vested in each Municipal Council, for the purposes of this Ordinance, the following classes of property:

- (a) all public parks, gardens and open spaces acquired by or otherwise transferred to the Council,*
- (b) **all streets** within the Municipality (except such streets as may be specially exempted by the President) **together with the pavements**, stones and other materials thereof and also all erections, materials, implements and things provided therefor;*

- (c) all public markets and all works, erections or structures for the benefit or convenience of the public which may be constructed, erected or provided under this Ordinance*
- (d) all other public buildings constructed or provided in whole or in part out of the Municipal Fund of the Council, or which may be otherwise transferred to the Council....*
- (e) the property of and in all the lamps, lamp-irons, lamp-posts, sluices, dams, pipes, posts, chains, poles, rails and other similar erections and things in, about or belonging to the streets vested in the Council,”*

Section 46 of the Ordinance sets out the duties of every Municipal Council. In terms of paragraph (a) thereof, it shall be the duty of every Municipal Council to maintain and cleanse all public streets and open spaces vested in the Council or committed to its management. In fact, Section 46(d) goes on to state that it shall be the duty of the Municipal Council to abate all nuisances, which the Petitioners claim would be the result if pavements are allowed to be leased.

The cumulative effect of the above provisions is that all streets and pavements are vested in the Municipal Council and it shall be the duty of such Municipal Council to maintain such streets and pavements, keep them clean and ensure the protection and promotion of the comfort, convenience and welfare of the people.

This Court shall now consider the argument of the learned President's Counsel for the 1st – 4th Respondents that a Municipal Council has the power to lease

out properties, and the argument of the learned Senior State Counsel that a Municipal Council does not have the power to execute leases in respect of pavements.

The power of a Municipal Council to lease out lands belonging to it is set out in Section 40(f) of the Ordinance, which reads as follows:

“For the purpose of the discharge of its duties under this Ordinance, a Municipal Council (without prejudice to any other powers specially conferred upon it) shall have the following powers:

- (f) to sell by public auction or, with the prior approval in writing of the Minister, to sell otherwise than by public auction, or to lease, either in block or in parcels:*
 - (i) any land or building vested in the Council by virtue of section 35 or section 37 if the prior sanction of the President has been obtained by the Council, and*
 - (ii) any other land or building of the Council, subject to the terms and conditions of the instrument by which the land or building was vested in or transferred to the Council, unless the sale or lease is prohibited by such instrument;”*

Thus, what a Municipal Council can lease is any *land* or *building* that has been vested in the Municipal Council by virtue of Section 35 and 37. This too can only be done if the prior sanction of the President has been obtained. It is the view of this Court that although Section 40(f) has a reference to Section 37,

such reference shall be limited to lands and buildings vested in the Municipal Council. This Court is further of the view that such reference shall not include paragraph (b) of Section 37(1), and that Section 40(f) does not confer upon a Municipal Council the power to lease streets or pavements or part thereof. The fact that a Municipal Council cannot lease out a street is supported by the provisions of Section 50 of the Ordinance, which provides as follows:

“Whenever any street or any part of any street vested in a Municipal Council ceases to be used as a street, the Council, with the prior approval of the President, may sell, lease, or exchange such street or part thereof, and in the event of such sale or lease, the proceeds thereof shall be paid into the Municipal Fund.”

The learned President’s Counsel for the 1st – 4th Respondents also brought to the attention of this Court the provisions of Section 86, which reads as follows:

*“Any Municipal Council may, from time to time, and either independently or in combination with any other Municipal Council, subject to the terms of any special enactment in that behalf, enter into agreement with any person or body of persons or any local authority constituted by law (hereinafter referred to as "the promoters"), to authorize such promoters, **for the purpose of any system of tramways, of any supply of gas, electrical energy, water, or other public service**, or any private enterprise or object, to make such use of streets under the control of a Council, and to execute all such works and to set up or to maintain all such erections or plant thereon or therein as may in the opinion of the Council be necessary for the purpose of the effective establishment or maintenance or the*

modification or development of such public service or such enterprise or object.”

While this Court is in agreement with the learned President’s Counsel for the 1st – 4th Respondents that the Municipal Council can utilise streets for the purpose of establishing tramways, gas, electricity, water etc., this Court is of the view that Section 86 does not empower a Municipal Council to lease out streets to establish public markets.

In the above circumstances, it is the view of this Court that while a street, as defined in Section 327 remains a street, the Municipal Council cannot lease out that street or part thereof, including the pavements. Any decision to do so, is *ultra vires* its powers.

A similar issue arose in **Liyanage vs Gampaha Urban Council**.⁵ In that case, the Gampaha Urban Council took a decision to establish a weekly fair on Market Street. For this purpose, the Urban Council closed Market Street for vehicular traffic, drew squares on the tarred area of the road and let the space within the squares to vendors to sell their wares from 6 a.m. to 8 p.m. A deposit of Rs. 100/-and a rental was charged by the respondents from the vendors. The vendors sold their wares on the road upon the authority granted by the respondents and when it got sunny they even erected temporary sheds on the road. The vendors obstructed the petitioners who are traders carrying on business in shops, boutiques, and other establishments situated along Market Street, and their customers. The respondents continued to hold this fair on Market Street every Friday.

⁵ (1991) 1 Sri LR 1.

This Court, having considered the argument of the petitioner that the decision to hand over public streets to carry out markets is *ultra vires* the powers of the Urban Council, held as follows:

*“Based on the foregoing analysis the legal position with regard to the application of the doctrine of ultra vires, in this respect, can be stated as follows. An authority (Corporation) established by statute such as an Urban Council has, in law, a status, objects, powers, functions and duties, only as provided in the constituent statute or in any other statute. Beyond these it is legally incapable of doing anything. For instance section 36(b) vests public roads in the Urban Council. As contended by counsel for the Respondents, vesting ordinarily connects a transfer of ownership and the Council should be considered the owner of the road. Notionally, this may be correct. **But vesting, here, does not mean that the Council gets the rights attaching to ownership at common law in respect of the road.** A statutory authority endowed with statutory powers, has... no common law powers at all (Wade, P.216). **Therefore, public roads are vested in the Urban Council so that it will exercise, perform and discharge such powers, functions, and duties as are specified in the Ordinance or in any other statute, in relation to such roads, and no more.** Anything purported to be done, by the Council, in excess of what is permitted by the statutory provisions will be considered as wholly invalid in law, on the application of the doctrine of ultra vires. However, in construing the relevant statutory provisions the Court will bear in mind the need to promote the general legislative purpose underlying these provisions and consider whether the impugned act is incidental to or consequential upon the express*

provisions. If it is so considered necessary, the impugned act will not be declared ultra vires.”⁶ (emphasis added)

This Court thereafter considered the provisions of the Urban Councils Ordinance with regard to thoroughfares, and whether the establishment of a market fair on a public street could be taken as incidental or consequential upon the express provisions of the Ordinance, and proceeded to state as follows:

*“The legislative purpose underlying these provisions is very clear. It is, to ensure that a Council, being the administrative authority at local level, will have the public thoroughfares within its area, free of obstructions, well maintained and improved with the passage of time. So that, the people for whose benefit these thoroughfares are meant can use them freely and without impediment, in the words of the old conveyancer, to pass and repass with vehicles laden and unladen. With the growth of population and the increase in commercial and other activity a certain degree of crowding and congestion on some thoroughfares is inevitable. But, an Urban Council cannot add to such crowding and congestion by drawing squares on the middle of one of the busiest streets and giving the space so marked to vendors to carry on their trade, however remunerative such a course of action may be to a Council. **By such conduct, the Council is causing an obstruction or an encroachment on a thoroughfare being the very thing, the Ordinance requires it to remove and abate. Therefore the decision of the Council to establish a weekly fair on Market Street is far removed from promoting the general legislative purpose underlying the***

⁶ Ibid; page 7.

provisions of the Ordinance. On the contrary, it can be seen as detracting from such legislative purpose.”⁷

*The submission of Counsel for the Respondents that the decision should be held as valid because an Urban Council has a duty to establish markets as a public utility, is untenable. **The duty to establish markets, is distinct and different from the duty to maintain the thoroughfares free and unimpeded.** A Council cannot discharge one duty in such a way as to cut across another duty. In any event drawing squares on a public road cannot be considered as an act of establishing a market.⁸*

Thus it is seen that although the Ordinance vests the thoroughfares and their administration and control in the Council with extensive powers and duties in relation to them, the Council is not vested with any power or duty to establish a market or a fair on any thoroughfare on any part of a thoroughfare.”⁹

In the above circumstances, this Court is of the view that the Municipal Councils Ordinance does not empower a Municipal Council to give on lease streets including pavements. A Municipal Council shall at all times comply with the intention of the legislature and the objective of the Ordinance which is to protect and promote the comfort, convenience and welfare of the people. This Court is therefore of the view that the Petitioners are entitled to prevent any such action by the 1st – 4th Respondents, and accordingly issues a Writ of

⁷ Ibid; page 8.

⁸ Ibid. page 9.

⁹ Ibid. page 6.

Prohibition restraining the 1st – 4th Respondents from leasing out streets and pavements that are situated within the Municipality of the 1st Respondent.

This Court makes no order with regard to costs.

Judge of the Court of Appeal