

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

*In the matter of an application for a
mandate in the nature of writ of Mandamus
in terms of Article 140 of the Constitution of
the Democratic Socialist Republic of Sri
Lanka*

Hapawana Vithanage Sujeewa,
B4 -1/4, Maligawaththa Housing Scheme,
Colombo 10.

Petitioner

CA (Writ) No: 335/2018

Vs.

01. Condominium Management Authority,
1st Floor,
National Housing Department Building,
Sri Chittampalama A Gardner Mawatha,
Colombo 02.

02. R. K Jayaweera,
General Manager,
Condominium Management Authority
01st Floor,
National Housing Department Building,
Sri Chittampalama A Gardner Mawatha,
Colombo 02.

03. E. M. M. Naufer,
B4 – G/4,
Maligawatte House Scheme,
Colombo 10.
04. Karupaiyyah Thiruselvam,
Niki Stores,
B4 – 1/1, (No. 532)
Maligawatte House Scheme,
Colombo 10.
05. Mohamed Naufer Mohamed Nafais,
No. 225/140/A, National Housing
Scheme,
Maligawatta,
Colombo 10.
06. Mohamed Naufer Mohamed Ismail
No. 225/140/B, National Housing
Scheme,
Maligawatta,
Colombo 10

Respondents

Before: C.P Kirtisinghe, J
Mayadunne Corea, J

Counsel: Chathura Galhena for the Petitioner
V. thevasenathipathi for 3rd to 6th Respondents
R. Aluvihare for 1st to 2nd Respondents

Argued on: 11.11.2022

Decided on: 13.12.2022

Mayadunne Corea J

The facts of the case briefly are as follows. The Petitioner's mother had purchased an apartment from the NHDA housing scheme at Maligawatte and subsequently gifted it to the Petitioner. The 3rd and 4th Respondents too are in occupation of the same residential complex. The 4th Respondent is alleged to have unauthorizedly raised his roof by two feet and the 3rd Respondent had constructed two shops illegally. The Petitioner alleges that the said unauthorized constructions are a danger to the safety of her house and deprived her of ventilation. Accordingly, she complained to the condominium management committee. Thereafter an inquiry had been held with the presence of all parties and the inquiring officer made recommendations pertaining to the complaint of the Petitioner. The Petitioner alleges that the said recommendations have not been implemented. Hence this writ application.

Petitioner's complaint to the Court

The Petitioner complained that after the inquiry the inquiring officer had delivered her ruling. However, the 3rd and 4th Respondent have failed to comply with the said ruling, and the 1st and 2nd Respondent have failed to implement the said ruling.

The Petitioner is seeking the following relief among others,

- Grant and issue a writ of Mandamus compelling the 2nd Respondent to act upon the letters marked 'P12' and 'P13' and to take steps to demolish the illegal and/or unauthorized constructions of the 3rd and 4th Respondent.

The Respondent took several objections pertaining to this application. They are as follows

- a) The Petitioner has not made the necessary parties to this application.
- b) The Petitioner has failed to explore the alternative remedies available
- c) The 5th and 6th Respondent are lawful lessees of the premises to be demolished

This Court will consider the said objections at a later stage.

It is common ground that there had been an inquiry and the parties have not challenged the procedure adopted in the inquiry nor the order made pursuant to the inquiry. None of the parties challenged the proceedings of the inquiry that has been marked and tendered to this Court marked as X & Y.

Petitioners case

The Petitioner's mother purchased the said condominium unit from the NHDA on 15.07. 2003 by Deed No. 1154 (P1). Subsequently, it has been transferred to the Petitioner by Deed of Gift No. 449(P2). The 3rd and 4th Respondent had constructed unauthorized structures which resulted in the Petitioner and a few other residents complaining about the said illegal constructions to the Chairman of the Condominium Authority. (P4). The Petitioner had complained about the unauthorized construction on several occasions (P6.P7, P8). These complaints had been made as the alleged illegal constructions were affecting her condominium unit as far as her access to light and air was concerned, and also she alleges that the illegal

construction put up by the 3rd Respondent was causing a security threat to her unit as it has provided easy access to any intruder to access her unit by climbing on to the roof of the illegal structures constructed by the said Respondent. Subsequent to several complaints being received, the NHDA replied to the Petitioner stating that it was the duty of the condominium management committee to protect the condominium housing scheme and the surrounding land that belongs to the same. Further, they have stated that if there is any unauthorized construction or unauthorized occupation, it is the duty of the condominium management corporation to rectify the same and that NHDA would assist in providing any management and technical assistance. Thus, the NHDA by this letter has given the approval to the condominium management authority to take the necessary steps to protect its property and the security of the occupants.

Armored with the said letter the condominium management authority also sent an officer to do a preliminary site inspection inquiry. The said site inspection had been carried out by an engineering assistant who submitted a report to the assistant general manager. In the said Report the inspecting officer observed that the 3rd Respondent was in the process of constructing an illegal construction and ordered the 3rd Respondent to stop the said construction. (X). Subsequently, another inspection was carried out and as per the report dated 15.3.17 she had reported that the earlier reported illegal construction had not been removed but another illegal construction had taken place where the roof of the adjoining building had been raised by its occupant the 4th Respondent.

Thereafter the Condominium authority issued a notice under its general manager informing the parties to be present for an inquiry pertaining to the unauthorized constructions. The said notice dated 14.7.17 was dispatched to the 3rd and 4th Respondent (P9, P10). As the said Respondent had failed to appear at the inquiry, another letter had been sent. The said inquiry notice specifically states that in the event the Respondents fail to be present before the inquiring officer the inquiry was to proceed *ex parte* against the 3rd and the 4th Respondents. The proceedings of the inquiry were tendered to this Court by the 1st and 2nd Respondents marked as X and Y. As per the proceedings all parties had been present for the inquiry and had duly signed the proceedings. The said proceedings were never challenged.

Subsequent to the said inquiry, an order under section 9(A) of act no 10 of 1973 dated 11.01.2018 had been issued to the 3rd and 4th Respondent whereby they were informed to remove the unauthorized constructions and ordered to restore the premises to their original state. The said order had been communicated to the 3rd and 4th Respondent by documents P12 and P13. The said letters gave the Respondent a further 14 days to comply with the order and to restore the premises to their original status.

It is the contention of the Petitioner that the said order was made subsequent to an inquiry pertaining to her complaint about the illegal construction. However, the 3rd and 4th Respondent failed to comply with the said order and the Petitioner contended that the 1st and 2nd Respondent had failed to execute the said order.

Thereafter, the Petitioner issued a letter through her attorney to the 1st and 2nd Respondent giving notice that the non-implementation of the order by the 1st and 2nd Respondent would result in the Petitioner filing legal action to get the said orders implemented. It was also contended that the non-implementation of the order amounts to a refusal to implement the order.

The learned state counsel appearing for the 1st and 2nd Respondent conceded that an inquiry had been held but the said decision of the inquiry had not been carried out and in keeping with the highest traditions of the attorney generals department submitted that he would not object to the writ that is sought by the Petitioner being issued. This Court appreciates the learned state counsel's submission.

The learned counsel appearing for the 3rd, 4th, 5th & 6th Respondent had taken several objections. At this stage, this Court will consider the said objections.

Objections of 3rd, 4th, 5th and 6th Respondent.

The learned Counsel for the said Respondent submitted that the 5th and 6th Respondent s are the children of the 3rd Respondent and further conceded that the 4th Respondent had raised the roof of his house by 2ft and thereby conceded to the unauthorized construction. Though the 4th Respondent had filed objections he did not contest the case at the argument stage. In fact, the learned counsel submitted that the 4th Respondent was willing to comply with the order. However, this Court observes the said Respondent after the order had been conveyed to him in the year 2018 had failed to comply with the said order up to the date of the argument.

Now, this Court will consider the objections raised by the other Respondents.

Necessary parties

It was the contention of the 3rd 5th and 6th Respondent that the necessary parties to this application are not before the court thereby making this application defective and bad in law. It was their contention that the Colombo Municipal Council, the UDA, and the national housing development authority should have been made parties to the said application. In response, the Petitioners submitted that their grievance is not against the parties whom the 3rd Respondent submitted as necessary parties but against the 1st and 2nd respondents who have failed to implement the order. It is apparent to this Court that the Petitioner is seeking a writ of mandamus against the 1st and 2nd Respondent to implement the order marked as P12 and P13. The said two orders have been delivered by the 2nd Respondent as the general manager of the 1st Respondent. Even though the condominium management authority is managing this housing scheme It had been built by the NHDA. National Housing Development Authority by their letter dated 06.01.2017 (P8) has specifically informed that any action pertaining to illegal construction and unauthorized occupation within the condominium property should be dealt with directly by the condominium management corporation. Thus, they have given the power to the 1st and 2nd Respondent and have specifically stated that they would only be assisting in the management and providing technical assistance but they had specifically stated that the responsibilities of protecting the said property fall within the 1st and 3rd Respondent. Therefore, the contention that the NHDA should be made a necessary party has to fail.

The 3rd, 4th, 5th & 6th Respondents have failed to demonstrate why the UDA or the CMC should be made parties to this case. Especially in view of the submission made by the Petitioner that they are only seeking a writ against the 1st and 2nd Respondent for the execution of P12 and P13. The said orders had not been given by the parties, the Respondents are arguing to be necessary parties. The 3rd 5th and 6th Respondent had failed to demonstrate to this Court the necessity to have the said disclosed parties as Respondent to this action. In our view, this objection on necessary parties has to fail. It is also the view of this Court that, this is a failed attempt by the 3rd 5th and 6th Respondent to prolong this case.

Illegal construction

Learned counsel appearing for 3-6th Respondent submitted that the 5th and 6th Respondent have never constructed an illegal construction and denied constructing the said disputed construction. However, the said Respondents have intervened in this application on the basis that they are the occupants of the said illegal constructions. The counsel submitted to Court photographic evidence marked 5R7, 5R8, 5R 9, as well as 3R1-3R12 which demonstrates the purported constructions. The said photographs clearly demonstrate that the alleged construction is being used as a shop, and the 5th and 6th Respondent admitted that they are in occupation of the said constructions.

The said photographs also establish the construction of raising the roof of an existing apartment. However, it was the contention of the Petitioners that the said construction of illegal shop premises had not been done by the 5th and 6th Respondent but by their father the 3rd Respondent, and the illegal raising of the roof by the 4th Respondent.

At this stage, it is pertinent to consider the inquiry notes that have been tendered to this Court by the 1st and 2nd Respondent. As per the said inquiry proceedings marked as X, and the photographic evidence submitted to this Court the illegal construction of raising the roof by the 4th Respondent is established. Also, the proceedings marked as Y contains the statement given by the 3rd Respondent who is the father of the 5th and 6th Respondent. It states as follows,

“මම වසර 10 ක් තිස්සේ මෙම ස්ථානයේ පදිංචි වී සිටිමි. එම ස්ථානයේ වැටක් තිබුණා එම වැට සලුවා මීට මාස 6 කට පමණ පෙර කඩ කාමර 2ක් මා සාදන ලදී. මීට අමතරව එම ස්ථානයේ තවත් දෙදෙනෙක් මේ ආකාරයේම ගෙවල් දෙකක් සාදා ඇත. මෙයටත් අමතරව මෙම මහල් නිවාප ක්‍රමයේ සැමදෙනාම පාහේ මෙවැනි ඉදිකිරීම් ඉදිකර ඇත. මෙම ඉදිකිරීම් සම්බන්ධයෙන් කිසිදු ස්ථානයකින් අවසර ලබා ගැනීමක් සිදුකොට නැත. මේ සම්බන්ධයෙන් මට කීමට ඇත්තේ මෙපමණයි.”

In this statement, the said Respondent had unreservedly admitted that the fence that was there demarcating the condominium property had been removed by him and he had constructed two shops on the said premises, also he has unreservedly admitted that he had not obtained any permission for the said construction. The said proceedings of the inquiry had been signed by the 3rd and as well as the 4th Respondent and the Petitioner.

Further, in proceedings of 28.07.2017 before the inquirer, the fourth Respondent admitted that he had demolished and removed the existing roof of his house and had raised it. The said statement states as follows,

“අදාළ ස්ථානයේ මම අවු. 20 ක පමණ කාලයක සිට ව්‍යාපාර කටයුතු වල නියෙලි සිටිමි. අදාළ ස්ථානයේ වහල වී අකුරක හැඩයක පහලට තිබූ අතර, එය කඩා වැටීමට ආසන්න තත්වයක පැවති බැවින්. මියත් වැනි සතුන් ඇතුලත් විය හැකි බැවින් එහි වහල කඩා ඉවත් කර කෙළින් කර නැවත සකස් කරන ලදී. පරණ වහලට වඩා අඩි 1/2 පමණ උස් කර මෙය සාදා ඇත. ඒ මගින් කානු අවහිර වීමක් හෝ වෙනත් කිසිදු අවහිරයක් නොවන බව කියා සිටී.”

Based on these statements, the evidence elicited at the inquiry and the initial report of the inspecting officer namely the engineering assistant, the inquiring officer has come to the correct conclusion that the 4th Respondent had unauthorizedly raised the roof and the 3rd Respondent had constructed two unauthorized shops depriving the occupants of the scheme, the common vacant space.

At the commencement of the arguments the counsel who appeared for the 3rd, 4th, 5th, & 6th Respondents conceded that the 5th & 6th Respondents are the 3rd Respondent's children. Accordingly, even though the 5th and 6th Respondent contend that they have not constructed the illegal construction it is apparent that on the admission of their father the 3rd Respondent, that he had constructed the illegal construction which is now being occupied by his two sons the 5th and 6th Respondent. In any event, we find that the impugned order is delivered against the 3rd and 4th Respondent.

It was submitted by the Petitioners that they had filed this case only against the 3rd and 4th Respondent however it appears that the 5th and 6th Respondent who are children of the 3rd Respondent had intervened in the case on the basis that they are the occupants of the premises. As per the material lead before this Court and on the admission made by the counsel before this Court, we observe that the 5th and 6th Respondent are occupying the said two shops on the basis that it was built by their father the 3rd Respondent who has admitted constructing them without any authorization from the relevant approving authorities. Thus, making the construction illegal.

The two shops are leased out by the 5th and 6th Respondent from NHDA

The 5th and 6th Respondent argued that they had entered into two lease agreements for the said shops. It was their contention that the said two shops are situated on bare land belonging to the NHDA and they had entered into an agreement with the NHDA to occupy the said premises. To substantiate this argument the 5th and 6th Respondent submitted to this Court two lease agreements marked as X1 and X2 attached to their intervention petition. This Court has

considered the said two lease agreements and observes that as per the submitted documents, the NHDA has leased out the property bearing number 225/140/A and property bearing number 225/140/B to the said two Respondents. The boundaries in the said properties are not depicted in the lease agreements. It is only the assessment numbers that are depicted in the said agreements. It was the contention of the Petitioner that these two lease agreements are not relevant to the disputed premises where the illegal constructions are but pertain to a lease of a property at a different location. This Court observes that the order P12 is issued to the 3rd Respondent to remove the unauthorized construction made by him at the address B4-G4 which is different from the address given in the lease.

It is observed that the schedule of the two lease agreements does not depict the disputed premises that are shown in P12 and P13 thus, we hold with the petitioner's submission that the two lease agreements that have been tendered to this Court do not belong to the premises in dispute.

At this stage, it is also pertinent to note that there is an unqualified admission by the 3rd Respondent that he had constructed the two shops which are the subject matter of the inquiry.

In our view, the documents submitted and the submissions made, clearly demonstrate that the said structures are unauthorized. Therefore the 3rd to 6th Respondent's contention that the NHDA had leased out two unauthorized structures to the two sons of the 3rd Respondent who constructed the said two illegal structures cannot be substantiated.

This Court also observes that the 5th and 6th Respondent have failed to demonstrate that the properties that are described in schedules X1 and X2 are one and the same that is mentioned in P12 and P13.

It is also pertinent to note that if the 5th and 6th Respondent were occupying the said two constructions by way of obtaining a lease from the NHDA then the 3rd Respondent who is the father of the 5th and 6th Respondent should have informed the same to the inquiring officer at

the site inspection inquiry into the illegal unauthorized constructions. As per the proceedings before the inquiring officer, it is clear that the 3rd Respondent had never mentioned that the 5th and 6th Respondent were in possession of the illegal construction, especially when the 5th and 6th Respondent are his children nor has, he disclosed that the 5th and 6th Respondent were occupying the said premises on a lease granted by the NHDA.

In this context, it is pertinent to note that if we are to accept the argument of the respondent's counsel it will result in an absurd situation where we find the NHDA is leasing out buildings that are not built by them and are illegal constructions. Further, in our view, the NHDA leasing out the said two shops to the two sons of the 3rd Respondent is an irrational contention that cannot be accepted. Therefore, this argument of the 5th and 6th Respondents have to fail.

The petitioner has failed to explore alternative remedies.

The 3rd to 6th respondents did not pursue this objection at the argument stage. They have also failed to demonstrate to this court the alternative remedies that were available to the petitioner.

Power to remove unauthorized constructions within the unit

It is evident that in view of section 9(a) of Act No. 10 of 1973, the power is vested with the 2nd Respondent to demolish any unauthorized construction. The said section reads as follows;

9A. Demolition of unauthorized construction.

(1) "Where the Authority receives a complaint or receives information that an unauthorized construction has been erected or is being erected on any registered or unregistered Condominium Property or semi-Condominium Property, the Authority shall cause a notice in writing to be served on the owner of the condominium parcel and a copy of such notice to be served on each occupier of such condominium parcel and the management corporation if any, who is erecting or has erected such unauthorized construction in the condominium parcel, or the common element and

direct such owner, occupier or management corporation, as the case may be to be present at an inquiry on a date, time and place, to be specified in the notice and to show

Cause -

(a) why the Authority should not prohibit such a person from proceeding with the construction;

(b) why the unauthorized construction should not be demolished and the condominium parcel restored to its original condition.

(2) The persons present at the inquiry in person to the receipt of a notice issued under subsection (1), shall be given an opportunity of being heard, and thereafter where the Authority is of the opinion that such construction is an unauthorized construction, it may direct, such owner or occupier or management corporation or other person, as the case may be

(a) not to proceed with such unauthorized construction; or

(b) to restore the condominium parcel or an accessory parcel appurtenant to the condominium parcel or common element to its original condition; or

(c) to take such other measures for the purpose of compliance with the conditions set out in the permit subject to which the Condominium Property or semi-Condominium Property has been constructed.

(3) Where such owner or occupier or management corporation or other person, as the case may be:

(a) fails to be present at the inquiry; or

(b) after being present at such inquiry refuses to comply with any direction issued under subsection (2) within seven days from the date of issue of such direction.

the Authority shall-

(i) take appropriate measures to demolish such unauthorized construction;

- (ii) *direct the discontinuance of the use of the land parcel or building;*
- (iii) *do all such other acts as the owner or occupier or other person was required to do by such directive under subsection (2).*

(4) The Authority may, for the purpose of acting under paragraphs (i), (ii), or (iii) of subsection (3) authorize any officer to enter the Condominium Property or the semi-Condominium Property on which such unauthorized construction is being erected or erected and do all such acts as may be necessary for the purpose.

In view of the above provisions of the law, it is apparent that the 1st and 2nd Respondents are vested with the power to demolish unauthorized constructions within the meaning of the Act. It is also apparent that the 1st and 2nd Respondents have come to the conclusion that the disputed constructions are unauthorized constructions and have to be removed, however, despite the two orders P12 and P13 being delivered on 11.01.2018 no steps have been taken to execute the same. After giving due consideration to all the material placed before us, this Court has no hesitation to grant the reliefs prayed by the Petitioner.

In coming to this conclusion, this Court follows the decision in **Dr. Jayalath Jayawardena v Chandra Fernando Inspector General of Police CA Writ Application no 1507/2005 dated 10/06/2008** Srisankarajah J granting a writ of Mandamus quoting administrative law by Wade (9th edition) held;

“Within the field of public law, the scope of mandamus is still wide and the Court may use it freely to prevent breach of duty and injustice. Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable”

As this Court has come to the conclusion pertaining to the issuance of a writ of mandamus prayed for, this brings us to the next question as to cost. This Court observes that the Petitioner had to incur expenses to file this action due to the unauthorized construction carried on by the

3rd and 4th Respondent and we also observe that the 5th and 6th Respondent had intervened in this case as the 3rd Respondent the father of the 5th and 6th Respondent had failed to comply with the order delivered at the inquiry. It is also our view by the intervention of the 5th and 6th Respondent they have attempted to unduly delay this case and to mislead this, Court. Therefore, we are inclined to award a cost of Rs 15,000 each to be paid to the Petitioner by the 3rd, 5th, and 6th Respondent.

This Court has considered the learned counsel's submission, where the 4th Respondent conceded to the illegal construction and his willingness to comply with the order marked P13. However, as observed above he had failed to comply, with the order compelling the Petitioner to invoke the jurisdiction of this Court. Also, he had filed objections to this application of the Petitioner. Therefore, we award a cost of Rs10,000 to the Petitioner to be paid by the 4th Respondent.

Accordingly, for the aforesaid reasons this Court grants the writ of mandamus as preyed in prayer(b) to the Petition.

Judge of the Court of Appeal

C.P Kirtisinghe, J

I agree

Judge of the Court of Appeal