

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*,
Mandamus and Prohibition in terms of Article
140 of the Constitution.

CA (Writ) No. 194/2017

1. Suraiya Akbarally
15B, Layards Road, Colombo 05.
2. Azra Jafferjee
5, Layards Road, Colombo 05.
3. Abdul Latiff Mohamed Hussein
7, Layards Road, Colombo 05.
4. Deshamanya Abbasally Akbarally
15, Layards Road, Colombo 05.
5. Mansoor Abbasally Akbarally
51, Layards Road, Colombo 05.
6. Hussein Akbarally
78, Layards Road, Colombo 05.

7. Hatim Abbasally Akbarally

90/1, Layards Road, Colombo 05.

PETITIONERS

-Vs-

1. Urban Development Authority

Ministry of Urban Development &
Housing,

6th and 7th Floors, "Sethsiripaya",
Battaramulla.

2. Dr. Jagath Munasinghe

The Chairman,

Urban Development Authority,

Ministry of Megapolis and Western
Development,

6th and 7th Floors, "Sethsiripaya",
Battaramulla.

2A. Mr. Harshan de Silva

The Chairman,

Urban Development Authority,

Ministry of Urban Development &
Housing,

6th and 7th Floors, “Sethsiripaya”,
Battaramulla.

2B. Mr. Nimesh Herath

The Chairman,
Urban Development Authority,
6th and 7th Floors, “Sethsiripaya”,
Battaramulla.

3. Colombo Municipal Council

Town hall, Colombo 07.

4. The Municipal Commissioner

Colombo Municipal Council,
Town hall, Colombo 07.

5. Blue Ocean Breeze (Pvt) Ltd.,

32, Second Floor,
Galle Road, Dehiwala.

6. D. D. Enterprises (Pvt) Ltd.,

9/3, Station Road,
Colombo 04.

7. The Attorney General

Attorney General's Department,

Colombo 12.

RESPONDENTS

Before : Dhammika Ganepola, J.

Counsel : Geoffrey Alagaratnam PC with Luwie Ganesathan
for the Petitioners.

Ranga Dayananda for the 3rd and 4th Respondent.

Shemanthi Dunuwille, S.C. with Thilini De Zoysa

A.S.A. for the Respondents.

Written Submissions : Petitioners : 06.08.2019

tendered On 1st, 2nd and 7th Respondents : 08.08.2024

3rd and 4th Respondents : 26.02.2024

Decided On : 19.09.2024

Dhammika Ganepola, J.

Factual matrix of the application

The Petitioners in the instant application are all either owners or the residents of premises situated at Layards Road, Colombo 5 where the subject premises belong to the 5th Respondent is also located. Said premises are situated within the "Special Primary Residential Zone" in terms of the City of Colombo Development Plan (Amendment)-2008 prepared by the 1st Respondent and published in the

Government Gazette Extraordinary No. 1535/4 of 06.02.2008. In terms of Clause 4.1(b)(ii) of the above City of Colombo Development Plan the maximum number of stories lawfully permissible within a “Special Primary Residential Zone” is five. The Petitioners came to know that the “Preliminary Planning Clearance” (PPC) had been granted to the 6th Respondent, who was the predecessor of the 5th Respondent in respect of the subject premises for the construction of eleven storied building. However, no permission had been granted for the development of such a building. Said position was confirmed by a letter dated 04.01.2017 marked P14 issued by the 2nd Respondent. The Petitioners were informed by the 1st Respondent that the Planning Committee had decided to refrain from renewing the aforementioned PPC which was due to lapse on 27.01.2017.

The requests made by the Petitioners from the 1st and 3rd Respondents for written confirmation that the PPC granted for the construction of the eleven-storied building will not be renewed and no approval will be granted had not been responded to. The Petitioners had come to know that the 6th Respondent is taking steps to reapply for a PPC in view of the construction of a building exceeding five floors within the subject premises. The Petitioners state that any PPC or Building Permit/ Approval issued in contravention of the Urban Development Authority Law and /or the Municipal Councils Ordinance and /or City of Colombo Development Plan (Amendment)-2008 for the construction of any building exceeding five floors within the subject premises is unlawful and *ultra vires* and liable to be quashed. Accordingly, the Petitioners seek *inter alia* a Writ of Certiorari quashing the PPC or any other document issued by the 1st and /or 3rd Respondents to the 5th and or 6th Respondents and a Writ of Prohibition prohibiting the said Respondents from issuing any PPC or Building permit /Approval to the 5th and /or 6th Respondents in respect of the subject premises for construction of any building exceeding five floors.

The 1st and the 4th Respondents admitted that the subject premises are situated within the “Special Primary Residential Zone” as per the City Development Plan (Amendment)-2008 and the maximum permissible number of floors to be constructed in a building situated therein is five in terms of Clause 4.1(b)(ii) of the above Plan. The 1st Respondent had issued a PPC under Ref. No.05/02/39/25/2015 dated 27.01.2016 valid for one year for the proposed development consisting of eleven storied building at the subject premises. The 1st and 2nd Respondents concede that the subject premises fall within the limits of Colombo Municipal Council and the

urban development area declared under Section 3 of the Urban Development Authority Act. The City of Colombo Development Plan-2008 marked R1 has been gazetted in terms of the above Act. Subject premises fall within the “Special Primary Residential Zone” of the said plan, wherein the maximum number of floors that could be built is five stories. The 6th Respondent has sought clearance for the construction of a building of 14 stories. The lots facing the Eastern direction of Layards Road with the available infrastructure and facilities have been designated as part of a “Mixed Development Zone”. This designation was outlined in the Extraordinary Gazette no.2054/45 dated 18.01.2018, marked R2, which amended the Plan marked R1.

The 3rd and the 4th Respondents state that the Eastern side of Layards Road falls within the “Mixed Development Zone” consequent to the amendment made to the City of Colombo Development Plan (Amendment)-2008 by order published in the Extraordinary Gazette no.2054/45 dated 18.01.2018(R2). Hence the Development Permit dated 28.12.2018 had been issued consequent to the Building Application dated 23.01.2017 submitted to the 5th Respondent by the 3rd Respondent as the 1st Respondent has renewed the PPC by its letter dated 01.02.2017 marked 3R2c. However, the 3rd and 4th Respondents were authorized to process the applications received prior to 01.02.2017 by the 2nd Respondent.

The 5th Respondent’s contention is that he has at all times acted duly and properly under and in terms of the applicable provisions of the law and obtained all approvals necessary for the development of the relevant property. The approved Building Plan marked R1a and the relevant Development Plan marked R1b issued by the Statutory Authority in respect of the relevant property are under and in compliance with the law. Further, it has been submitted that the Petitioner’s application for judicial review is without basis and unlawfully interferes with the development of property.

The Petitioners submit that the Building Plan marked R1a and Development Permit R1b does not refer to any PPC obtained prior to applying for the Development Permit and the 3rd Respondent did not have the authority to issue the Development Permit R1b as such powers were removed from the 3rd Respondent prior to such issuance. The Development Permit R1b was issued on 28.12.2017 before publishing the Amended Development Plan-2008 marked R2 in the Extraordinary Gazette

no.2054/45 dated 18.01.2018(R2). Accordingly, the Petitioners argue that the Development Permit R1b is invalid and void in law.

All parties agreed to deal with and determine the application by way of Written Submissions.

Authority of the Respondents to issue Development Permits

It is on common ground that the subject premises are situated within the “Special Primary Residential Zone” as per the City Development Plan (Amendment)-2008 published in the Government Gazette Extraordinary No. 1535/4 of 06.02.2008 (R1) and the maximum permissible number of floors in a building constructed within such area is five in terms of Clause 4.1(b)(ii) of the above Plan. It is also on the common ground that the “Preliminary Planning Clearance” (PPC) which was due to lapse on 27.01.2017 had been granted to the 6th Respondent, the predecessor of the 5th Respondent for the construction of the eleven-storied building on the subject premises. Subsequently, the 5th Respondent had been issued a Development Permit on 28.12.2017 (R1b/E12). The Respondents submit that the City Development Plan (Amendment)-2008 (R1) had been amended by the Gazette (Extraordinary) bearing No.2054/45 dated 18.01.2018 (R2) with retrospective effect rezoning the Eastern direction of Layards Road allowing for construction of buildings higher than five floors. Said Development Permit R1b/E12 had been issued by the 3rd Respondent as per the authority delegated by the 1st Respondent under Section 23(5) of the Urban Development Authority Act.

However, the Petitioners submit that such authority to accept, charge fees for and process building applications and issue and extend development permits in respect of constructions including constructions that are over four floors and 4000 sq. ft. and premises in extent over 40 perches had been withdrawn with effect from 01.02.2017 by the 1st Respondent as per the letter dated 23.01.2017 (E6). The Petitioners contend that as per the building application marked (E8/3R2b), such application had been submitted to the 3rd Respondent by the 5th Respondent on 01.02.2017 and the approval had been granted on 28.12.2017. Furthermore, the payment relating to the building application had been made on 01.02.2017. The Development Permit (R1b/E12) was issued by the 3rd Respondent on 28.12.2017 pursuant to a meeting of

the planning committee held on 21.12.2017. Accordingly, the Petitioners argued that the Development Permit(R1b/E12) is *ultra vires* as it was issued after the withdrawal of authority delegated to the 3rd Respondent by the 1st Respondent.

However, the 3rd and 4th Respondents have taken up the position that although the withdrawal of the delegated authority by the 1st Respondent by its communication dated 23.01.2017(E6) applies with effect from 01.02.2017, as per the further communication of the 2nd Respondent dated 22.02.2017 (3R2d) the Respondents were authorized to process the applications that had been received by the 3rd and 4th Respondents prior to the 01.02.2017. Accordingly, the stance taken up by the Petitioners that the building applications received prior to 01.02.2017 cannot be processed by the 3rd Respondent cannot sustain.

A copy of the said building application marked (E8/3R2b) has been submitted for the perusal of this Court. As per the day stamp of the planning division of the 3rd Respondent on the said building application (E8/3R2b), it is observed that the said application had been submitted on 30.06.2017. Further, the endorsement dated 30.01.2017 made on the application (E8/3R2b) concerning the calculation of the processing fee also supports the fact that the application was submitted on 30.01.2017. Accordingly, I am of the view that the application (E8/3R2b) had been received before 01.02.2017 and the Respondents were authorized to process such building application as per communication E6.

Discrepancies in the Development Permits

The Petitioners have submitted Development Permits that purported to be the same but have different serial numbers and dates on which the building application was submitted, indicating that the Respondents were fabricating fraudulent documentation. The Petitioners brought to the attention of this Court, that the Development Permit bearing serial no.16789 marked P34 on which the building application was submitted, bears the date 01.02.2017 while the Permit bearing no.16791(P35) and Permit bearing no.16789 marked as R8a filed in Case No. CA/Writ 227/18 bears the date 30.01.2017. The Respondent clarified that the date 01.02.2017 which appears on the P34 is the date on which the building application

was submitted and that due to a typographical error, which was later corrected, other copies of the same document (including P35) bear the date 30.01.2017. It is further submitted that the Development Permit was made available in four copies with distinct and consecutive numbers which were released to the Developer (5th Respondent), 1st Respondent, Assessor Department of 3rd Respondent and the City Planning Division of the 3rd Respondent. It is observed that all such copies of the Development Permit bear the same reference number as ME/PB/J/BA/11/17.

It is observed that the position of the Petitioner that the Respondents have committed fraud in issuing the said Development Permit appears to be an assumption made by the Petitioners. It is also observed that the Petitioners have failed to substantiate their said position as well. As such, under the above circumstances and with the materials made available, this Court is not in a position to accept the stance of the Petitioner which appears to be a mere conjecture.

Validity of the Development Permit

The Petitioners have taken up another stance that the purported Development Permit (R1b/E12) issued on 28.12.2017 is arbitrary and *ultra virus* as the amendment to the provisions of the City of Colombo Development Plan (Amendment)-2008 dated 14.07.2017(R2) which allows the construction of buildings exceeding five stories came in to effect only after its publication. The said amendment to the City of Colombo Development Plan had been published in the Gazette Extraordinary No.2054/45 dated 18.01.2018. The Petitioners rely on the provisions of Sections 8(G) and 8(H) of the Urban Development Act. Section 8(G) reads as follows:

8G. *Where any draft development plan has been approved by the Minister, it shall be the duty of the Authority as soon as may be after such approval*

(a) to cause a notice to be published in the Gazette and in a daily newspaper in the Sinhala, Tamil and English languages circulating in the development area or part thereof to which the development plan relates, to the effect that the development plan has been approved by the Minister and that it shall come into operation on the date of the publication of the notice in the Gazette; and

(b) to cause copies of the development plan, together with the written statement, plans, maps and annex urea thereto, to be available for inspection by the public at the head office of the Authority in Colombo, and at such offices of the Authority, and at the office or offices of the local authority or local authorities, situated in or near the development area or part thereof to which the development plan relates,

As per the Section 8G above, in order to effect any development plan approved by the Minister, such development plan should be published as specified and should be made available for inspection of public.

Accordingly, the Petitioners submit that on the date the Development Permit was issued to the 5th Respondent, the impugned development plan was ineffective in terms of Section 8G of the Act. As such it is contended that the subject premises were within a “Special Primary Residential Zone” wherein the maximum number of floors lawfully permissible is five. However, Section 8J(1) of the same Act provides as follows:

8J.(1) Notwithstanding the provisions of any other law, no Government agency or any other person shall carry out or engage in any development activity in any development area or part thereof, except under the authority, and in accordance with the terms and conditions, of a permit issued in that behalf by the Authority.

...

(3) A permit under subsection (1) shall be granted by the Authority under that sub-section subject to such terms and conditions as the Authority may consider necessary if the Authority is satisfied that;

(a) in any case, where the development plan has been submitted to the Minister for approval or the development plan has been approved by the Minister, the development activity proposed to be carried out or engaged in will not be inconsistent with or in

contravention of any proposal or provision in such development plan; and

(b) in any case, where no development plan has been prepared, the purpose for which such permit is required to carry out or engage in such development activity conforms to the future development of such area.

Upon careful perusal of the above section, this court observes that the legislature has empowered the authority to issue permits to development activities which are neither “inconsistent” nor “in contravention” with a development plan regardless of whether such development plan has been approved or not, by the Minister so long as it has been “submitted to the Minister for approval”. Thus, the Minister's approval does not appear to be a prerequisite for the granting of a permit under Section 8J(3) of the Act. Nevertheless, it must be noted that in the instant application, the development plan had already been approved (on 14.07.2017) by the time the development permit was issued (dated 28.12.2017).

In my view, Section 8J (3) has been included in the Act to ensure the prompt and efficient implementation of development plans without any hindrance or delay upon the permit-granting authority being satisfied that the proposed development activities are not “inconsistent” or “in contravention” of the development plan submitted to the Minister for approval. Therefore, in the above circumstances and for the reasons given, the stance taken up by the Petitioners that the purported Development Permit issued on 28.12.2017 (R1b/E12) is arbitrary and ultra virus, cannot sustain.

The Petitioners seek to quash the PPC, or any further document issued by the 1st to 3rd Respondents and prohibit issuing any PPC or Building Permit in respect of the subject premises for construction of any building exceeding five floors. However, any such document issued within the legal purview could not be subject to judicial review.

Conclusion

In view of the reasons given, I am not inclined to grant any of the reliefs prayed for in the prayer to the Petition. Accordingly, the application is dismissed. I order no cost.

Application dismissed.

Judge of the Court of Appeal