

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 Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Writ Application No. 0188 / 2023

1. Data Exchange International (Private) Limited,
78 & 80, Asset Arcade Building York Street, Colombo 01.
2. Mohamed Jameel Ahamed Fuward
3. Fathima Nasliya Fuward
Both of: No. 48, Ananda Coomaraswamy Mawatha, Colombo 03.

Petitioners

Vs.

1. C.I. Ratnayake,
Officer-in-Charge Colombo Crimes Division, Colombo 09.
2. Senior DIG T. M. W. D. Tennakoon,
Senior DIG (Western Province),
DIG Colombo Office Olcott Mawatha, Colombo 11.
3. C. D. Wickremaratne,
The Inspector-General of Police,
The Police Headquarters,
Colombo 01 .
4. Colombo Municipal Council,
Townhall, Colombo 07.
5. Rosy Senanayake,
Former Mayor,
Colombo Municipal Council,
Colombo 07.
6. J. M. Badrani Jayawardana,
Municipal Commissioner,
Colombo Municipal Council,
Colombo 07.

7. Dr. Pathum Chamikara Kodikara,
Medical Officer of Health - District 2A,
No. 27, Vivekananda Hill,
Colombo 13.
8. Asset Arcade (Private) Limited,
51E, York Street,
Colombo 01.
9. Meegoda Godakandage don
Mahindarathna,
Managing Director,
Asset Arcade (Private) Limited,
No. 51E, York Street,
Colombo 01.
10. Honourable Magistrate,
Fort Magistrate's Court,
Colombo 01.
11. The Registrar,
Fort Magistrate's Court,
Colombo 01.
12. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
13. Deshamanya Gamlathge don Chandana
Wijesekara,
8/B/11,
Sir Razik Fareed Mawatha,
Colombo 01.
14. Haja Mohideen Mohammed Shafeek,
8/B/5,
Sir Razik Fareed Mawatha,
Colombo 01.
15. K. S. M. Wikramanayake,
57/B1A, York Street,
Colombo 01.

16. Western Province Merchant Navy
Professionals Co-op Association,
57/B2, York Street,
Colombo 01.
17. Lak Derana Supplies (Private) Limited,
57/B/2/2, York Street,
Colombo 01.
18. P. A. N. S. Ranasinghe,
57/B/3, York Street,
Colombo 01.
19. S. Vincentrajan,
57/B/4,
York Street,
Colombo 01.
20. T. H. N. D. Perera,
57/B/5, York Street,
Colombo 01.
21. D. V. P. Fernando,
57/B/6, York Street,
Colombo 01.
22. B. Ganeshalingam,
57/B/7, York Street,
Colombo 01.
23. A. M. Rizvi,
8, Sir Razik Fareed Mawatha (Bristol
Street),
Colombo 01.
24. K. M. Wanigarathna,
6, Sir Razik Fareed Mawatha
(Bristol Street),
Colombo 01.
25. A. H. Kamal Hassan,
57A, 53A, 74-76,
York Street,
Colombo 01.

26. R. Gopalapillai,
78A, York Street,
Colombo 01.
27. I. Annamalai,
57, York Street,
Colombo 01.
28. K. Gandhidasan,
51C, 57C, York Street,
Colombo 01.
29. K. Sivaneesan,
55, York Street,
Colombo 01.
30. S. U. Jeinulabdeen,
53C, Asset Arcade (Private) Limited,
51E, York Street,
Colombo 01.
31. B. Rafeek,
51D, 51/1/1/B, 53, 53B,
York Street,
Colombo 01.
32. Swiss Money Exchange (Private) Limited,
51B/A, York Street,
Colombo 01.
33. M. S. M. Rasik,
51B, York Street,
Colombo 01.
34. M. Z. N. Ahamed,
51, 51/B/1,
York Street,
Colombo 01.
35. D. V. P. Fernando,
51/8/2, York Street,
Colombo 01.
36. C. A. O. Vithana,
5 1 /2/3, York Street,
Colombo 01.

37. M. S. M. Fairouz,
8/B/1,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
38. M. I. M. Rila,
8/B/1A,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
39. M. A. Farook,
8/B/3,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
40. M. I. M. Farshan,
8/B/4,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
41. G. S. H. Uwais,
8/B/6,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
42. M. I. M. Risly,
8/B/7,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
43. M. I. Farish,
8/B/8,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
44. B. S. L. Perera,
8/B/10,
Sir Razik Fareed Mawatha Bristol Street),
Colombo 01.
45. S. Nanayakkara,
8/B/10A,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

46. M. S. Mohideen,
8/1 and 8/1A,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
47. Loards Travel Services (Pvt) Ltd.,
8/2 and 8/3,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
48. I. Annamalai,
8/4, Sir Razik Fareed Mawatha (Bristol
Street),
Colombo 01.
49. B. M. Indirasena,
8/5,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
50. T. L. W. Abeygunaratne,
8/6, Sir Razik Fareed Mawatha (Bristol
Street),
Colombo 01.
51. P. J. Pushpakumara,
8/7, Sir Razik Fareed Mawatha (Bristol
Street),
Colombo 01.
52. T. K. S. Ramani Dias,
8/10, Sir Razik Fareed Mawatha (Bristol
Street),
Colombo 01.
53. A. Sudagar
54. S. S. U. Kumari,
Both of 8/1/1,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
55. Mayura Travels (Private) Limited,
8/1/2,

Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

56. K. Arulchelvam,
8/1/4,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

57. V. Subramaniam,
8/1/5,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

58. A. M. Salay,
8/1/6,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

59. S. S. Neville,
8/1/7,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

60. S. Senthivel,
8/1/8,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

61. K. M. R. C. Kumara,
8/1/10,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

62. G. D. S. Premathilaka,
8/1/11,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

63. Sagara Marine & Engineering Services
(Pvt) Ltd.,
8/1/12,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

64. M. F. S. Lanthira

65. M. N. N. Shiraj,
Both of:
8/2/1 Sir Razik Fareed Mawatha (Bristol
Street).
Colombo 01.
66. L. L. S. L. Munaweera,
8/2/2,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
67. Hello Covers and Casings (Private)
Limited, 8/2/3,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
68. K. K. T. S. Priyadarshana,
8/2/4,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
69. M. F. Sarin,
8/2/5,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
70. S. N. K. Nawarathna,
8/2/6,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
71. I. M. M. Wakeel,
8/2/7,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
72. G. Chandrakumara,
8/2/9,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
73. E. K. Devadas,
8/2/10,

Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

74. S. Jayakumar,
8/2/11,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

75. K. S. L. de Silva,
8/3/1,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

76. T. S. Fernando

77. T. P. Fernando

78. H. D. C. Peiris
All three of: 8/3/2,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

79. C. Sundarapandian,
8/3/3,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

80. W. Witharana,
8/3/7,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

81. R. A. D. D. Perera,
8/3/8,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

82. G. W. Jayasundara,
8/3/10,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

83. J. Thanuraj,
8/3/11,

Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

84. M. Z. Mohideen,
8/3/13,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

85. M. S. M. Nisham,
8/4/1,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

86. S. A. D. S. P. Gunasekara,
8/4/3,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

87. R. A. C. Jayan,
8/4/4,
Sir Razik Famed Mawatha (Bristol Street),
Colombo 01.

88. D. A. M. Cooray

89. E. N. P. Shivanthi

Both at:
8/4/6,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

90. T. S. Fernando,
8/4/7,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

91. Speed Link Cargo Services (Private)
Limited,
8/4/8,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

92. T. K. S. Ramani Dias,
8/4/11,

Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.
93. M. N. S. Subhasiri

94. P. A. C. Priyanga
Both at:
8/4/12,
Sir Razik Fareed Mawatha (Bristol Street),
Colombo 01.

Respondents

Before: **N. Bandula Karunarathna J. P/CA**

&

M.C.B.S. Morais J.

Counsel: Faiszer Musthapha, PC with Shaheeda Barrie, AAL and Amila Perera, AAL for the Petitioners instructed by S. Kaluarachchi, AAL.

Ruwantha Cooray, AAL for the 4th, 6th and 7th Respondents instructed by P.U. Sanjeewa, AAL

Uditha Egalahewa, PC with N.F. Ashokbharan, AAL instructed by H. Chandrakumara de Silva for the 8th and 9th Respondents

Hejaz Hizbulla, AAL with Shifan Maharroof, AAL for the 30th and 33rd Respondents instructed by M. Murshid, AAL.

Written Submissions: By the Petitioners – 27.10.2023

By the Respondents – 20.10.2023, 06.06.2023, 20.06.2023

Argument on : 03.10.2023

Decided on : 14.11.2023.

N. Bandula Karunarathna J. P/CA

The Petitioners filed this application before this Court by way of a Petition dated 10.04.2023 *inter alia* seeking Writ of Mandamus directing the 4th Respondent to duly assess the subject building, to take temporary measures under Section 66 of Municipal Councils Ordinance and to take steps to secure the vested rights of the 1st Petitioner Company.

The 8th Respondent submitted a letter dated 08.12.2022 drawing the attention of the 6th Respondent to the issues in relation to the subject building and the premises.

The preliminary concerns raised by the 8th Respondent were *inter alia* as follows;

- (a) In the year 2020, an incident of a concrete block falling from the 4th floor took place causing damages;
- (b) The 8th Respondent had requested for the renewal of the insurance policy for the purpose of recovering from the said damage;
- (c) For the said purpose, the Insurance company had informed the 8th Respondent a requirement of their engineers to carry out an inspection;
- (d) Consequent to the said inspection, the insurance company was directed to obtain a report from the National Building Research Organization (NBRO);
- (e) The NBRO report was issued in August 2022 recommending the subject building to be demolished;
- (f) Therefore, the 8th Respondent requested for an independent scientific report from the University of Moratuwa;
- (g) The report received from the Department of Civil Engineering of the University of Moratuwa dated 08.12.2022 had recommended immediate evacuation and demolition of the building

Therefore, the 8th Respondent brought the said concerns to the domain of 4th and the 6th Respondents with the intention of deciding whether the same is adequate for the 4th Respondent to issue a notice under Section 66 of the Municipal Council Ordinance. Thereafter, the 7th Respondent inquired into the said issues, perused through the said NBRO report and the report issued by the University of Moratuwa and conducted independent site visits.

It is important to note that findings in relation to the subject building. They are as follows;

- (a) the stability of the building is questionable and it is strongly recommended to take immediate action to ensure the safety of the occupants; and
- (b) alternatively demolishing the subject building, and building a new building altogether as opposed to the restructuring of the old building is practically viable.

The report issued by the University of Moratuwa titled 'Investigation of Structural stability of the Five Storey Building at No. 51E, York Street, Colombo 01, for Asset Arcade (Pvt) Ltd reflects that;

- (a) The building is structurally condemned; and
- (b) Therefore, construction of a new building on the premise is strongly recommended.

It is evident that the 7th Respondent pursuant to independent inquiries and site visits along with the PHI & MOH of Colombo Municipal Council came into a finding that the building is of imminent danger to the occupants of the building and the general public.

Thereafter, notice issued by the Colombo Municipal council under and in terms of section 66 of the act.

The Section 66 of the Municipal Council Ordinance is reproduced herein below;

"If any house, building, boundary wall or gateway adjoining any street in any Municipality, or anything affixed thereon, be deemed by the Council to be in a ruinous state, whether dangerous or not or to be likely to fall, the Council shall immediately, if it appears to be necessary, cause a proper hoarding or fence to be put up for the protection of persons using such street, and shall cause notice in writing to be served on the owner or occupier forthwith to take down, secure, or repair such house, building, boundary wall, gateway or thing fixed thereon, as the case may require."

Accordingly, the building is in a ruinous state and poses a threat to the general public including that of the occupants of the subject building. Therefore, the 7th Respondent acting in terms of law notified by the 8th Respondent of the imminent danger that is evident by way of the notice dated 04.01.2023.

The learned President's Counsel for the 8th and 9th Respondents argued that the Petitioners have made false representations to this Court. It is trite law that a party coming before this court must come with clean hands. Making false representations, and misleading this court are valid ground to dismiss the writ petition. Courts have consistently held that a party invoking the Writ jurisdiction of this court must come with clean hands and utmost good faith.

The Supreme Court in Liyanage & another v Ratnasiri, Divisional Secretary, Gampaha & Others 2013 (1) SLR 6 citing the case of Jayasinghe v National Institute of Fisheries and Nautical Engineering and Others 2002 (1) SLR 277 has held as follows;

"The conduct of the Petitioner in withholding these material facts from Court shows a lack of *uberrima fides* on the part of the Petitioner. When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. This contractual relationship requires the Petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court."

In the case of Blanca Diamonds (Pvt) Limited v. Wilfred Van Els and Two Others 1997 (1) SLR 360, the Court highlighted this contractual obligation which a party enters into with the Court, requiring the need to disclose *uberrima fides* and disclose all material facts fully and frankly to court. Any party who misleads court, misrepresents facts to court or utters falsehood in Court will not be entitled to obtain redress from Court. It is a well-established proposition of law, since courts expect a party seeking relief to be frank and open with the court.

This principle has been applied even in an application that has been made to challenge a decision made without jurisdiction. Further, Court will not go into the merits of the case in such situations.

In Kishore Samrite v. State of UP., (2013) 2 SCC 398, the Indian Supreme Court clearly indicated principles that govern the obligations of a litigant as follows,

- "(i) Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without faults disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief
- (ii) The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equal fundamentals of judicious litigation. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands. No litigant can play 'hide and seek' with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts."

In the words of Justice Bhagwati (as he then was) in Bandhua Mukti Morcha v. Union of India 1984 AIR 802:

"the Court must be ever vigilant against the abuse of its process."

According to the documents available in the case record this building which is the subject matter in the present case is in the heart of Colombo, bordering York Street, and Bristol Street (now Sir Razeek Fareed Mawatha). If the building collapses, it will cause serious threat to, not only the life and well-being of the occupants, but also to thousands of public. It will be a public health disaster. It is in consideration of the actual ruinous condition of the building, and the danger it posed to the safety of the occupants, and the public that all Lessees, except for 7 including the Petitioner, have voluntarily vacated the premises. The serious public interest in this matter pertaining to public safety overrides any contractual commercial concerns of the Petitioners.

It is important to note that preventing the demolishing of the building is dangerous not only to the occupants, but also to the general public. The Petitioners are guilty of serious suppression, and misrepresentation of facts. At the time of filing of this Writ Application, over 50 lessees have already voluntarily vacated the premises and demolishing works have already progressed, and the building was in a partially demolished state. 53 Lessees, identifying themselves as "Key Leaseholders" representing all leaseholders occupying two buildings owned by Asset Arcade (Pvt) Limited at 51E, York Street, Colombo 01, and No. 8, Sir Razeek Fareed Mawatha, Colombo 01, have, in fact, written to the NBRO on behalf of all leaseholders, on or about 15.12.2022, and sought the NBRO to reconsider their report. In the said letter they concede that they are aware of the NBRO, and University of Moratuwa reports. The NBRO replied to the above letter on or about 16.01.2023, and stated that it "found that stability of the building structure is questionable. Hence, it is recommended to take immediate actions to ensure the safety of the building occupants and the general public who use the 4m wide corridor".

The above letters were submitted before the Learned Magistrate, and is a part of the Magistrate's Court case record. Learned Counsel for the 8th and 9th respondents submit that the Petitioners have suppressed the above from this Court, and misled this Court, in order to obtain interim reliefs. The Petitioners although have pleaded reserving their right to submit the Magistrate's Court case record, they have until to date failed to submit the same.

The Petitioners having deviously suppressed the Magistrates Court case record, have deliberately misled this court in order to obtain interim reliefs. The Petitioners have not stated anything about the partially demolished state of the building. The Petitioners have suppressed that roof, electrical infrastructure, and water infrastructure are dismantled, and several window panels, and doors are removed, and many walls are already demolished. The present state of the building is suppressed from this Court, in order to obtain interim reliefs.

The Petitioners, falsely tried to paint the picture to the effect that the Petitioners have a "perpetual" or "irrevocable" lease agreement with the 8th Respondent, and falsely alleged that the 8th Respondent is colluding with the Police, and MOH in order to evict the Petitioners from the building. This is complete misrepresentation of facts, deviously crafted to mislead this, Court.

Clause 8 (d) of the Lease Agreement between the 1st Petitioner and the 8th Petitioner clearly provides that;

"If either party to these presents is desirous of terminating the lease hereby granted prior to the expiration thereof such party shall do so by giving Three (03) calendar months' notice in writing to the other party provided however that if these presents shall be sooner determined as aforesaid at the instance of the lessee, the lessee shall pay to the Lessor a sum equivalent to Three (03) months' rent in lieu of such notice."

If the intention of the Respondents is to terminate the lease, and evict the Petitioner, the Respondents could have easily given 3 months' notice, and done the same. With the enactment of Recovery of Possession of Premises Given on Lease Act, No. 1 of 2023, the Respondents could have upon termination of the Lease Agreement, easily obtained possession of the premises as well.

It is trite Law that a Petitioner invoking the Writ Jurisdiction of this Court must come with clean hands, not suppress or misrepresent material facts, and mislead this Court:

In Alphonso Appuharny v Hettiarachchi 1973 77 NLR 131, Pathirana J. held:

"It is the duty of a party asking for an injunction to bring under the notice of the court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward."

In Sarath Hulangamuwa v Siriwardena 1986, (1) SLR 275, Siva Selliah J. held:

"A petitioner who seeks relief by Writ which is an extraordinary remedy must in fairness to this court, bare every material fact so that the discretion of this court is not wrongly invoked or exercised."

In Blanca Diamonds (Pvt) Ltd v Wilfred Van Else & Others 1997, (1) SLR 360), Jayasuriya J. held:

"In the decision in Alphonso Appuhamy v. Hettiaratchi, *supra* Justice Pathirana, in an erudite judgment, considered the landmark decisions on this province in English Law and cited the decisions which laid down the principle that when a party is seeking discretionary relief from this Court upon an application for a writ of certiorari, he enters into a contractual obligation with the Court when he files an application in the Registry and in terms of that contractual obligation he is required to disclose *uberrima fides* and disclose all material facts fully and frankly to this Court."

In Namunukula Plantations Ltd v Minister of Lands and others (SCIAp1/46/2008, decided on 13.03.2012), an appeal from the Court of Appeal to the Supreme Court, where suppression of material facts before the Court of Appeal was pointed out in the appeal to the Supreme Court, Marsoof J held:

"It is settled law that a person who approaches the Court for grant of discretionary relief, to which category an application for certiorari would undoubtedly belong, has to come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case. In other words, he owes a duty of utmost good faith (*uberrima fides*) to the court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence."

"If any party invoicing the discretionary jurisdiction of a court of law is found wanting in the discharge of its duty to disclose all material facts, or is shown to have attempted to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. It is therefore my considered view that this Court need not, and should not, answer any of the questions on which special leave to appeal was granted, as the letter dated 30.11.2000, which is reproduced in full in this judgement, clearly demonstrates that the Appellant has been guilty of deceptive conduct, and has not only suppressed, but also misrepresented material facts before the Court of Appeal as well as this court."

Considering the aforesaid strong authorities, the Petitioners have misrepresented facts and suppressed facts before this Court, and acted with *mala fides* to obtain the interim relief in a purported urgency before the vacation bench of this Court. Whereas there was already a pending Revision application, and Appeal with regard to the Learned Magistrate's Order, there was no urgency as wrongfully portrayed by the Petitioners.

Therefore, the interim reliefs should be vacated, and Petition should be dismissed as the Petitioners have not come before this court with clean hands, and suppressed material facts. As manifestly evident from the Objections filed by the Respondents, there are serious factual disputes in this matter. In the Petition, and during the submissions, the Petitioners, and few other Respondents were heard to impugn, the veracity of the NBRO and University of Moratuwa Reports.

The Petitioners were also heard to dispute the present condition of the building, although they have not submitted any evidence whatsoever to substantiate their claim. It is my view that the

Petitioners are falsely claiming without any proof that there are 82 lessees, where in fact, as evidenced by " 66 have already voluntarily vacated the premises at the time of filing the Limited Objections. It is trite law that when facts are disputed, writ won't lie.

The rationale for this is that, the Writ Court is not equipped to test the veracity of disputed facts.

In the case Thajudeen vs Sri Lanka Tea Board and another 1981, (2) SLR 471 Ranasinghe J. held:

"that the remedy by way of an application for a Writ is not a proper substitute for a remedy by way of a suit, specially where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where the parties would have ample opportunity of examining their witnesses and the Court would be better able to judge which version is correct, has been laid down in the Indian cases of: Ghosh v. Damodar Valley Corporation, Porraju v. General Manager B. N. Rly."

In the case W.M.Karunawathie and others v A.H.Pemawathie and others (CA (Writ) 452/2008) Anil Gooneratne J. held that:

"When facts are disputed, court should be cautious and refrain from interfering by way of granting a prerogative writ. This is a discretionary remedy of court. Given the powers of such a remedy, the Common Law surrounding this remedy requires multiple conditions that must be met prior to issuance of a writ by court. Only if;"

- (a) the major facts are not on dispute and the legal result are not subject to controversy Thajudeen v Sri Lanka Tea Board and another (supra)
- (b) the function that is to be completed by writ is a public duty with the power to perform such duty, Vide Hakmana Multipurpose Corporative Society Ltd v Ferdinando 1985, 2 SLR 272, Silva v Ambawatta 1968, 71 NLR 248, will Writ of Mandamus lie.
- (c) A Writ of Mandamus cannot lie as a matter of course or routine.

In the case Aselro Financial Services (Private) Limited vs M.A.Wasantha Chandrasiri and others (CA (Application) 797/2007) Srisikandarajah J. held that:

"On careful consideration of the facts placed by both parties, now the issue before this court is to decide whether the "Kanibi Kotuwe Kumbura" 'is situated within the land called "Polkotuwewatta Deniya" or not. This factual position falls within the ambit of a court of first instance to decide after an inquiry or trial. In such an inquiry or trial, the petitioner will also get an equal opportunity to contest the trial. As factual matters are in issue this application is not amendable to the writ jurisdiction of this court. "

In the present case the facts alleged by the Petitioners are clearly disputed by the Respondents and due to existence of such serious factual disputes this cannot be resolved by way of a Writ. It is evident that the relationship between the Petitioners, and the 8th Respondent are of contractual nature. The relationship arises out of the Lease Agreement marked as "P4".

The Petitioners are abusing and misusing the Writ Jurisdiction of this Court to secure private contractual rights.

In the case of Jayaweera v. Wijeratne, 1985 (2) SLR at 413 it was held that:

"Where the relationship between the parties is purely contractual one of a commercial nature, neither certiorari nor mandamus will lie to remedy grievances arising from an alleged breach of contract or failure to observe the principles of natural justice even if one of the parties is a public authority. "

In the case of Gawarammana v. The Tea Research Board and others, 2003 (3) SLR 1201 Sripavan J (as he then was) held:

"that the powers derived from contracts are matter of private law. The fact that one of the parties to the contract is a public authority is not relevant since the decision sought to be quashed by way of certiorari is itself was not made in the exercise of any statutory power."

In Galle Flour Milling (Pvt) Limited vs. Board of Investment of Sri Lanka and another (2002) BLR 10, the Court held that:

"An analysis of the relationship that existed between the parties reveals that as it was purely a contractual one of commercial nature, neither certiorari nor mandamus will lie to remedy the dispute over the rights of the parties. The purported breach of such rights and the grievances between the parties, arise entirely from a breach of contract, even if one of the parties was a statutory or public authority."

The Petitioners have subsequently filed a case bearing number DSP/157/2023 in the District Court of Colombo against the 8th Respondent, and has obtained enjoining orders protecting his contractual right as a Lessee. The Petitioners have failed to bring the above to the notice and cognizance of this Court. If the building collapses, it will cause serious threat to not only the life and well-being of the occupants, but also to thousands of public. It will be a public health disaster. The serious public interest in this matter pertaining to public safety overrides any contractual commercial concerns of the Petitioners.

It is crystal clear that the balance of convenience is not in the Petitioners' favour. Not demolishing the building, which is in a ruinous, and partly demolished state is not only a threat to the occupants, but also to the public at large.

In the case of Ceylon Cold Stores Ltd. Vs. Whittall Boustead Ltd. 1980, (2) SLR 120 page 129 it was held as follows:

"The balance of convenience in these cases is always of great importance. In evaluating the balance of convenience, regard must be had where appropriate to the question of not compensable disadvantage or irreparable damage."

It is important to focus on Section 98(1)(d) of the Code of Criminal Procedure;

Section 98.

- (1) Whenever a Magistrate considers on receiving a report or other information and on taking such evidence (if any) as he thinks fit —

- (d) that any building or tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by and that in consequence its removal, repair, or support is necessary; or

such Magistrate may make a conditional order requiring that the person causing such obstruction or nuisance or carrying on such trade or occupation or keeping any such goods or merchandise or owning, possessing, or controlling such building, substance, tree, tank, well or excavation shall within a time to be fixed by such order;

- i. remove such obstruction or nuisance; or
- ii. suppress or remove such trade or occupation; or
- iii. remove such goods or merchandise; or
- iv. prevent or stop the construction of such building; or
- v. remove, repair, or support it; or
- vi. alter the disposal of such substance; or
- vii. remove such tree; or
- viii. fence such tank, well. Or excavation as the case maybe."

The aforesaid section empowers a Magistrate to order the removal of a building which is in a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by. The purpose of the provision is to prevent harm being caused to persons living or carrying on business in the neighbourhood or passing by a building that could fall. The Learned Magistrate has taken into cognisance the NBRO Report, and the University of Moratuwa Report, which, as more fully iterated above, categorical conclude that the building is in ruinous state, and could collapse.

The Petitioners, or any of the Lessees, who contested the matter before the Learned Magistrate, did not provide any evidence to counter the NBRO, and University of Moratuwa Reports. The Petitioners, or any of the Lessees, who contested the matter before the Learned Magistrate, did not impeach the credibility of the NBRO, and University of Moratuwa Reports. The Learned Magistrate was correct in making the order as the building was likely to fall, and cause injury and harm to the public. It would be a mockery of the law to refrain from not making the order based on purported technicalities, and expose the public to serious threat of injury and harm, and to take such an approach would defeat the purpose of the said section.

The Petitioners are in effect suggesting that, even though there are two corroborating independent reports by top experts of the country suggesting that the building is in ruinous state, and might collapse, which could cause grave injuries and harm to the public, the Learned Magistrate should refuse to act under section 98(1)(d) of the Code of Criminal Procedure because of purported technicalities invented by the Petitioners. Hence, the farcical position, and corresponding submissions of the Petitioners impugning the order of the Learned Magistrate does not hold water.

The Petitioners have blatantly lied to this court about giving notice to the Respondents, and have misled this court to obtain interim reliefs. The Petitioners have suppressed, and misrepresented material facts, and misled this, court. There are alternative remedies available in law, and the same have been sought with regard to the purportedly impugned order of the Learned Magistrate. Alternative remedies are not only available, but have also been sought and

invoked. The Petitioners are abusing or misusing the Writ Jurisdiction for private contractual matters and collateral or extraneous purposes.

Learned President's Counsel for the 8th and 9th Respondent says that the Petitioners are guilty of laches. The Leaseholders have written to the NBRO, and verified the truth of the NBRO report, and also received further clarification as to the ruinous state of the subject building. The subject building is in a ruinous state, and also is partially demolished. It is true that not completing the demolishing of the building poses grave threat to the safety and well-being of the occupant, and the public.

The principles governing interim relief are not in favour of the Petitioners. It is my view that the Learned Magistrate properly, duly, and lawfully made the impugned order. Hence, there is no valid matter to be considered under the Writ Jurisdiction of this Court.

For the reasons stated above, the Petition dismissed with cost.

President of the Court of Appeal

M.C.B.S. Morais J.

I agree.

Judge of the Court of Appeal