

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

**CA (Writ) Application No: 116/2016**

Compannage Devindasiri Fonseka,  
No. 12/3, Sri Guneratne Mawatha,  
Mount Lavinia .

**PETITIONER**

Vs.

1. Urban Development Authority,  
Ministry of Urban Development,  
'Sethsiripaya', Battaramulla.
2. Danasiri Amaratunga.
- 2A. Nawalage Stanley Dias,  
Mayor,  
Dehiwela – Mt.Lavinia Municipal Council.
3. K.B.V.D.N. Muthugala.
- 3A. Sunil Galagama,  
Municipal Commisioner,  
Dehiwela – Mt.Lavinia Municipal Council.
4. Dehiwela – Mt.Lavinia Municipal Council.  
  
2<sup>nd</sup>, 2A, 3<sup>rd</sup>, 3A and 4<sup>th</sup> Respondents at  
Anagarika Dharmapala Mawatha,  
Dehiwela.
5. Neelamani Clera Fernando,  
No. 14B, Sri Guneratne Mawatha,  
Mount Lavinia.

**RESPONDENTS**

**Before:** Mahinda Samayawardhena, J  
Arjuna Obeyesekere, J

**Counsel:** Charith Galhena with Ms. Shalani Jayasinghe the Petitioner  
  
Manohara Jayasinghe, Senior State Counsel for the 1<sup>st</sup> Respondent  
  
W. Dayaratne, P.C., with R. Jayawardena for the 2<sup>nd</sup> - 4<sup>th</sup> Respondents  
  
Jacob Joseph with N.M.Riyaz for the 5<sup>th</sup> Respondent

**Argued on:** 9<sup>th</sup> September 2020

**Written Submissions:** Tendered on behalf of the Petitioner on 20<sup>th</sup> September 2019  
  
Tendered on behalf of the 5<sup>th</sup> Respondent on 15<sup>th</sup> October 2019

**Decided on:** 16<sup>th</sup> November 2020

**Arjuna Obeyesekere, J**

The Petitioner states that he is the owner of premises bearing assessment No. 12/3 and 12/3/1/1, Sri Guneratne Mawatha, Mount Lavinia while the 5<sup>th</sup> Respondent is the owner of premises No. 14A-D, Sri Guneratne Mawatha, Mount Lavinia. Both premises come within the Municipal Council area of the 4<sup>th</sup> Respondent, the Dehiwela – Mount Lavinia Municipal Council.

The Petitioner states that the Dehiwela – Mount Lavinia Municipal Council Area has been declared as an Urban Development Area in terms of a declaration made in terms of the Urban Development Authority Law No. 41 of 1978, as amended (the UDA Law). The planning powers of the 1<sup>st</sup> Respondent, the Urban Development Authority, in respect of the aforementioned Area have been delegated to the 2<sup>nd</sup> Respondent, the Mayor of the Dehiwela – Mount Lavinia Municipal Council and/or the 3<sup>rd</sup> Respondent, the Municipal Commissioner of the Dehiwela – Mount Lavinia Municipal Council. Although the delegation has been withdrawn in 2017, the powers have subsequently been delegated to the 4<sup>th</sup> Respondent.

In this application, the Petitioner is seeking *inter alia* a Writ of Mandamus directing the 4<sup>th</sup> Respondent to take steps in terms of the law to prevent his neighbour, the 5<sup>th</sup> Respondent from engaging in any unauthorised constructions on the premises owned by the 5<sup>th</sup> Respondent.

I would commence by examining the provisions of the UDA Law relating to construction within an Urban Development area.

In terms of Section 8J(1) of the UDA Law:

*“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.”*

Section 29 of the UDA Law defines a ‘development activity’ as follows:

*“development activity means the parcelling or sub-division of any land, the erection or re-erection of structures and the construction of works thereon, the carrying out of building, engineering and other operations on, over or under such land and any change in the use for which the land or any structure thereof is used, other than the use of any land for purposes of agriculture, horticulture and the use of any land within the curtilage of a dwelling house for any purpose incidental to the enjoyment of a dwelling house, not involving any building operation that would require the submission of a new building plan.”*

Thus, it is clear that the construction of a dwelling house within the Dehiwala- Mount Lavinia Municipal Council Area is a *development activity* which can be carried out only with a permit issued by the 4<sup>th</sup> Respondent.

The procedure for making an application for a permit is set out in Section 8J(2) and reads as follows:

*“An application, for a permit to carry out or engage in any development activity within a development area or part thereof shall be made to the Authority in such form, shall contain such particulars and be accompanied by such fees as may be prescribed by regulations made under this Law.”*

In terms of Section 8J(3):

*“A permit under subsection (1) shall be granted by the Authority under that subsection 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.”<sup>1</sup>*

Section 8K (1) of the UDA Law makes it clear that, ‘No development activity shall be carried out or engaged in, in contravention of, or in variance with, the permit issued in that behalf.’

The consequences of engaging in any development activity without a permit or contrary to the terms of a permit have been set out in Section 28A of the UDA Law, which is re-produced below:

*“(1) Where in a development area, any development activity is commenced continued, resumed or completed without a permit or contrary to any term or condition set out in a permit issued in respect of such development activity, the Authority may, in addition to any other remedy available to the Authority under this Law, by written notice require the person who is executing or has executed such development activity, or has caused it to be executed, on or before such day as shall be specified in such notice, not being less than seven days from the date thereof:*

- (a) to cease such development activity forthwith;*
- (b) to restore the land on which such development activity is being executed or has been executed, to its original condition;*
- (c) to secure compliance with the permit under the authority of which that development activity is carried out or engaged in, or with any term or condition of such permit, and for the purposes of compliance with the requirements aforesaid:*
  - (i) to discontinue the use of any land or building; or*
  - (ii) to demolish or alter any building or work.*

*(2) It shall be the duty of the person on whom a notice is issued under subsection (1) to comply with any requirement specified in such notice within*

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<sup>1</sup> Section 8J(4) provides that, ‘The Authority may take into consideration the recommendations or the Planning Committee, in granting or refusing to issue a permit under this section.’

*the time specified in such notice or within such extended time as may be granted by the Authority on application made in that behalf.*

*3(a) Where any person has failed to comply with any requirement contained in any written notice issued under subsection (1) within the time specified in the notice or within such extended time as may have been granted by the Authority, the Authority may, by way of petition and affidavit, apply to the Magistrate to make an Order authorizing the Authority -*

*(a) to discontinue the use of any land or building;*

*(b) to demolish or alter any building or work;*

*(c) to do all such other acts as such person was required to do by such notice, as the case may be,*

*and the Magistrate shall after serving notice on the person who had failed to comply with the requirements of the Authority under subsection (1), if he is satisfied to the same effect, make order accordingly.”*

I shall now consider the facts relevant to this application.

The Petitioner claims that the 5<sup>th</sup> Respondent had commenced the construction of a house on the said premises in 2006 without obtaining the prior approval of the 4<sup>th</sup> Respondent. He claims further that the house of the 5<sup>th</sup> Respondent has a blind wall on its Northern boundary, and that provision has not been kept for the rear space of the house. The 5<sup>th</sup> Respondent states however that he has obtained approval for the said construction, as evidenced by the building plan produced by the 4<sup>th</sup> Respondent, together with its motion filed on 25<sup>th</sup> May 2016.

Acting on a complaint made by the Petitioner that provision has not been kept for the rear space of the house in terms of the law, the 4<sup>th</sup> Respondent had informed the 5<sup>th</sup> Respondent by a letter dated 16<sup>th</sup> October 2007 that construction is being carried out contrary to the approval granted by the 4<sup>th</sup> Respondent and the provisions of the UDA Law,<sup>2</sup> and directed the 5<sup>th</sup> Respondent to restore the property to its original condition. As the 5<sup>th</sup> Respondent had not complied with the said directive, the 4<sup>th</sup> Respondent had instituted proceedings against the 5<sup>th</sup> Respondent in the Magistrate’s Court, Mount Lavinia.<sup>3</sup> On 24<sup>th</sup> July 2009, the learned Magistrate had delivered her Order enabling the 4<sup>th</sup> Respondent to act in terms of Section 28A(3) of the UDA Law.

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<sup>2</sup> එම්ඩී/32/2006 අනුමත ගොඩනැගිලි සැලැස්මට පටහැනිව සිටී ගුනරත්න මාවත ගොඩනැගිලි සීමාව උල්ලංඝනය කරමින් නිත්‍යානුකූල පිටුපස ඉඩ පමාණය අවතිර කරමින් 22’6” x 10’ 0” ප්‍රමාණයේ තෙමහල් ගොඩනැගිල්ලක් ඉදිකිරීම

<sup>3</sup> Magistrate’s Court, Mount Lavinia – Case No. 3532/S/08; vide documents marked ‘A8’.

Aggrieved by the said Order, the 5<sup>th</sup> Respondent had filed a revision application in the Provincial High Court of the Western Province, holden at Colombo. On this application too being dismissed, the 5<sup>th</sup> Respondent had filed an appeal in this Court, which matter is pending. I have only referred to the above facts in order to give context to the issues that have arisen in this application. I must state that I am mindful that the issues arising from the said Magistrate's Court case must be resolved in the appeal that is pending before this Court.

The Petitioner states that while the revision application was pending in the High Court, the 5<sup>th</sup> Respondent had continued with the construction of her house on the said premises. The Petitioner states that he complained to the 1<sup>st</sup> Respondent, as well as to the 2<sup>nd</sup> – 4<sup>th</sup> Respondents about the unauthorised construction, but that they have failed to take action and/or institute action against the 5<sup>th</sup> Respondent. It is under these circumstances that the Petitioner has filed this application, seeking *inter alia* a Writ of Mandamus directing the 1<sup>st</sup> – 4<sup>th</sup> Respondent to act in terms of Sections 28A and 28B of the UDA Law, and to demolish the unauthorised construction.

In her Statement of Objections, the 5<sup>th</sup> Respondent has stated that the Petitioner is a troublesome busybody who has been making complaints against her over the years to various Government authorities. She has stated that she sought and obtained approval of the 4<sup>th</sup> Respondent in the year 2000 for Building Plan No. MB/33/2000. She states however that construction work did not commence until 2006, and for that reason, she re-submitted the building plan and that approval was renewed by the 4<sup>th</sup> Respondent. The 5<sup>th</sup> Respondent states that during construction, the necessity arose to shift the rear space of the house from the east to the west. Although the 5<sup>th</sup> Respondent claims that the 4<sup>th</sup> Respondent instructed her to proceed pending approval, no written approval had been granted by the 4<sup>th</sup> Respondent for the above shifting of the rear space. On the contrary, the 4<sup>th</sup> Respondent has specifically instructed the 5<sup>th</sup> Respondent, by letters dated 22<sup>nd</sup> November 2006 marked '5V2' and 25<sup>th</sup> January 2007 marked '5V3' not to proceed with any construction until she submits an amended building plan and obtains approval. The construction that the 5<sup>th</sup> Respondent engaged in, *pending approval* is the subject matter of the aforementioned application to the Magistrate's Court, Mount Lavinia, and the revision application and appeal arising therefrom.

The 5<sup>th</sup> Respondent has denied that the building on the said premises has been constructed without obtaining approval. However, an Order has already been made by the Magistrate's Court confirming that the 5<sup>th</sup> Respondent has in fact engaged in construction contrary to approvals granted by the 4<sup>th</sup> Respondent, in respect of which the aforementioned appeal is pending.

The 5<sup>th</sup> Respondent states that she submitted building applications in 2008 and 2012 seeking approval for an amended building plan, and that the said applications have not been processed in view of the pending litigation. In paragraph 34 of her affidavit, the 5<sup>th</sup> Respondent has stated that, *‘the existing structure is in accordance with Plan Nos. MB/69/2008 and MB/121/2012, and I consent to the demolition of any part of the building that deviates from either Plan No. MB/121/2012.’* Thus, it is clear that there have been attempts by the 5<sup>th</sup> Respondent to *regularise* the constructions which have been carried out by her.

The first issue before this Court is whether the 5<sup>th</sup> Respondent has engaged in any unauthorised constructions which are not the subject matter of the aforementioned action in the Magistrate’s Court. By a motion filed on 25<sup>th</sup> May 2016, the 4<sup>th</sup> Respondent had filed a copy of Building Plan No. 32/2006 approved by it. I have examined same and observe that there existed on the said premises, a single storey house. Approval was sought and had been granted for the addition of a structure consisting of four floors – that is ground plus three floors, adjoining the existing single storey house. The photographs of the building produced with the counter affidavit however show a building which has five floors.

Annexed to the above motion marked ‘**B2**’ is a sketch prepared by the Technical Officer of the 4<sup>th</sup> Respondent, which depicts in orange stripes the unauthorised construction which is the subject matter of the Magistrate’s Court case. The construction for which approval has been granted by Building Plan No. 32/2006 is shown in blue stripes. Adjoining that is a three storey structure shown in red stripes, which construction has not been approved by the 4<sup>th</sup> Respondent, and is therefore an unauthorised construction. The 4<sup>th</sup> Respondent has filed together with the said motion, another sketch marked ‘**B1**’ which shows the boundary wall and the gates of the said premises of the 5<sup>th</sup> Respondent, which the 4<sup>th</sup> Respondent claims is unauthorised. Thus, it is clear that the 5<sup>th</sup> Respondent has engaged *inter alia* in an unauthorised construction of a three storey building and a boundary wall on the said premises.

The second issue before this Court is whether a Writ of Mandamus should issue to the 4<sup>th</sup> Respondent to demolish such unauthorised constructions. It would therefore be appropriate to consider at this stage the matters that must be satisfied by a party seeking a Writ of Mandamus.

The Supreme Court in **Ratnayake and Others vs C.D.Perera and others**<sup>4</sup> held that:

*“The general rule of Mandamus is that its function is to compel a public authority to do its duty. The essence of Mandamus is that it is a command*

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<sup>4</sup> [1982] 2 Sri LR 451.

*issued by the superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, Mandamus will lie to secure the performance of the public duty, in the performance of which the applicant has sufficient legal interest. It is only granted to compel the performance of duties of a public nature, and not merely of private character that is to say for the enforcement of a mere private right, stemming from a contract of the parties.”*

The above position has been reiterated in **Jayawardena vs. People’s Bank**<sup>5</sup> where it was held that:

*“Courts will always be ready and willing to apply the constitutional remedy of mandamus in the appropriate case. The appropriate case must necessarily be a situation where there is a public duty. In the absence of a public duty an intrusion by this Court by way of mandamus into an area where remedial measures are available in private law would be to redefine the availability of a prerogative writ.”*

In **Rajeswari Nadaraja v. M. Najeeb Abdul Majeed, Minister of Industries and Commerce and Others**<sup>6</sup> Aluwihare, J held that, *“In an application for a writ of mandamus, the first matter to be settled is whether or not the officer or authority in question has in law and in fact the power which he or she refused to exercise. As a question of law, it is one of interpreting the empowering statutory provisions. As a question of fact, it must be shown that the factual situation envisaged by the empowering statute in reality exists.”*

Thus, while the public authority must be under a legal or public duty to carry out the act which a petitioner demands, the petitioner must have a legal right to the performance of such public duty. In **Kaluarachchi vs Ceylon Petroleum Corporation and Others**,<sup>7</sup> Fernando J, referring to the judgment in **Credit Information Bureau of Sri Lanka vs M/s Jafferjee and Jafferjee (Pvt) Limited**<sup>8</sup> reiterated that, *“the foundation of mandamus is the existence of a legal right. A court should not grant a Writ of Mandamus to enforce a right which is not legal and not based upon a public duty.”*

I have already set out the provisions of the UDA Law which mandates that any development activity must be carried out only with a permit issued by the 1<sup>st</sup> or 4<sup>th</sup> Respondent. Failure to do so would render such construction, unauthorised, and therefore liable to action being taken to suspend the said construction and

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<sup>5</sup> [2002] 3 Sri LR 17.

<sup>6</sup> SC Appeal No. 177/15; SC Minutes of 31<sup>st</sup> August 2018.

<sup>7</sup> SC Appeal No. 43/2013; SC Minutes of 19<sup>th</sup> June 2019.

<sup>8</sup> [2005] 1 Sri LR 89.



subsequent demolition of such construction. I am therefore satisfied that the 4<sup>th</sup> Respondent on whom the powers of planning have been conferred, has a legal duty to take action whenever an unauthorised construction is brought to its attention. For the reasons that I have already set out, *the factual situation envisaged by the empowering statute in reality exists.*

The learned Senior State Counsel for the 1<sup>st</sup> Respondent, the Urban Development Authority submitted that the Petitioner's complaint is that the construction of the 5<sup>th</sup> Respondent obstructs his access to light and air, and therefore the Petitioner should enforce his rights through a civil action. In other words, the submission of the learned Senior State Counsel was that the Petitioner does not have a legal right to secure compliance by the 5<sup>th</sup> Respondent with the applicable law. I regretfully cannot agree with this submission. Quite apart from public interest litigation, an individual is entitled to have his neighbour comply with the laws introduced by the legislature to regulate the construction of buildings and houses. If as a result of any unauthorised construction, the right of an individual to light and air is obstructed, that individual has every right to complain to the regulatory agency established by law for that very purpose of regulating constructions. If the regulatory agency does not carry out its statutory function, my view is that an individual is entitled to invoke a public law remedy, as has been done in this application. Therefore, I am of the view that the Petitioner has the requisite *locus standi* to have and maintain this application, and that he has a legal right to seek a Writ of Mandamus.

I shall now consider the relief that this Court must afford in this application. Taking into consideration all the circumstances that I have referred to, I issue a Writ of Mandamus directing the 1<sup>st</sup> – 4<sup>th</sup> Respondents to act in terms of Section 28A(1)(a) of the UDA Law.<sup>9</sup> The 5<sup>th</sup> Respondent shall desist from carrying out any construction on the said premises after the receipt of the notice in terms of Section 28A(1)(a).

I cannot ignore the fact that the 5<sup>th</sup> Respondent has made an application to *regularise* the unauthorised construction. Once the 1<sup>st</sup> – 4<sup>th</sup> Respondents acts in accordance with the aforementioned Writ of Mandamus, and provided the 5<sup>th</sup> Respondent complies with such notice, I direct the 1<sup>st</sup> – 4<sup>th</sup> Respondents to consider in terms of the applicable laws and regulations the amended building plan submitted by the 5<sup>th</sup> Respondent. The 1<sup>st</sup> – 4<sup>th</sup> Respondents may consider the granting of approval for the said building plan, including the subject matter of the aforementioned Magistrate's Court case, provided the said Plan is in accordance with the applicable laws and regulations, and subject to any other terms and conditions that the 1<sup>st</sup> – 4<sup>th</sup> Respondents may impose in terms of the law.

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<sup>9</sup> The Writ of Mandamus is being issued on the 1<sup>st</sup> Respondent, even though the planning powers have been delegated to the 2<sup>nd</sup> – 4<sup>th</sup> Respondents, for the reason that the 1<sup>st</sup> Respondent can cancel such delegation at any time.

The 1<sup>st</sup> – 4<sup>th</sup> Respondents shall thereafter take steps in terms of Section 28A of the UDA Law in respect of all constructions carried out by the 5<sup>th</sup> Respondent for which approval cannot be granted, and which are therefore contrary to the provisions of the UDA Law.

I make no order with regard to costs.

**Judge of the Court of Appeal**

**Mahinda Samayawardhena, J**

I agree

**Judge of the Court of Appeal**