

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

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

CA (Writ) 87/2022

1. Dr. N. V. Jayatilake
No. 15 1/1, Park Avenue,
Colombo 08.
2. R. A. Jayatilake
No. 15, Park Avenue,
Colombo 08.

and presently,

17044 Briardale Rd, Derwood,
MD 20855,
U. S. A.

Appearing by his attorney

Dr. N. V. Jayatilake
No. 15 1/1, Park Avenue,
Colombo 08.

Petitioners

Vs.

1. Colombo Municipal Council
Town hall, Colombo 07.
2. Her Worship Mrs. Rosy
Senanayake
The Mayoress of Colombo,
Colombo Municipal Council,
Townhall, Colombo 07.
3. Roshanie Dissanayake
Municipal Commissioner,
Colombo Municipal Council,
Townhall, Colombo 07.
- 3A.J. M. Bhadrane Jayawardhana
Municipal Commissioner,
Colombo Municipal Council,
Townhall, Colombo 07.
4. Dr. R. L. De S. Wijayamuni
Chief Medical Officer,
Colombo Municipal Council,
Townhall, Colombo 07.
5. Eng. (Mrs.) Y. Sylvester
Deputy Municipal Commissioner,
(Engineering Services),
Colombo Municipal Council,
Townhall, Colombo 07.

5A.Eng. (Mr.) A. G. Irshad
Acting Deputy Municipal
Commissioner,
(Engineering Services),
Colombo Municipal Council,
Townhall, Colombo 07.

6. Sena Hetti Arachchige
City Planning Division,
Colombo Municipal Council,
Town Hall, Colombo 07.

6A.Anuja Mendis
Director City Planning Division
(Acting)
Colombo Municipal Council,
Townhall, Colombo 07.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Uditha Egalahewa P.C. with Damitha
Karunaratna and Miyuru Egalahewa for the
Petitioners.
Senany Dayaratne with E. Mendis for the 3A,
4th, 5A, and 6A Respondents.

Argued On : 07.09.2023

Written Submission : Petitioners : 09.10.2023
tendered On Respondents : 13.10.2023

Decided On : 30.01.2024

Dhammika Ganepola, J.

The 1st and the 2nd Petitioners are the owner of the condominium property bearing No. 15 and 15 1/1 situated in Campbell Park Avenue, Colombo 8. The Municipal Council of Colombo has issued a Certificate of Ownership dated 11.12.2017 pertaining to the above premises [CMC] confirming that the Petitioners are the owners of the premises.

The Petitioners state that the CMC created a hazardous environment within Campbell Park Avenue, Colombo 08, after installing the filling station within Campbell Park Avenue, Colombo 08. The environment of the area had become unsanitary and unhealthy as CMC had started using the surrounding of subject land as a parking ground for all garbage trucks, tractors, water tank carriers and backhoes owned by the CMC. Hence, the Petitioners had filed a Writ Application bearing No.60/2020 on or about 04.03.2020 and had obtained an interim relief against the CMC preventing the 1st Respondent and its officers and employees from causing nuisance or inconvenience to the Petitioners by parking vehicles belonging to the 1st Respondent CMC. However, the Petitioners assert that the officers of the CMC have acted in breach of the said interim order. Accordingly, the Petitioners through their Attorney-at-Law had sent a letter (P9) stating their intent to take action against the Respondents for contempt of court in respect of the alleged violation of the said interim order. The Petitioners contend that the Respondent responded to the said letter P9 by its letter P10. The Petitioners

claim that the said response by P10 was malicious and consequently, the employees of the 1st Respondent threatened to break down the walls of the property of the Petitioners' immediately.

As the matters remain such, on or about 18.01.2022, by a notice marked P13 issued by the 6th Respondent, the Petitioners had been advised to permanently close two gates towards the southern side of their property and take necessary action to regularize the boundary wall by obtaining the relevant approval. The Petitioners state that the aforementioned premises and the boundary wall of the said premises were built approximately in 1962 pursuant to obtaining the necessary approvals from the 1st Respondent and the Petitioners continuously enjoyed the peaceful possession of the said constructions. The Petitioners claim that they are unaware of any violation of Municipal Council Regulations pertaining to the said construction and have not ostensibly violated any such regulations. It is claimed that the impugned Notice P13 manifested a lengthy gap of over 60 years from the above constructions. Therefore, the Petitioners claim that the said notice is ultra vires, unreasonable, in violation of principles of natural justice and legitimate expectations. Under such circumstances, the Petitioners invoke the jurisdiction of this Court moving this Court to issue a Writ of Certiorari to quash Notice P13, Writs of Prohibition prohibiting the Respondents from taking any steps in pursuant to Notice P13.

The Respondents claim that the filling station situated at Park Avenue had been in existence since 1980's. The Petitioners came to ownership of the impugned property in 1992 and yet made no move to object or protest against the installation of said filling station until as late as 2017. The CMC claims that the said land containing the said fuel station and several other lands surrounding the land bordering the Petitioners' property from the south have been lawfully vested with CMC. The vehicles belonging to CMC are parked on lands owned by the CMC and said vehicles are momentarily parked on the sides of the public roads in order to discharge their duties. Further, the Respondents vehemently deny acting in breach of the interim order. The Respondents state that the Petitioners have purported to install two gates along the southern boundary wall of the Petitioner's land bordering the state land which has been vested with the CMC. The Respondents claim that no person can lawfully construct a gate opening into someone else's property

and that an authorized gate can only be open to a public road or sanctioned private road. The Respondent's position is that no approval has been obtained prior to the construction of the boundary wall and that the long-term occupation of the property cannot be used to cover up or rectify illegality. Therefore, it is advanced that the said gates are completely unauthorized and unlawful structures. The Respondents submit that at all times required they have acted according to the applicable laws, rules and regulations.

The Respondents claim that the boundary wall of the Petitioners' premises No. 15 & No. 15 1/1 of Campbell Park Avenue, Colombo 08 and the two entrances installed therein are unauthorized. The Petitioners claim that the boundary wall of the said premises was built approximately 1962, upon all necessary approvals being obtained from the 1st Respondent. Thus, it is necessary to consider the required procedure to be applied in the construction of said walls and entrances within the Municipal Council limits.

It is on common ground that the property owned by the Petitioners is situated within the Colombo Municipal Council area. Section 5 of the Housing and Town Improvement Ordinance, No.19 of 1915 which was repealed by the Urban Development Authority Law stipulates that no building shall be erected without the approval of the Chairman of a Local Authority.

The Petitioners had been asked to submit documentation to prove the approval granted by the Respondent to construct the boundary walls and three gates if any by the Director (City Planning) of the 1st Respondent by letter marked P13. The Respondents state that the Petitioners have failed to produce any evidence to demonstrate that such approval has been obtained. Further, neither the Petitioners' housing plan prepared in 1962 (P15(a)), nor the condominium plan prepared in 1982 (P15(b)) indicate a wall or gate so approved. The Respondents contend that the mere occupation of the premises for a long period by the Petitioners could not be used to cover up or rectify any illegal construction constructed.

However, the copies of the Street Line Certificate of the Condominium Plan and the Condominium Plan for the impugned premises no. 15 and no.15 1/1, Park Avenue have been submitted by the Petitioners to this Court and the same are marked as P15(e) & P15(g). The Respondents have submitted the

same documents also marked as R8 & R8(a). According to the said documents southern boundary of premises no.15 & no.15 1/1 is described as the “southern walls of this lot”. The said Condominium Plan had been prepared on the 2nd of January 1983. Therefore, it is evident from the same that the impugned boundary wall on the southern boundary of the subject property has been in existence since 1983. The Respondents further contend that the recent Plan dated 16.06.2020 (R10) only shows one gate to the southern boundary and therefore the second gate has been erected even after the said Plan R10 was prepared in 2020. Nevertheless, when R10 is carefully and closely perused, it is apparent that more than one gate had existed on the southern boundary of the Petitioners’ property. Further, it is evident that the Director of the City Planning Division of the 1st Respondent had authorized the boundary wall which is depicted in document R8/P15(e) as the Southern boundary of premises no 15 & 15 1/1, Park Avenue by issuing a street line certification to the R8/P15(e) as referred therein.

The fact that the Condominium Plan of the Petitioner had been approved is not in dispute. Further, the said Condominium Plan refers to the wall as the southern boundary of the subject premises. In terms of Section 3A of the Apartment Law, in order for a Condominium Plan to be registered it is mandatory that the application for such registration be accompanied with the certificate of conformity issued by the relevant local authority within whose limits the land is situated and empowered to approve the building plan. Said Section stipulates as follows:

3A.1(a) Every application for the registration of a Condominium Plan, shall be made to in the prescribed form in triplicate.

(2) Every application made under subsection (1) shall be accompanied by,

...

(f) the certificate of conformity issued by the local authority within whose limits the land is situated and empowered to approve the building plan.

Therefore, it could be presumed that the authorization of the CMC had been granted in respect of the building plan depicted in the R8/P15(e) which includes the southern boundary wall also. Hence the southern boundary wall of the Petitioners’ property no. 15 & 15 1/1 of Campbell Park Avenue, Colombo 08 cannot be considered as an unauthorized construction.

The Respondents claim that the Petitioners have installed two gates along the southern boundary wall of the Petitioner's premises bordering the state land which has been vested with the CMC, illegally and that the said construction is unauthorized. In the above context, the first question that arises is whether the said State Land is vested with the CMC.

The Respondents claim that Cambel Park contains 18 Acres, and 2 Roods in the extent and that the same is described in the Plan marked R2. The same has been acquired by the State and had been vested over to the CMC by the Vesting Certificate marked R1 as far back in 1902 under Section 72 of the Municipality Ordinance No. 07 of 1887. The Respondents further state that the premises in question is situated within the limits of the said Cambel Park depicted in R2. The approved Condominium Plan R8(a)/P15(g) for the Petitioners' premises no 15 & 15 1/1 described its southern boundary as State Land and Plan No.21 dated 06.11.1956 prepared by C. C. Cumarasamy Licensed Surveyor marked R9 & P15(h) also describes the southern boundary of the above premises no.15 as Crown Land. However, such mere reference to a particular land as "State /Crown Land" in the Plan does not substantiate the position of the Respondent that such land was vested with CMC.

Despite the Respondents' assertion that the land bordering the southern boundary of the Petitioners' property is vested with the CMC by the Vesting Certificate R1, this Court is unable to arrive at such a conclusion with the available materials placed before it. The strip of land which is described as State/Crown Land in plans R8(a)/P15(g) and R9 & P15(h) bordering the southern boundary of the Petitioners' premises cannot be asserted as a land vested with the CMC in the absence of the adequate evidence to prove the same. The parties are also at variance on this matter. Whether the above strip of State Land bordering the southern boundary of the Petitioners' premises is a part of the Cambel Park vested with the CMC or not could only be determined by superimposing the relevant plans and by a closer assessment of fact before an appropriate forum which is vested with the jurisdiction to do so. **CHOUDRI** in his book on the *Law of Writs and Fundamental Rights (2nd Edition) Vol.2(at p.381)* observed "*where the 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 parties would have ample opportunity of examining their witnesses...*". In the above circumstances, this Court is unable to determine

with the available evidence before Court, whether the Respondents' contention that, the strip of land bordering the southern boundary of the Petitioners' premises is State Land vested with CMC, is correct or not.

The Respondents further submit that the two gates installed on the southern boundary of the Petitioners' premises are open to the pavement built on the above State Land vested with CMC to ensure the vehicles which belong to them are parked suitably. The document R13(f) submitted by the Respondent which contains the photographs of the southern boundary of the Petitioners' premises under the heading of "*a foot-walk for pedestrian movement*" and the Photographs submitted by the Petitioners marked P12(a), P12(b) & P12(c) contradict the Respondents' above submission. Further, as it is evident from the Photographs marked R13(f), P12(a), P12(b) & P12(c), it appears that the vehicles are being parked outside the pavement. Hence, the contention of the Respondents that the said pavement is reserved only for the purpose of parking CMC vehicles cannot be accepted. However, as the above strip of land bordering the premises of the Petitioners' southern boundary is used as a foot-walk for pedestrian movement, usage of the same by the Petitioners for a similar purpose cannot be denied by law. It is further observed that the gates installed on the boundary wall are used only to step out into the pavement but not for vehicular movements. Further, it is observed that no allegation is raised against the Petitioners by the Respondent to the effect that the existence of the impugned gates disturbs the public pavement. By letter P13 the Petitioners had been asked to close the said two gates which provide access out from the southern boundary of the Petitioners' property. Under any circumstances, the strip of land bordering the southern boundary of the Petitioner's premises has now become a pavement for pedestrian movement. The Respondents have failed to provide any provision under the law which prevents the Petitioners from installing a gate open to the pavement and stepping into such public pavement. Therefore, in the said circumstances, the disputed gates cannot be deemed unauthorized unless the pavement is disturbed.

Although the Respondents claim that the instalment of the above two gates are unauthorized, the Respondents have failed to describe the time period

during which such alleged unauthorized construction had been built in. Nevertheless, the Condominium Plan marked P15(g)/R8(a) prepared on 02.01.1983 establishes the existence of an impugned southern boundary wall in the Petitioners' premises. Therefore, it could be presumed that the said gates have been in existence since 1983. Issuance of Street Line Certification for the Condominium Plan R8/P15(e) supports the stance of the Petitioner that the impugned boundary wall is an authorized construction. The Respondents issued an undated notice P13 allegedly on 18.01.2022 directing the Petitioners to permanently close the gates after taking cognizance of such construction. If the CMC considered said constructions were unauthorized, they would have taken necessary action at the time the Street Line Certification was issued when the condominium plan was submitted for approval in 1983. It appears that the Respondents have not taken any steps for a considerable period of time upon the alleged illegal construction and no explanation is provided for such a failure. Under such circumstances, this court cannot exclude the fact that the immediate cause for the issuance of letter P13 was the institution of the action CA Writ Application no. 60/2020 against CMC by the Petitioners and the interim reliefs granted therein.

In the circumstances pertinent to this application and the reasons given above, I am of the view that the Notice marked P13 issued to the Petitioners by the 6th Respondents is unlawful, arbitrary, male fide and cannot stand in law. Accordingly, I am inclined to issue a Writ of Certiorari and a Writ of Prohibition as prayed for in paragraphs (b) and (c) of the prayer of the Petition. I order no cost.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal