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

1. Hatton-Dickoya Urban Council,
   Hatton.
2. S. Balachandiran,
   The Chairman,
   Hatton-Dickoya Urban Council,
   No. 85/86, Main Street,
   Hatton.
3. A.J.M. Pamis,
   Vice Chairman,
   Hatton-Dickoya Urban Council,
   No. 55, Danbar Road,
   Hatton.
4. M.D.K. Karunasiri,
   Member,
   Hatton-Dickoya Urban Council,
   No. 34/20, Vilbert Town,
   Hatton.
5. A. Nandhakumara,
   Member,
   Hatton-Dickoya Urban Council,
   No. 110, Dimbula Road,
   Hatton.
6. R. Rameshwary,
   Member,
   Hatton-Dickoya Urban Council,
   No. 37/18B, Bandaranayakepura,
   Hatton.
7. K. Balasubramanium,
   Member,

Hatton-Dickoya Urban Council,
No. 76, Banku Wattha,
Hatton.

8. A.P. Anura de Silva,
   Member,
   Hatton-Dickoya Urban Council,
   No. 72, Circular Road,
   Hatton.
9. M. Gunasundaram,
   Member,
   Hatton-Dickoya Urban Council,
   No. 45, Circular Road,
   Hatton.
10. S. Kesavamoorthy,
    Member,
    Hatton-Dickoya Urban Council,
    No. 29/26, Samanalagama,
    Hatton.
11. S. Rathnakumar,
    Member,
    Hatton-Dickoya Urban Council,
    No. 418, Main Street,
    Dickoya.
12. M.R. Vijayananthan,
    Member,
    Hatton-Dickoya Urban Council,
    No. 50/01F, Kovil Road,
    Hatton.
13. Chamdhiramathy,
    Member,
    Hatton-Dickoya Urban Council,
    No. 143/03, Aluthgama,
    Dickoya.

14. Garti Somapala,
    Member,
    Hatton-Dickoya Urban Council,
    Walawwa, Fruithill,
    Hatton.
15. S. Sivadharshini,
    Member,
    Hatton-Dickoya Urban Council,
    No. 03, Saththaq Housing Road,
    Hatton.
16. R.M.S.V. Rathnayake,
    Member,
    Hatton-Dickoya Urban Council,
    No. 09, Bus Stand Road,
    Hatton.
17. P. Subramaniam,
    Member,
    Hatton-Dickoya Urban Council,
    No. 88/2, Danbar Road,
    Hatton.

Respondents-Appellants

Court of Appeal Case No:
CA/PHC/ 167/2014
HC Nuwara Eliya Case No:
HC/NE/ WRIT 03/2014

-Vs-

Ibrahim Cadar Meera Arthum,
No. 31, Circular Road,
Hatton.

Petitioner-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

Dr. Ruwan Fernando J.

Counsel : K.V.S. Ganesharajan with V. Subhangi for the Respondents-Appellants.

Janajith De Silva for the Petitioner-Respondent.

Written Submissions: By the Respondents-Appellants on 30/09/2019

By the Petitioner-Respondent on 13/12/2019

Argued on : 02/03/2020

Judgment on : **03/07/2020**

A.L. Shiran Gooneratne J.

The Petitioner-Respondent (hereinafter referred to as the Respondent) filed an application before the Provincial High Court of the Central Province holden in Nuwara-Eliya against the Respondent-Appellants, Hatton-Dickoya Urban Council as 1st Respondent-Appellant, (hereinafter referred to as the Appellants) seeking writs in the nature of writ of *certiorari* and *prohibition* to quash the decisions reflected in letters marked "P9" and "P10", dated 08/11/2013 (Vide page 167 of the brief) and 21/11/2013, (Vide page 168 of the brief) respectively, on the basis of illegality and that the said decisions have adversely affected the rights of the

Respondent. By the impugned letters marked "P9" and "P10", the 1st Appellant Council restrained the Respondent from undertaking further development activity in the land marked lot No. 18, in terms of Section 8A (1), of the Urban Development Authority Law No. 41 of 1978 (as amended), (referred to as the UDA Act).

The Appellants contended that the impugned letters were dispatched by the Council in the exercise of power within the province by the 1st Appellant Council, in terms of the UDA Act.

The learned High Court Judge by order dated 10/09/2014, granted relief to the Petitioner-Respondent as prayed for. Before this Court, the Appellants raised a preliminary objection to the application filed before the High Court on the basis that the Hatton-Dickoya Urban Council area has been declared as an "Urban Development area" in terms of Section 3 of the Act and therefore, the Respondent cannot invoke writ jurisdiction of the Provincial High Court. Section 3 of the UDA Act deals with the declaration of areas as "Urban Development" areas by order of the Minister and the effect of such order. The impugned letters have been sent to the Respondent in the context that the land has been declared as an "Urban Development" area in terms of the said Act.

According to Article 154P (4) of the Constitution,

"Every High Court shall have jurisdiction to issue, according to law-

b) *Order in the nature of writs of Certiorari, Prohibition, Procedendo, Mandamus and Quo warranto against any person exercising, within the Province, any power under*

i. *any law; or*

ii. *any statutes made by the Provincial Council established for that Province, in respect of any matter set out in the Provincial Council List."*

Referring to the words "any law" in Article 154P (4) (b) (i), the Supreme Court in ***Weragama v. Eksath Lanka Kamkaru Samithiya (1994) 1 SLR 293 at page 294***, held that;

"the jurisdiction of the Court of Appeal is not an entrenched jurisdiction because Article 138 provides that it is subject to the provisions "of any law". Hence it was always constitutionally permissible for that jurisdiction to be reduced or transferred by ordinary law."

Therefore, the 13th Amendment to the Constitution conferred a parallel jurisdiction (subject to the restrictions set out in Article 154 (4) (a) and (b)) on the Provincial High Courts to issue the above-mentioned writs.

Furthermore, the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 provides in Section 7 that *"The Provisions of written law applicable to applications to the Court of Appeal invoking the jurisdiction vested in that Court by Articles 140 and 141 of the Constitution shall Mutatis Mutandis, apply to applications made to a High Court established by Article 154P of the Constitution*

invoking the jurisdiction vested in that Court by paragraph (4) of Article 154 of the Constitution."

The above provisions of the law makes it absolutely clear that any law or any statute applicable to the exercise of writ jurisdiction of the Court of Appeal are applicable to the exercise of writ jurisdiction by the Provincial High Courts, however, is subject to the restrictions set out in Article 154P (4) (a) and (b) of the Constitution.

In ***Weragama v. Eksath Lanka Kamkaru Samithiya (supra),*** it was also held that,

"if a law or statute is covered by a matter in the (exclusive) Provincial Council List, but not otherwise, the exercise of powers there under is subject to the writ jurisdiction of the High Court."

Therefore "any law" referred to above is referable to any law passed by parliament pertaining to any matter set out in the Provincial Council List.

There is a limitation on the issue of granting writs by the Provincial High Court as set out in Article 154P (4) of the constitution. They could only be issued against any person who exercises any power under any law or provincial statute on a subject set out in the Provincial Council List. Therefore the writ jurisdiction of the High Court is limited to matters falling under the Provincial Council List.

Accordingly, the question to be determined is whether the High Court of the province has the jurisdiction to issue orders in the nature of writs of *certiorari* and *prohibition* against the Appellant Council exercising power within the province delegated to the said Council, in terms of the Urban Development Authority Law.

The Appellant Council entered into a Lease Agreement No. 4179 dated 29th October 2013 (vide page 80 of the brief) with the Respondent. The operative article of the deed reveals that Hatton-Dickoya Urban Council is the owner of the said land, states thus,

"whereas the Council is the owner and is seized and possessed of all that land and premises....."

The land marked "Lot 18" is within the area declared as a development area under Gazette Notification (marked as "P1" vide page 94 of the brief) No. 100/4, dated 04/08/1980, by the Minister, in terms of Section 3 of the Urban Development Authority Law No. 41 of 1978 (as amended). In terms of the document marked "P2", (vide page 100 of the brief) the Urban Development Authority (UDA) has delegated its powers under Section 23(5) of the Urban Development Authority Law (as amended) to the Hatton-Dickoya Urban Council to perform their duties under the direction, supervision and control of the UDA.

Section 36 (e) of Urban Councils Ordinance No. 61 of 1939 (as amended) reads, thus;

i. *to sell, exchange, let or give out on lease any land or building belonging to the Council or vested in it otherwise than by virtue of the provisions of section 32 or section 34, subject to the terms and conditions of the instrument by which the land or building was transferred to or vested in the Council, unless the sale, exchange, letting or leasing is prohibited by such instrument ;*

ii. *to let or give out on lease any land or building vested in it by virtue of the provisions of section 32 or section 34 and not required for any public purpose for the time being, subject, however, to the prior approval of the Minister and subject always to such terms and conditions as may be set out in the vesting order, certificate or recon issued or made under section 33, or the will, or the deed or instrument of gift or trust executed by the donor, in respect of such land or building ;*

Accordingly, it is clearly established that the land, morefully described as a development area in terms of Section 3 of the UDA Law is situated within the limits of the Urban Council and the land has right title and interest in the Hatton-Dickoya Urban Council and therefore comes within the purview of Section 32 of the Urban Councils Ordinance.

It is also to be noted that in ***Madduma Banda Vs. Assistant Commissioner of Agrarian Services and Another, (2003) 2 SLR 80 Bandaranayake J.*** (as was she then) observed thus;

"in case of ambiguity, the enactment should be interpreted so as to give effect to its purpose. The purpose of the 13th Amendment is to give a right to an aggrieved party to have recourse to the Provincial High Court instead of having to seek relief from the Court of Appeal in Colombo. As such the High Court is deemed to have jurisdiction to grant writ sought under Article 154P (4)."

In the circumstances, I hold that in the instant application, the High Court of the province has jurisdiction to issue orders in the nature of writs by virtue of the power given to them in terms of Article 154P (4) of the Constitution. Therefore, the preliminary objection raised by the Appellant is dismissed.

Apart from the preliminary objection, both parties were heard on the impugned documents marked "P9" and "P10". The position of the Respondent is that the Council approved the said building plan bearing No. BA 71/2009 to construct a building, subject to the terms and conditions therein. According to document marked "P6a", dated 29/04/2013, (Vide page 155 of the brief) the building application has been approved subject to the condition that the Respondent enter into a Lease Agreement with the 1st Appellant Council in order to proceed with the building construction in Lot No.18. The Respondent also submits that on written instructions given by the Appellant to lease the land to the Respondent as reflected in document marked "P7a", dated 25/09/2013, (Vide page 159 of the brief) a monthly lease rental was paid in respect of the said land. However, due to objections raised by 5 Council members, by letter marked "P9",

the Respondent was informed to halt all construction work by 08/11/2013. By letter marked "P10", the Respondent was notified that the Respondent had undertaken the construction without a valid approval and/ or in violation of the terms of the permit, and requested the Respondent to produce the lease agreement, deeds, building application to the 1st Appellant Council on the 25/11/2013. By letter marked "P11", dated 03/01/2014, (Vide page 169 of the brief) the Respondent in writing opposed the request by citing previous approval given to him to proceed with the construction of the building. The Appellants have failed to reply the said letter.

In ***Thirimavavithana Vs. Urban Development Authority and Others, (2010) 2 SLR 262 Sisira De Abrew, J.*** held that,

"If a public authority decides to act contrary to its published policy or decisions to frustrate Legitimate Expectation created among the individuals by way of promise or undertaking such decisions, unless there is an overriding public interest are liable to be quashed by way of Writ of Certiorari."

Justice Sisira De Abrew cited with approval the case of,

*"**Regina Vs. Hull University Ex Parte (1993) AC 682 at 701 (House Lords)** where **Lord Brown Wilikinson** observed thus: The fundamental principle (Of judicial review) is that courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases.... This intervention by way of prohibition or certiorari is based on the proposition that such powers have*

been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with the fair procedures...."

"The provisions contained in Section 28A (3) falls within the scope of the term "planning" and therefore the powers, duties and functions referred to therein can be delegated by the Urban Development Authority to any officer of the local authority" ***(Perera, Municipal Commissioner Vs. Selvam (2012) BLR 58).***

In the above context, it is important to note that the Appellants have entered into a Lease Agreement No. 4179, therein the Respondent has deposited a sum in excess of Rs. 10,000/- with the Appellant Council as per the written instructions received by the Respondent by letter dated 25/09/2013. Thereafter, approval was granted to proceed with the construction of the building on 03/05/2013. In the impugned letters sent to the Respondent, the Appellants state that the Respondent is constructing a building without a permit and/ or in violation of the conditions of the permit.

The Respondent is in possession of a building plan which had been approved by the Council, however, contends that presently no construction work has been carried out in the said land. It is also contended that the 1st Appellant Council has failed to give reasons, when it turned down the development approval.

"In terms of the Act "the Planning Procedure" referred to in part IIA in Section 8B identifies matters pertaining to the (i) preparation; (ii) implementation

and (iii) enforcement of a development plan. Hence, implementation of a development plan falls within the broad caption of "Planning Procedure". While Section 8A to Section 8H deals with the manner in which a development plan has to be prepared, Section 8J makes it clear that the purpose of issuing a permit is to ensure that all development activities in development areas should confirm to the development plan". ***Perera, Municipal Commissioner Vs. Selvam (Supra)***. In terms of Section 8J of the Act, the purpose of issuing a permit is to ensure that all development activity in the development area should confirm to the development plan and in accordance with the terms and conditions.

According to Section 8J (4) of the Act *"The Authority may take into consideration the recommendations of the Planning Committee, in granting or refusing to issue a permit under this section".* Although there is no general duty to give reasons it has become the rule for reasons to be given if a decision is to withstand the test of review.

In ***Karunadasa Vs. Unique Gemstones Ltd. and others (1997) SLR 256***, it was held that, *"in the context of the machinery for appeals, revisions, judicial and the enforcement of fundamental rights, giving reasons is becoming increasingly and important protection of the law, for if a party is not told the reasons for an adverse decision his ability to seek review will be impaired".* The giving of reasons by the decision maker in the context of fairness was considered in ***Doody Vs. Secretary of State for the Home Department (1993) 3All E.R. 92***, where it

was observed, *inter alia*, that *"Fairness will very often require that a person who may be affected by the decision will have an opportunity to make representation on his own behalf either before the decision was taken with a view to producing a favorable result, or after it is taken, with a view to procuring its modification or both".*

In ***Mowjood Vs. Pussedeniya (1987) 1 SLR 63***, the Court held that;

"In the matter of procedural fairness effective administration should be made possible while preserving a reasonable degree of fairness in executive action for the protection of the public."

"Therefore, writ will be granted if it can be established that the Respondents had the minimum of a duty to act fairly, even if they were not performing a strictly judicial function" ***(J.B. Textiles Industries Ltd. Vs. Minister of Finance and Planning (1981) 2 SLR 238)***.

When the Council informed the Respondent that he had no valid building construction approval and/ or that he is in violation of terms and conditions fairness will very often require that he is informed the factors against his interest in order to make a worthwhile representation. Even after responding to the impugned letters, the Authority has failed to bring to the attention of the Respondent the factors against his interest.

Therefore in the context of procedural fairness, I find that the Council has failed to afford the Respondent a "fair inquiry" prior to the decision taken as reflected in the impugned decisions marked "P9" and "P10", to proceed with the construction according to the approval granted by the Council. As such the order given by the learned High Court Judge is affirmed.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL