

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

In the matter of an Application for Orders in the nature of Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 402/2017

Aravandy Gangatharan,
No. 9/2-2/1, Ebert Place, Colombo 5.

PETITIONER

Vs.

1. Condominium Management Authority.

2. C.A. Wijeweera,
Chairman,
Condominium Management Authority.

3. R.K. Jayaweera,
General Manager,
Condominium Management Authority.

4. S. Wirithamulla,
Inquiring Officer,
Condominium Management Authority,

1st – 4th Respondents at
Sir Chittampalam A. Gardiner Mawatha,
National Housing Department Building,
1st Floor, Colombo 2.

5. Manjula Satgunasingam.

6. Kumarasingam Satgunasingam.

7. Sarada Devi Satgunasingam.
5th to 7th Respondents at
No. 9/2, 2/2, Ebert Place, Colombo 5.
8. Colombo Municipal Council,
Town Hall, Colombo 7.
9. Urban Development Authority,
6th and 7th Floors,
“Sethsiripaya”, Battaramulla.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: Shantha Jayawardena with Chamara
Nanayakkarawasam for the Petitioner

Sanjay Rajaratnam, P.C., Solicitor General with Ms.
Anusha Fernando, Deputy Solicitor General for the 1st
– 4th Respondents

S.N.Vijith Singh for the 5th – 7th Respondents

S. Serasinghe for the 8th Respondent

Argued on: 4th September 2019

Written Submissions: Tendered on behalf of the Petitioner on 1st April 2019

Tendered on behalf of the 1st – 4th Respondents on
24th January 2019

Tendered on behalf of the 5th – 7th Respondents on
18th March 2019

Decided on: 7th August 2020

Arjuna Obeyesekere, J

This application arises from the Order marked '**P13**' made by the 1st Respondent, the Condominium Management Authority directing the Petitioner *inter alia* to carry out certain constructions at premises bearing assessment No. 9/2, Ebert Place, Colombo 5 in order to comply with the Condominium Plan marked '**P3**' relating to the said premises.

The facts of this matter very briefly are as follows.

It is agreed between the parties that the building situated on the said premises consists of three floors, and that the said building, which was constructed by the Petitioner's father as a single house, was subsequently converted to a condominium property. It is also agreed by all parties that the said building now consists of the following residential units:

Assessment No.	Floor	Unit No.	Owned by
9/2	Ground	1	Petitioner's wife
9/2 1/1	First	2	Petitioner
9/2 1/2	First	3	Sister of the 5 th Respondent
9/2 2/1	Second	4	Petitioner
9/2 2/2	Second	5	5 th Respondent, subject to the life interest of the 6 th and 7 th Respondents

The Petitioner states that by letter dated 1st November 2011 marked '**P5**', he made a complaint to the then General Manager of the 1st Respondent alleging *inter alia* that the 5th – 7th Respondents have *erected unauthorized constructions in the said Condominium property contrary to the Approved Building Plan and the Condominium Plan*. While a copy of the Approved

Building Plan has been marked 'P2',¹ a copy of the Condominium Plan has been marked 'P3'. Acting on the said complaint, a Technical Inspector of the 1st Respondent had inspected the said premises on 16th February 2012.

Pursuant to a similar complaint made by the Petitioner to the 8th Respondent - the Colombo Municipal Council - the officers of the Planning Division of the 8th Respondent had also inspected the said premises on 2nd April 2012. By a letter dated 14th May 2012 marked 'X8' annexed to 'P9',² the 8th Respondent, while directing the 5th – 7th Respondents to remove certain *unauthorised constructions*, had directed the Petitioner to:

- (a) Restore the window marked 'W4' in the bedroom of Unit No. 4 situated on the wall adjoining the area marked as '*open terrace*', as depicted in 'P2'; and
- (b) Demolish the wall that had been erected across the '*open terrace*' area between the said bedroom and the end of the building.

The Petitioner states that he duly complied with the latter part of the said directive by removing the said wall, only to be informed by the 8th Respondent, by its letter dated 31st May 2012 marked 'X9' annexed to 'P9', not to act on 'X8', and to await the decision of the 1st Respondent.

The 1st Respondent had conducted an inquiry in respect of the aforementioned complaint of the Petitioner marked 'P5', with the participation of the Petitioner and the 5th Respondent. The 4th Respondent, who was the Inquiry

¹ 'P2' is in fact an amendment to the original building plan approved by the Colombo Municipal Council.

² 'P9' has been filed with the further affidavit of the Petitioner dated 12th February 2018.

Officer³ had afforded the Petitioner and the 5th Respondent an opportunity of placing evidence with regard to the illegal constructions that are said to have taken place, as well as an opportunity of filing written submissions. The Petitioner has no complaint with regard to the procedure that was followed by the Inquiry Officer, nor is there any complaint with regard to the hearing afforded to the Petitioner.

The Inquiry Officer had thereafter submitted his report dated 28th September 2017 marked 'P18' to the 1st Respondent, and by letter dated 28th November 2017, marked 'P13', the 3rd Respondent who was the General Manager of the 1st Respondent at that time, had informed the Petitioner, *inter alia* as follows:

- a) The Petitioner should re-construct at his cost, the wall that existed between the open areas marked 'CE8' and 'CE9' on page 5 of the Condominium Plan 'P3' – vide 'P13a';
- b) Open spaces shall be created at the top of the said wall to serve as ventilation openings – vide 'P13b';
- c) The Petitioner shall reconstruct the opening of the wall that was demolished by the Petitioner to fix the window marked 'W4' – vide 'P13c'.

It is observed that 'P13' contains several other directions relating to the said premises including directions given to the 5th Respondent to demolish certain other unauthorised constructions at the said premises.

Dissatisfied by the said decision, the Petitioner filed this application, seeking Writs of Certiorari to quash each of the said directives marked 'P13a', 'P13b' and 'P13c'.

³ The inquiry had commenced before a different Inquiry Officer. The parties had however agreed to the appointment of the 4th Respondent and to proceed with the Inquiry having adopted the evidence led before the previous Inquiry Officer.

The Roman Dutch Law principle, expressed by the maxim *superfices solo cedit* essentially provides that an owner of the land is the owner of any buildings situated on it. Thus, when a land is transferred, any building standing on the land would automatically be transferred with the land. With the introduction of the Condominium Property Act No. 12 of 1970, it was possible to acquire an interest over a condominium unit, which formed a part of a multi storey building. This act was repealed and replaced by the Apartment Ownership Law No. 11 of 1973, which has subsequently been amended by the Apartment Ownership (Amendment) Act No. 45 of 1982, the Apartment Ownership (Special Provisions) Act No. 4 of 1999, and the Apartment Ownership (Amendment) Act No. 39 of 2003 (the Act).

Before considering the two arguments placed before this Court by the learned Counsel for the Petitioner, it would be useful to record the background to the dispute between the Petitioner and the 5th Respondent that culminated in the complaint by the Petitioner and the aforementioned order of the 1st Respondent. The starting point of this discussion is the admission by the Petitioner that the said premises was owned by the Petitioner's father, and that *the property was initially a residential house.*⁴ While this Court has not been apprised as to when the construction took place, and a copy of the approved building plan for the house has not been filed of record, it appears from the caption of the Plan marked 'P2' – i.e. *Proposed Amendment to Approved Plan No. ME/PBK/899/80* - that the Building Plan for the house that was built by the Petitioner's father had been approved in 1980.

This Court has examined 'P2' and observes the following:

⁴ Paragraph 8 of the affidavit filed by the Petitioner in CA (Writ) Application No. 187/2010 – vide page 76 of the documents annexed to the further affidavit of the Petitioner dated 12th February 2018.

- a) The second floor plan, shown on the extreme right of 'P2' sets out the two units that are relevant to this application;
- b) Between the said units is an area described as an '*open terrace*';
- c) The southern wall of the bedroom in Unit No. 4 that is relevant to this application is adjacent to the '*open terrace*';
- d) The said bedroom has a window marked 'W4' which opens into the said '*open terrace*';
- e) The kitchen of Unit No. 4 and the dining hall of Unit No. 5 opens into the said '*open terrace*', and face each other;
- f) 'P2' has been approved by the 8th Respondent on 10th August 1987.

The Petitioner then goes on to state that the said residential house '*was later converted into a condominium property. At the time of conversion, numerous windows and doors were closed in order to ensure privacy of each of the units*'.⁵ While this Court has not been apprised of the windows that were closed, or when the window in question was removed and the space created by the removal covered with brick and mortar, what is important is the reason for the closure of certain selected windows – i.e. to ensure the privacy of each of the units, especially since any person looking through the window of the aforementioned bedroom in Unit No. 4 has a direct and unobstructed view into the dining room of Unit No. 5, and vice versa.

The Petitioner has produced marked 'P3' Condominium Plan No. 3280^A dated 11th March 1989 prepared by A.F. Sameer, Licensed Surveyor, which sets out

⁵ Ibid.

the amendments that were effected at the time of conversion to a condominium property. This Court has examined 'P3' and observes the following:

- a) Unit Nos. 4 and 5, which are the two units that are the subject matter of this application, have been set out in page 5;
- b) The '*open terrace*' area in 'P2' has been divided into two separate areas, which have been referred to as 'CE8', and 'CE9';
- c) The endorsement, '*CE8 and CE9 for exclusive use of Units 4 and 5 respectively*' appears on 'P3';
- d) While the doors and windows of the two Units have not been set out in 'P3', the boundaries of each Unit and the internal areas of each Unit has been shown by a straight line;
- e) A straight line (which is the continuation of the boundary of the bedroom which is relevant to this application) has been drawn separating 'CE8' from 'CE9';
- f) 'P3' has been **approved by the 8th Respondent** on 12th June 1989.

It would thus be seen that the amended Approved Building Plan marked 'P2' is different to the Condominium Plan marked 'P3' in respect of at least two matters - the first is that the window in the bedroom bordering the '*open terrace*' area shown in 'P2' is not there in 'P3'. The second is that the '*open terrace*' shown in 'P2' has been divided into two areas in 'P3', and depicted as 'CE8', and 'CE9'.

This Court must note two important matters at this point. The first is that the Condominium Plan 'P3' has been approved by the Colombo Municipal Council, which also approved 'P2'. The second is that the said changes effected to 'P2', as reflected in 'P3' compliments the admission that alterations were effected to enable the conversion of the single house to a condominium property by the Petitioner's father.

There is no dispute that the Condominium Deed of Declaration dated 11th February 1991 marked 'P4' has been prepared based on 'P3'. This position is in fact borne out by the following paragraph in 'P4':

"(3) AND WHEREAS in terms of the provisions of the said Apartment Ownership Law No. 11 of 1973 as amended by Apartment Ownership (Amendment) Act No. 45 of 1982 the buildings standing on the said allotment of land and premises marked Lot 1F on the said Plan No. C/28 dated 9th May 1950 made by R. Piyasena Perera Licensed Surveyor in the said Schedule hereto firstly fully described formed a Condominium Property and the Declarants caused the said Condominium Property to be depicted as Units 1, 2, 3, 4 and 5 with common elements in Condominium Plan No. 3280A dated 4th March 1989 made by A.F. Sameer Licensed Surveyor in the said Schedule hereto fully described".

This Court must note that all subsequent Deeds relating to one or more of the Units of 'P3' – vide 'X4', 'X5', 'X6' of 'P9' – have been executed by reference to 'P3', and in terms of the details of the units provided in 'P3'. Although the Deeds of Transfer by which the 5th Respondent purchased Unit No. 5 has not been produced, it is not in dispute that the 5th Respondent purchased Unit No. 5 from the Petitioner's father/ Petitioner after 'P3' was approved by the 8th Respondent in 1989, and presumably on the strength of 'P3'.

It is in the above background that the Petitioner submitted his complaint 'P5' to the 1st Respondent alleging that the 5th – 7th Respondents have *erected unauthorized constructions in the said Condominium property contrary to the Approved Building Plan and the Condominium Plan*. These unauthorised constructions related to the closure of the window 'W4', the erection of a wall which served as a physical separation of the open terrace into 'CE8' and 'CE9', and several other constructions, which are not relevant to this application. The position taken up by the 5th Respondent was that whatever the modifications that had been carried out in the said premises had been done prior to her purchasing the said premises, and that she has not carried out any modifications.

Having examined the report of the Inquiry Officer marked 'P18', this Court observes that the reasons for the aforementioned recommendations of the Inquiry Officer is as follows:

“එකී X3 ගොඩනැගිලි සැලැස්ම 1987.03.10 දින අනුමත කොට ඇති අතර ඊට වසර ගණනකට පසු ව X1 සහාදිපතය ගොඩනැගිලි සැලැස්ම 1989.06.12 දින අනුමත කොට ඇති බැවින් ඉහත කී කාරණය වඩාත් පැහැදිලි වේ. මෙම ගොඩනැගිලි සංකීර්ණය අද වන විට සහාදිපතය දේපලකි. පිටු 06 කින් යුතු X1 ලෙස ලකුණු කළ සහාදිපතය සැලැස්මේ 5 වැනි පිටුව මෙම ගොඩනැගිල්ලේ දෙවැනි මහලේ ප්‍රශ්නගත ඉදිකිරීම් වලට අදාළ ය. එම සැලැස්ම පරීක්ෂාවෙන් කියවන විට පහත සඳහන් කරුණු ස්ථිර කර ගත හැක.

- අ) ඒකක 4 සහ ඒකක 5 නිවාස දෙක අතර පැහැදිලි සීමාවක් ඇති බව.
- ආ) එම ඒකක දෙක අතර සීමාව නිවාස දෙකෙහි අනන්‍යතාව සහ ඒකකයන්හි නිවාසීයන්ගේ පෞද්ගලිකත්වය ආරක්ෂා වන පරිදි අඛණ්ඩ ස්ථිර බිත්තියක් ඇති බව පැහැදිලි ව පෙනේ. එය සැලැස්මේ “Open CE4” යනුවෙන් ලකුණු කර ඇති උතුරු සීමාව ඔස්සේ, ඒකක 4 හි නිදහන කාමරයේ දකුණු සීමාව සහ “CE8 Ter”

සහ “CE9 Ter” යන විවෘත කොටස් දෙක අතරින් වැටී “Open CE3” යන විවෘත කොටසේ බටහිර සීමාව තෙක් දිවෙයි.

ඇ) X1 ලේඛනයේ 5 වැනි පිටුවේ ඇති 2 මහලේ සැලැස්මේ එකී මායිම් රේඛාව මත යම් යම් ඇදීම කර ඇති බවින් මතු වන ව්‍යාකූලතාව ලිපිගොනුවේ 3 වැනි පිටුවේ ඇති එම සහාධපනය සැලැස්මේ ම පිටපත පරීක්ෂා කිරීමෙන් පැහැදිලි ව හඳුනාගත හැකිය. තවද එම සැලැස්මේ පොදු කොටස් වෙන් කිරීම යටතේ මෙසේ දක්වා ඇත.

“CE1 for common use of units 4 and 5
CE6, CE4, CE5 and S2 for common use of units with CE7 roof garden
S1 for common use of units 5
CE8 & CE9 for exclusive use of units 4 & 5 respectively.”

පැමිණිලිකාර පාර්ශවයේ හඬ කිරීමට ලක් වූ R9 ලේඛනයේ සාක්ෂි ලියවිල්ලක් වශයෙන් ඇති වටහාකම අඩු බව සැබෑ ය. එසේ වුවත් ඉහත නිරීක්ෂණය තහවුරු කර ගැනීමට ඉන් පිටුබලයක් ලැබේ.

ඇ) ඒ අනුව CE9 විවෘත කොටසෙහි පරිහරණ අයිතියක් ඒකක 4ට නොමැති බැවින්, CE8 විවෘත කොටසෙහි පරිහරණ අයිතියක් ඒකක 5ට නොමැති බැවින් ඒවා අතරින් බිත්තියක් තිබීම නිතැතින් පිළිගැනීමට සිදුවේ.

X3 සැලැස්මේ දැක්වෙන CE9 විවෘත කොටසේ උතුරු මායිමේ W4 ලෙස දක්වා ඇති පහේලයක් 3280 A දරණ අනුමත සහාධපනය සැලැස්මේ පෙන්නුම් නොකෙරේ. එකී සැලැස්මේ අනෙක් පහේල් සහ දොරවල් ද ලකුණු කොට නැති බව නිරීක්ෂණය කරමි. එසේ වුවත් සහාධපනය සැලැස්මේ 2 වැනි පිටුවේ පහළින් ඇඳ ඇති XX නිවාස හරස් කඩ පරීක්ෂා කිරීමේ දී ඒකක 5හි නිදහ කාමරයට පල තුනක් සහිත පහේලයක් එම කාමරයේ නැගෙනහිර බිත්තියේ දක්නට ඇත. එකී පල තනේ පහේලය X3 සැලැස්මේ පෙන්නුම් නොකරයි. එය W4 ලෙස ලකුණු කර ඇති පහේලය වසා දමා ඒ වෙනුවට X1 සැලැස්ම ක්‍රියාවට නංවද්දී ඉදි කරන ලද්දක් බව නිරීක්ෂණය කරමි. ඒ අනුව පවුල් නිවාස පද්ධතියක් ලෙස අනුමත කරගත තිබුණු X3 සැලැස්ම, සහාධපනය සැලැස්මක් ලෙස X1 සැලැස්ම සකස් කිරීමේ දී ඒකකයන්හි අනන්‍යතාව සහතික වීම පිණිස එකී W4 පහේලය වසා දමනු ලැබ ඇතැයි සාධාරණව විශ්වාස කළ හැකි ය. ඒකක 4 හි නිදහ කාමරයේ පහේලයක් CE9 ට විවෘත කොට සහාධපනය සැලැස්මක දී පිටස්තර ඒකකයක නිවාසියන්ට විවෘත කරනු ඇතැයි පිළිගත නොහැකි ය.

ඒ කරනු සැලකිල්ලට ගත් කළ;

- අ) CE8 සහ CE9 විවෘත කොටස් අතර තිබී පැමිණිලිකරු විසින් (කොළඹ මහනගර සභාවේ ලියවිල්ලක් උපයෝගී කරගෙන) කඩා ඉවත් කර ඇති බිත්තිය අනවසර ඉදිකිරීමක් ලෙස නිගමනය නොකරමි.
- ආ) CE9 විවෘත කොටසට යාබද ඒකක 4 හි නිදහස කාමරයේ බිත්තියේ W4 ලෙස ඉහතින් සඳහන් කළ පහේලය වසා බැමීමක් බැඳ තිබීම (දැනට කඩා විවෘත කර ඇති) අනවසර ඉදිකිරීමක් ලෙස නිගමනය නොකරමි.”

The learned Counsel for the Petitioner presented two arguments before this Court. The basis for the first argument of the learned Counsel for the Petitioner is that the plan that prevails is the Approved Building Plan marked ‘**P2**’, and not the Condominium Plan marked ‘**P3**’, and therefore, the directions given by the 1st Respondent by ‘**P13**’ which was to comply with the plan as depicted in ‘**P3**’ are contrary to the law, and therefore illegal.⁶ The response of the learned Solicitor General appearing for the 1st – 4th Respondents, and the learned Counsel for the 5th – 7th Respondents was that the Plan that prevails is the Condominium Plan ‘**P3**’, and that the directives marked ‘**P13a**’ – ‘**P13c**’ are in accordance with the provisions of the Condominium Plan marked ‘**P3**’, and are within the law.

Having identified *illegality* as one of the grounds on which a decision of an administrative body could be subjected to judicial review, Lord Diplock in **Council of Civil Service Unions vs Minister for the Civil Service**⁷ described *illegality* as follows:

“By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-

⁶ As ‘P2’ and ‘P3’ have been approved prior to the amendments made to the Act in 1999 and 2003, this Court would have to consider the first argument in the context of the law that existed at the time ‘P2’ and ‘P3’ were approved.

⁷ 1985 AC 374.

making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.”

As stated in **De Smith’s Judicial Review**⁸:

“The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The courts when exercising this power or construction are enforcing the rule of law, by requiring administrative bodies to act within the “four corners” of their powers or duties.”

The issue that this Court must therefore consider is which of the two plans was the 1st Respondent required to enforce, with the answer deciding whether the 1st Respondent acted illegally.

In terms of Section 3(1) of the Act, *“Any person claiming to be an owner of any Condominium Property may make application to the Registrar for the registration of a Plan of the Condominium Property (hereinafter referred to as “Condominium Plan”)”*. The reference to ‘Registrar’ is to the ‘Registrar of Lands’ appointed under the Registration of Documents Ordinance and having jurisdiction over the registration district in which the Condominium Property is situated.”⁹

⁸Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, De Smith’s Judicial Review (8th Edition, 2018), Sweet and Maxwell, p245-246.

⁹ Vide Section 26 of the Apartment Ownership Law.

Section 5(1) of the Act provides as follows:

“The Condominium Plan shall comprise-

(i) a survey plan or plans which shall be prepared and drawn by a licensed surveyor or by or under the authority of the Surveyor-General and shall

*(a) delineate the external surface boundaries and boundary marks of the proposed Condominium Property and **the position of each subdivided building thereon fixed in relation to the surface boundaries;***

(c) include a vertical section of each subdivided building showing-

(i) the floors and ceilings of each storey; and

(ii) the height of each storey;

*(d) include a description, as well as the vertical section and dimensions, of each building or parts thereof proposed to be erected within the Condominium Property as a separate tenement or an extension of any completed subdivided building, **in accordance with building plans and subdivision plans approved by the authority for the time being responsible for the approval of such plans;***

(e) delineate, subject to the provisions of subsections (IA) and (IB), each proposed unit and define the boundaries thereof by reference to floors and walls showing the horizontal dimensions, without it being necessary to show any bearing;

- (i) *delineate the external boundaries and show the horizontal dimensions without it being necessary to show any bearing of each building or parts thereof proposed to be erected within the Condominium Property as a separate element or an extension of any completed subdivided building or buildings in accordance with building plans (if any) and subdivided plans approved by the authority for the time being responsible for the approval of such plans;*
- (j) *define the common elements of the Condominium Property; and*
- (l) *have attached to it a certificate of a qualified architect or a qualified civil or structural engineer to the effect that **the units shown therein are the same as those existing on the Condominium Property;***¹⁰

In terms of Section 5(2) of the Act, “A Condominium Plan tendered for registration shall be accompanied by a certificate from the local authority to the effect that the division of the building into units as illustrated in the Plan is in accord with its by-laws and regulations.”

Section 5(4) of the Act provides as follows:

“No plan lodged as a Condominium Plan shall be registered unless

- (a) *the plan has been endorsed with a certificate of a licensed surveyor that all buildings and all units shown in the Condominium Plan in relation to the external surface boundaries of the Condominium Property are within the Condominium Property and are in compliance*

¹⁰ Sub-paragraphs (b), (f), (g), (h) and (k) of Section 5(1)(i) are not relevant and have not been re-produced.

with building plans (if any) and subdivision plans issued by the authority for the time being responsible for the approval of such plans;

(b) the plan is accompanied by a copy of the relevant Condominium subdivision plan approved by the authority for the time being responsible for the approval of such plan;

(c)”

While in terms of Section 7A(1) of the Act, *“The Condominium Plan shall be deemed to be registered under the provisions of this Law when the Condominium Plan has been signed and sealed by the Registrar and has been marked with the serial number of the Condominium Plan register”*, Section 9(3) provides that, *“Upon registration of a Condominium Plan, each unit depicted therein together with the common elements appurtenant thereto shall be deemed to be absolutely owned by the person or persons described in the Plan as the owner or owners of the Condominium Property”*.

Taking into consideration the above provisions of the Act, it is the view of this Court that the Condominium Plan is based on the Building Plan approved by the local authority, and that there cannot be any inconsistency or contradiction between the Condominium Plan and the Approved Building Plan. The fact of the matter however is that there are differences between **‘P2’** and **‘P3’**, which differences could probably be attributed to the fact that approval was initially granted to a house, and the necessity for a Condominium Plan arose only because of the application of the Petitioner’ father to convert the said premises to a Condominium Property.

What is significant however is fact that:

- (a) The building that should be situated on the said premises should be the building that is depicted in 'P3';
- (b) 'P3' is later in time, and has superseded 'P2';
- (c) 'P3' too has been approved by the 8th Respondent, the Colombo Municipal Council.

Even where the decision of the 1st Respondent is within the purported “four corners” of the Act, Courts can still intervene where the decision is irrational or where it was reached in an improper manner. Although Courts are now moving towards using a less tortuous test for irrationality¹¹, this Court is of the view that the facts and circumstances of this case and the manner in which the 1st Respondent had arrived at the decisions contained in 'P13(a) – (c)', cannot be considered as *“conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.”*¹²

In these circumstances, it is the view of this Court that:

- (a) The Condominium Plan 'P3' shall prevail over 'P2';
- (b) The 1st Respondent acted within the four corners of the law when it decided to act in terms of 'P3', and therefore the aforementioned decision of the 1st Respondent marked 'P13a' – 'P13c' is neither illegal nor irrational;

¹¹See Colonel U.R Abeyratne v. Lt. Gen. N.U.M.M.W. Senanayake and Others - CA (Writ) Application No. 239/17; CA Minutes of 7th February 2020.

¹²Secretary of State for Education and Science v. Metropolitan Borough Council of Tameside [1977] AC 1014.

- (c) The first argument advanced on behalf of the Petitioner is misconceived, both in fact and in law.

The second argument of the learned Counsel for the Petitioner is that the powers vested in the 1st Respondent by the Condominium Management Authority Act No. 10 of 1973, as amended (the CMA Act) is limited to securing compliance with the Development Permit issued by the Urban Development Authority and the Approved Building Plan, and that the 1st Respondent does not have the power to make directions which are contrary to the Approved Building Plan.

Section 9A(1) of the CMA Act reads as follows:

“Where the Authority receives a complaint or receives information that an unauthorized construction has been erected or is being erected in any registered or unregistered Condominium Properly or Semi Condominium Property, the Authority shall cause a notice in writing to be served on the owner of the condominium parcel and a copy of such notice to be served on each occupier of such condominium parcel and the management corporation if any, who is erecting or has erected such unauthorized construction in the condominium parcel, or the common element and direct such owner, occupier or management corporation, as the case may be, to be present at an inquiry on a date, time and place, to be specified in the notice and to show cause

- (a) why the Authority should not prohibit such person from proceeding with the construction;*
- (b) why the unauthorized construction should not be demolished and the Condominium Parcel restored to its original condition.*

Section 9A(2) of the CMA Act sets out that after an inquiry, the 1st Respondent may direct an owner or occupier:

- (a) not to proceed with such unauthorized construction; or*
- b) to restore the condominium parcel or an accessory parcel appurtenant to the condominium parcel or common element to its original condition ; or*
- (c) to take such other measures for the purpose of compliance with the conditions set out in the permit subject to which the Condominium Property or Semi Condominium Property has been constructed.*

*"Unauthorized construction" has been defined in Section 27 of the CMA Act to mean, "any improvement or alteration to the condominium parcel or ancillary parcel appurtenant to such condominium parcel, any improvement or alteration to the common elements, any parceling or subdivision of the land parcel where the Condominium Property or Semi condominium Property is constructed, the erection or re-erection of sub structures and the construction of works on the land parcel where the Condominium Property or Semi Condominium Property is constructed, carrying out of building, engineering and other operations on over or under such land parcel, or any change in the use for which the land parcel or any building or any structure thereof is used, **without a valid permit from the authority who have been empowered by law to approve the building plan**, or contrary to any term or condition set out in the permit issued in respect of the building plan approved for the relevant Condominium Property or semi Condominium Property".*

The argument of the learned Counsel for the Petitioner was that given the above definition, a construction amounts to an *unauthorised construction* only if it is done without a valid permit from the authority that has been empowered by law to approve the building plan.¹³ He submitted further that as the aforementioned window 'W4' has been shown in 'P2', and as there is no wall separating 'CE8' from 'CE9' in the Approved Building Plan 'P2', the 1st Respondent cannot direct the Petitioner to act contrary to the said Approved Building Plan.

This Court, while reiterating the reasons given earlier as to why 'P3', which has been approved by the Colombo Municipal Council must prevail, is of the view that the Petitioner must comply with 'P3'. If the Petitioner wishes to act outside 'P3', he must obtain a valid permit to do so from the Colombo Municipal Council, and the approval of the 1st Respondent. Any construction outside of 'P3' is illegal and would come within the above definition of *unauthorised construction*. Hence, this Court does not see any merit in the second argument of the Petitioner.

Before concluding, there is one matter that this Court must advert to. The Petitioner was fully aware that the said window had been removed at the time the house was converted to a condominium property, and that the open area between Unit Nos. 4 and 5 had been separated into two lots referred to as 'CE8' and 'CE9' and allocated for the exclusive use of Unit Nos. 4 and 5, respectively. The Petitioner was fully aware (a) that the Condominium Plan 'P3' reflecting these changes was prepared at the request of the Petitioner's father; (b) that 'P3' was approved by the Colombo Municipal Council; and (c) that carrying out the said changes was a precondition to seeking approval for the Condominium Plan 'P3'. Furthermore, the Petitioner could not have been

¹³ Vide paragraph 10.7 of the written submissions of the Petitioner.

unaware that Unit Nos. 3 and 5 were based on 'P3' at the time the said premises were sold. Yet, the Petitioner chose to come before this Court and argue that 'P2' prevails over 'P3'. This is not the conduct that this Court would expect from a litigant seeking a discretionary remedy.

In **Fernando, Conservator General of Forests and two others vs. Timberlake International Pvt. Ltd. and another**¹⁴, the Supreme Court, having held that the conduct of an applicant seeking Writs of Certiorari and Mandamus is of great relevance because such Writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of Court, stated that, *"It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show uberrimae fides or ultimate good faith,..."*.

As observed by the Supreme Court in **Namunukula Plantations Limited vs Minister of Lands and Others**,¹⁵ *"If any party invoking 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."*

For the aforementioned reasons, this Court is of the view that the duty of good faith commences prior to the institution of action, and that the Petitioner has not come before this Court with clean hands. This application is liable to be dismissed on this ground alone.

¹⁴ [2010] 1 Sri LR 326.

¹⁵ SC Appeal No. 46/2008; SC Minutes of 13th March 2012; per Saleem Marsoof, P.C./J.

Taking into consideration all of the above facts, this Court is of the view that the Petitioner is not entitled to the relief prayed for. This application is accordingly dismissed.

Judge of the Court of Appeal