

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

CA (Writ) Application No: 136/2015

Happy Homes (Pvt.) Limited,
No. 8, Alfred House Avenue,
Colombo 3.

PETITIONER

1. The Condominium Management Authority.
2. Mr. G.U. Upawansa,
General Manager,
Condominium Management Authority.
- 2A. Mr. K.H.A. Upali,
Actg. General Manager,
Condominium Management Authority.
3. The Colombo Municipal Council,
Town Hall, Colombo 7.
- 3A. Mr. V.K.A. Anura,
Colombo Municipal Council,
Town Hall, Colombo 7.
4. Mr. J.D.N. Chandrapala,
Asst. General Manager (Operations &
Maintenance),
Condominium Management Authority.
5. Mrs. T. Kanapathipillai,
No. 9, Ransivi Lane, Colombo 4.

6. Mr. G.T.S. Perera,
Inquiring Officer.
1st, 2nd, 2A, 4th and 6th Respondents at
1st Floor,
National Housing Department Building,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.
7. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Ranjan Mendis with Ashoka Kandambi for the Petitioner

Ms. Anusha Fernando, Deputy Solicitor General for the 1st, 2nd, 2A,
4th, 6th and 7th Respondents

C. Nilanduwa for the 3rd Respondent

Padma Bandara, P.C., with S. Rajapakse for the 5th Respondent

Written Tendered on behalf of the Petitioner on 16th September 2019

Submissions:

Tendered on behalf of the 1st, 2nd, 2A, 4th, 6th and 7th Respondents on
16th September 2019

Tendered on behalf of the 3rd Respondent on 17th October 2019

Tendered on behalf of the 5th Respondent on 19th September 2019
and 21st October 2019

Decided on: 23rd October 2020

Arjuna Obeyesekere, J

When this matter was taken up for argument on 6th August 2020, the learned Counsel for all parties moved that this Court pronounce its judgment on the written submissions that have already been filed by the parties.

The Petitioner is a limited liability Company incorporated under the provisions of the Companies Act No. 7 of 2007. The Petitioner states that it is the owner of a condominium property situated in Milagiriya, Colombo 4. The said property comprises of eight residential units, together with common elements, and is depicted in Condominium Plan No. 1563 dated 18th December 1973, marked '**P3**' which Plan the Petitioner states has been registered in the Register of the 1st Respondent maintained at the Land Registry, Colombo.¹

The above residential units bear assessment Nos. 9, 11, 15, 9 1/1, 9 1/2, 9 1/3, 9 1/4 and 9 1/5, Ransivi Lane, Colombo 4. The dispute that has given rise to this application relates to Unit No. 3 bearing assessment No. 9. The Petitioner states it purchased Unit No. 3 of the said Condominium property in 2009 from Ram Naraindas Mirchandani.² The 5th Respondent is the tenant of the said Unit.

The Petitioner states that it came to know in September 2011 that the 5th Respondent had constructed a shed in the common area at the front of the building causing obstruction of the common parking area, and thereby blocking access to the building. The Petitioner had accordingly submitted a complaint dated 25th October 2011, marked '**P5**' to the 1st Respondent, the Condominium Management Authority, by which the Petitioner informed the 1st Respondent *inter alia* as follows:

“All the apartments were given on rent, and the tenants were not vacating. After we transferred the building to the name of our company Happy Homes Ltd, we managed to clear six apartments of its tenants by negotiations.

The last two tenants who are not vacating and living in apartments number 9 and 11 have built (a) shed in the common area at the front of the building

¹ See Declaration made under Section 5(1) of the Apartment Ownership Law No. 11 of 1973, annexed to the Counter Affidavit of the Petitioner marked 'X'.

² Vide Deed of Transfer No. 9681, marked 'P4'.

making it an inconvenience for us to access the rest of the building. Also, it is blocking the common parking.”

Acting on the said complaint ‘P5’, the 4th Respondent had conducted a field inspection of the said Condominium property. By his report dated 15th November 2011 marked ‘P6’, the 4th Respondent had informed the 2nd Respondent, the General Manager of the 1st Respondent of the following:

“අංක 9 රන්සිව් පටුමග, කොළඹ - 03 හි අනවසර ඉදිකිරීම සම්බන්ධව

ඉහත සඳහන් ස්ථානයේ කලමනාකරන සංස්ථාවේ ලේකම් විසින් එහි අංක 09 හා 11 යන නිවෙස්වල පදිංචි කුලී නිවැසියන් විසින් නිවෙස් ඉදිරි පස පොදු අංගෝපාංග අවහිර වන සේ අනවසර ඉදිකිරීම් සිදුකර ඇති බව දන්වා වවා ඇත.

මේ පිලිබඳ මා විසින් ක්ෂේත්‍ර පරීක්ෂනයක් සිදු කළෙමි. එහිදී පහත සඳහන් අනවසර ඉදිකිරීම් නිරීක්ෂණය විය.

1. අංක 09 හි කුලී නිවැසියා විසින් 10’-0”-12’-0” ක් පමණ දිග පළල ඇති ගරාපයක් ඉදිකර තිබීම.
2. අංක 11 හි අයිතිකරු විසින් පොදු අංගෝපාංග අවහිර වනසේ ගස් සිටුවා වගාල ප්‍රමාණයේ මල්පෝච්චි, කුරුළු කුඩු සහ මාළු ටැංකි තබා ඇත.
3. බාහිර පුද්ගලයෙක් විසින් අංක 09 ට යාබදව මුළුතැන් ගෙයක් ඉදිකර ඇත.

ඉහත සඳහන් සියළුම ඉදිකිරීම් සහාධපත්‍ය පිඹුරු අංක 1563ට අනුව පොදු අංගෝපාංග අවහිර වන සේ සිදුකර ඇති බවද වැඩිදුරටත් දන්වා සිටින අතර අවශ්‍ය කටයුතු සඳහා ඉදිරිපත් කරමි.”

Section 9A of the Condominium Management Authority Law No. 10 of 1973, as amended³ (the Act) sets out the procedure that should be followed with regard to a complaint such as ‘P5’. Section 9A(1) 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 Property 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

³ See Section 3 of the Common Amenities (Amendment) Act No. 24 of 2003, by which the name of the principal enactment, the Common Amenities Law was amended to read as the ‘Condominium Management Authority Law’.

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.*

In terms of Section 9A(2), *“The persons present at the inquiry in pursuant to the receipt of a notice issued under subsection (1), shall be given an opportunity of being heard ...”*

Thus, the person who has engaged in an unauthorised construction must be afforded an opportunity of explaining his/her position, in the manner set out in Section 9A of the Act.

By a notice dated 23rd November 2011 marked ‘**P7**’, the 2nd Respondent had forwarded a copy of the complaint to the 5th Respondent, and requested her to show cause by 7th December 2011 *as to why the complainant’s application should not be considered.* As the 5th Respondent had not responded, the Assistant General Manager (Legal) of the 1st Respondent, by a letter dated 19th December 2011 marked ‘**P8**’ had requested the 5th Respondent to be present for a discussion on 11th January 2012. The 5th Respondent had also been informed that *‘this discussion will be conducted by the Inquiring officer who is appointed by the Condominium Management Authority to inquire into this matter. If you fail to be present for this discussion, steps will be taken to proceed with the ex-parte inquiry and order will be issued on the available facts.’*

Although the Inquiry had been held on 11th January 2012, the 5th Respondent had not been present. The minutes of the inquiry marked ‘**P8x**’ maintained by the 1st Respondent, discloses the following:

“පසුව මෙම පැමිණිල්ලේ පිටපතක් සභාධිපතය කළමනාකරණ අධිකාරිය විසින් ඉහත කී වගඋත්තරකරුවන්ට පැමිණිල්ලේ පිටපතක් 2011.11.23 දරණ ලිපිය මගින් යවා අදාළ පැමිණිල්ලේ සඳහන් කරුණුවලට උත්තර සපයන ලෙස දන්වා ඇත. ලිපිගොනුව අනුව පෙනී යන්නේ එම වගඋත්තරකරුවන් විසින් සභාධිපතය කළමනාකරණ අධිකාරිය දැන්වූ පරිදි ඊට කිසිම ප්‍රතිචාරයක් දක්වා නැති බවය. පසුව සභාධිපතය කළමනාකරණ අධිකාරිය විසින් පැමිණිලිකරු සහ වගඋත්තරකරුවන් සභාධිපතය කළමනාකරණ අධිකාරියේ 2011.12.19 දින දරණ නොතිසිය මගින් පාර්ශවකරුවන් අද දින පරීක්ෂණයට කැඳවා ඇත. නමුත් අද දින මෙම පරීක්ෂණයට පැමිණි ඇත්තේ පැමිණිලිකරු කළමනාකරණ සංස්ථාවේ ලේකම් පමණි. වගඋත්තරකරුවන් මෙම පරීක්ෂණයට අද දින නොපැමිණෙන බවට කිසිම දැනුම් දීමක් හෝ ඔවුන් වෙනුවෙන් නීතිඥ නියෝජනයක් ද නැත.”

The Inquiry Officer had thereafter directed that fresh notices be served on the 5th Respondent, and re-fixed the inquiry for 30th January 2012.

The 2nd Respondent had thereafter sent the following letter dated 20th January 2012 marked ‘P9’ to the 5th Respondent:

“සභාධිපතය දේපලක පොදු ඉඩමේ අනවසර ඉදිකිරීම්

ඉහත කරුණු මැයෙන් සභාධිපතය කළමනාකරණ අධිකාරිය විසින් ඔබ වෙත එවන ලද 2011/12/19 දරණ ලිපිය හා බැඳේ.

එකී ලිපිය අනුව දැනුම් දී ඇත්තේ 2012/01/11 වන දින මෙම අධිකාරියේදී ප.ව. 2.00ට පැවැත්වීමට නියමිත පරීක්ෂණයට සහභාගිවන ලෙසයි. නමුත් එදින මෙම පරීක්ෂණයට පැමිණියේ පැමිණිලිකරු වන හැපි හෝමස් කළමනාකරණ සංස්ථාවේ ලේකම් පමණි. ඔබ මෙම පරීක්ෂණයට නොපැමිණෙන බවට මෙම අධිකාරියට කිසිදු දැනුම් දීමක් කර නැති අතර පරීක්ෂණය පැවති දිනයේදී ඔබ වෙනුවෙන් නීතිඥ නියෝජනයක්ද වාර්තා වී නැත.

තවද මෙම පරීක්ෂණයට අදාළ 2011/11/23 දරණ ලිපිය මගින් පැමිණිල්ලේ පිටපතක්ද ඔබ වෙත එවා ඇති අතර එකී ලිපියෙන් උපදෙස් දී ඇත්තේ එම පැමිණිල්ලේ කරුණු සම්බන්ධයෙන් නිදහසට කරුණු ඉදිරිපත් කිරීමට ඇත්නම් එවා ඉදිරිපත් කරන ලෙසයි.

නමුත් එකී ලිපියේ සඳහන් පරිදි මේ වනතෙක් පැමිණිල්ලේ සඳහන් කරුණු වලට පිළිතුරු සපයා නොමැත.

නැවතත් මෙම පරීක්ෂණය 2012/01/30 වන දින ප.ව 2.00 මෙම අධිකාරියේ පැවැත්වීමට තීරණය කර ඇත. එකී පරීක්ෂණයට ඔබ පැමිණීමට අපොහොසත් වුවහොත් පරීක්ෂණය ඒක පාර්ශවිකව පැවැත්වීමට තීරණය කර සභාධිපතය කළමනාකරණ අධිකාරියේ නියෝගය නිකුත් කිරීමට නියෝග කරන බව කාරුණිකව දන්වා සිටිමි.

එබැවින් නැවතත් මෙම පරීක්ෂණයට පැමිණෙන ලෙස ඔබට අවධාරණය කරමි.”

The 5th Respondent had not been present at the inquiry scheduled for 30th January 2012, in spite of 'P9' having been sent to her. As a result, the inquiry had been postponed once again to 28th February 2012. Even though the 5th Respondent had not been present on 28th February 2012 as well, the inquiry had finally been taken up on that date, as borne out by the minutes of the inquiry marked 'P10'.

In his evidence, Harin Mirchandani, a director of the Petitioner had stated as follows:

“ඉහත පොදු ඉඩමේ ඇති අනවසර ඉදිකිරීම් ඉවත් කරන ලෙස එම කුලී නිවැසියන්ට දැනුම් දුන් නමුත් ඔවුන් මා හට විරුද්ධව පොලිසියට පැමිණිල්ලක් කරන ලදී. ඊට හේතු මා ඔවුන්ට නිරිතර කරන නිසා බව ඔවුන් විසින් ප්‍රකාශ කර ඇත. මෙම පොදු ඉඩම අවහිර වීම නිසා දැනට උද්ගත වී ඇති අපහසුතා පහත සඳහන් පරිදි සඳහන් කරමි.

මෙම ගොඩනැගිල්ලේ අනෙකුත් නිවාස වලට එනම් පහත මාලයේ ඇති නිවසකට සහ උඩුමහල් වලට පදිංචි අයට මෙම පොදු ඉඩම පාවිච්චි කිරීමට කිසිම හැකියාවක් නැත. මෙම කරුණ මත ඉහත නිවාස 06 දැනට හිස්ව පවතී. ඒවා වෙනත් අයට කුලියට දීමට පවා නොහැකි වී ඇත. එසේම අයිතිකරුවන්ටද මෙහි පදිංචි වීමට හැකියාවක් නැත. වාහන ගාල් කිරීමට පොදු ඉඩමේ ඉඩකඩ නැත. මේ නිසා මෙම දේපළෙහි කිසිම ප්‍රයෝජනයක් ගැනීමට නොහැකි තත්වක් උදාවී ඇත. එය විශාල අලාභයක් වී ඇත. ඒ නිසා මා ඉල්ලා සිටින්නේ මෙම පොදු ඩිමෙහි ඇති සියළුම අනවසර ඉදි කිරීම් සහ අවහිරතා ඉවත් කරන ලෙසය.”

Together with its Statement of Objections, the 1st Respondent has produced marked '2AR1', the report of the Inquiry Officer dated 29th May 2012. After referring to the facts relating to the application of the Petitioner, and the documents that had been examined, the Inquiry Officer had held as follows in '2AR1':

“06. ඉහත සඳහන් ලේඛණ වලට අනුව ඉහත සඳහන් සහාධපතය දේපල මහල් 03 කින් සමන්විත වන අතර, නේවාසික නිවාස 08ක් පෙන්නුම් කරනු ලැබේ. පහත මාලයේ නිවාස 03ක් ඇත. එනම් A3 – වටිපනම් අංක 15, A4 - වටිපනම් අංක 11, A5 - වටිපනම් අංක 9 යන නිවාසයි. අංක 9 හි කුලී නිවැසියා වන්නේ ටී. කනපතිපිල්ලේයි මියයි. අංක 11 දරණ නිවසේ පදිංචිකරු එන්.එම්. මුමින් මහත්මියයි. ඉහත නිවාස 08න් 05කම අයිතිකරු වන්නේ හැපි හෝම්ස් පුද්ගලික සමාගම වන අතර, අංක 9 1/1 නිවාසය අයිතිව ඇත්තේ, කාන්තා ප්‍රකාශ් නරේන්ද්‍රන් මර්චන්ද්‍රානි යන අයටයි.

ඉහත සහාධපතය පිඹුර පරික්ෂා කර බැලීමේදී, පහත මාලයේ ඉදිරිපසින් ඇති පොදු භූමිය Lot A කැබැල්ලේ කොටසකි. එකී ඉඩම කොටස සහාධපතය පිඹුරට අනුව පොදු අංගෝපාංග ලෙස පෙන්වා ඇත. මෙම ඉඩම කොටසේ ඉහත 9 හා 11 දරණ ස්ථානයේ පදිංචිකරුවන් විසින් තාක්ෂණික වාර්ථාවේ සඳහන් පරිදි පොදු අංගෝපාංග අවහිර කර ඇති බවට සනාථ විය. තවද මෙම පරික්ෂණයේදී හෙලි වූයේ, පොදු ප්‍රවේශ ඉඩමේ අංක 9 දරන ස්ථානයට යාබදව ඉදිකර තිබූ මුළුතැන්ගෙය බාහිර පක්ෂයක් විසින් අයිත්ත කර ඇති බවයි. තවද, 2012/05/10 දින මෙම

ස්ථානය පරීක්ෂා කිරීම මා විසින්ද, සහකාර සාමාන්‍යාධිකාරී (හිත), සහ සහකාර සාමාන්‍යාධිකාරී (මෙහෙයුම්/නඩත්තු) - සහාධිපතය කළමනාකරණ අධිකාරිය යන අය සමග පරීක්ෂා කරන ලදී. එහිදී එම පොදු ප්‍රවේශයේ සම්පූර්ණයෙන්ම වාගේ, ගස්වලා මල් පෝච්චි තබා, තවද කුරුළු කුඩු තබා, ගරාපයන්ද නනා ඇති බව දැක ගත හැකි විය. පහත මාලයේ නිවාස අංක 15 දරණ ස්ථානයේ පදිංචිකරුවන්ට එහි ප්‍රවේශය පොදුවේ භාවිතා කිරීමට අවහිර වී ඇත. තවද මෙම පරීක්ෂණයේදී කළමනාකරණ සංස්ථාවේ ලේකම් විසින් පරීක්ෂණ සභාවට අවධාරණය කරන ලද්දේ සහාධිපතය දේපලේ නිවාස 06ක් දැනට වසා ඇති අතර, එකී නිවාස වලට වාහන ගාල් කිරීමට ඉඩකඩ නොමැති හෙයින්, එම නිවාසවලට කුලීනිවැසියන් සොයා ගැනීමට නොහැකි නිසා විශාල මුදල පාඩුවක් එම දේපල හිමියන්ට සිදු වී ඇති බවයි.

ඉහත කරුණු අනුව සනාථ වන්නේ පහත මාලයේ අංක 09 හා 11 දරණ කුලීවැසියන් පොදු ඉඩම වැරදි ආකාරයට භාවිතා කිරීම නිසා, නිවාස අයිතිකරුවන් අතර, ආරවුල් තත්ත්වයක් පැන නැගී ඇති බවයි. එබැවින් මෙම පොදු ඉඩමේ ඇති සියළුම අනවසර ඉදිකිරීම්ද, පොදු ඉඩම වටා ඇති සියළුම ගස් හා අනෙක් අවහිරතාද ඉවත් කරන ලෙස කළමනාකරණ සංස්ථාවට හා අංක 9 හා අංක 11 දරණ නිවාසවලට පදිංචිකරුවන්ට දැන්වීමට කටයුතු කල බවට නිගමනය කරමි.”

Section 9A(2) sets out the steps that the 1st Respondent can take at the end of the Inquiry that is conducted in terms of Section 9A. The relevant parts of Section 9A(2) are re-produced below:

“ ...where the Authority is of the opinion that such construction is an unauthorized construction, it may direct, such owner or occupier or management corporation or other person, as the case may be:

- (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.”*

By letter dated 5th June 2012 marked 'P11', the 2nd Respondent had informed the 5th Respondent as follows:

“It was revealed at the inquiry that you being the tenant of No. 9, Ransivi Lane, Colombo 4 have erected a shed to park the vehicle which has resulted in

blocking of Common area (front) and access to the other apartments of the Condominium building.

Therefore you are hereby directed to remove the said shed within 14 days of receipt of this letter.

If you do not do so the Management Corporation is entitled to remove the said shed and recover all expenses incurred by the Management Corporation. ”

The Petitioner has produced marked '**P12**' a letter dated 17th June 2012 written by the 5th Respondent and Ms. N.M.Muhshin, the tenant of premises No. 11, Ransivi Lane, Colombo 4. The title of the said letter is a reference to '**P11**', thus confirming that the 5th Respondent received the Order of the 1st Respondent. Other than for stating that, '*we are not blocking any common area and access to any other property*', the 5th Respondent has not taken any steps to challenge the findings of the 1st Respondent.

I must state that the 1st Respondent has scrupulously followed the procedure laid down in the Act and afforded the 5th Respondent several opportunities of explaining her position. Furthermore, the 4th Respondent as well as the Inquiry Officer have examined the Site and seen for themselves the factual circumstances relating to the complaint of the Petitioner, and thereby satisfied themselves of the authenticity of the complaint.

By letter dated 18th November 2014 marked '**P13**', the Secretary, Management Corporation had informed the 1st Respondent that the 5th Respondent has not taken any steps to comply with the said Order communicated to her by '**P12**', and moved that the 1st Respondent take action as a period of 2 ½ years have lapsed since '**P11**' was issued. Upon the failure by the 1st Respondent to take any further steps, the Petitioner filed this application, seeking *inter alia* the following relief:

- a) A Writ of Mandamus directing the 1st Respondent to take steps in terms of Section 9A of the Act;
- b) A Writ of Mandamus directing the 1st Respondent to remove and/or demolish the unauthorised construction carried out by the 5th Respondent.

I shall consider at the outset 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**⁴ 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 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**⁵ 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**⁶ 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.”*

⁴ [1982] 2 Sri LR 451.

⁵ [2002] 3 Sri LR 17.

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

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,⁷ Fernando J, referring to the judgment in Credit Information Bureau of Sri Lanka vs M/s Jafferjee and Jafferjee (Pvt) Limited⁸ 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.*”

The principle relief that is sought by the Petitioner is for the 1st Respondent to demolish the aforementioned unauthorised structure that the 1st Respondent has satisfied itself, exists – vide the Inspection Report marked ‘**P6**’, and the report of the Inquiry Officer – vide ‘**2AR1**’.

I shall first consider whether the 1st Respondent has the power to demolish unauthorised constructions. In terms of Section 5 of the Act, the objects of the 1st Respondent shall *inter alia* be to:

- “(a) *Control, manage, maintain and administer the condominium parcels, the common elements and the common amenities of the Condominium Property or Semi Condominium Property;*
- (d) *Remove all such unauthorized constructions erected or carried out by the respective owners or occupiers of such condominium parcels or by any person, contrary to the registered condominium plan of the Condominium Property or the registered Semi Condominium Plan of the Semi Condominium Property.”*

Section 6 of the Act sets out the powers of the 1st Respondent. In terms of Section 6(j):

“For the proper carrying out of its objects the Authority shall exercise any one or more of the following powers:

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

⁸ [2005] 1 Sri LR 89.

- (j) *enter, either by itself or by its duly-authorized agents, at all reasonable times, any condominium parcel for the purpose of removing or demolishing unauthorized constructions of the Condominium Property or Semi Condominium Property”*

Thus, it is clear that the removal of unauthorised constructions is an object of the 1st Respondent, and that the legislature has empowered the 1st Respondent to achieve such object by conferring the 1st Respondent with the power to do so, by way of Section 6(j). This position is fortified by the provisions of Section 9A(3), which reads as follows:

“(3) Where such owner or occupier or management corporation or other person, as the case may be:

- (a) *fails to be present at the inquiry ; or*
- (b) *after being present at such inquiry refuses to comply with any direction issued under subsection (2) within seven days from the date of issue of such direction,*

the Authority shall-

- (i) *take appropriate measures to demolish such unauthorised construction;*
- (ii) *direct the discontinuance of the use of the land parcel or building;*
- (iii) *do all such other acts as the owner or occupier or other person was required to do by such directive under subsection (2).”*

Thus, it is clear to me that:

- (a) The 1st Respondent has a public duty to demolish unauthorised constructions if the person to whom the direction has been given does not comply with such direction;

(b) All what the Petitioner is seeking is for the 1st Respondent to exercise its statutory powers and its public duty, and implement the Order 'P11' that it has made.

Does the Petitioner have a legal right to the performance of the said legal duty? It is not in dispute that Condominium Properties have common elements, which are available for use by all residents of the said Condominium Property, without any obstruction.⁹ That is a legal right that every owner and occupier of a condominium property has been bestowed with. Thus, whenever any owner or occupier of a unit in such Condominium Property, or for that matter, even the Management Corporation of such Condominium Property obstructs the common elements, the other owners as well as the Management Corporation, as the case may be, have a legal right to have those obstructions to the common elements removed. The detailed procedure in the Act which I have already discussed has been provided by the legislature to address this legal right.

It is in the above background that I must consider the position of the 5th Respondent with regard to the unauthorised constructions that she is said to have carried out. In paragraph 8 of her first affidavit, the 5th Respondent has stated that, '*there is no such construction done by me causing any kind of obstruction to any other occupants of the condominium property mentioned in the petition.*' If that be so, the 5th Respondent ought to have responded to the several notices sent by the 1st Respondent and satisfied the Inquiry Officer that the complaint of the Petitioner is baseless.

I have already referred to the several steps that were taken by the 1st Respondent to ensure the presence of the 5th Respondent, and to the fact that she did not respond to any of the letters sent to her. Paragraphs 14 – 22B and 26 of the petition contains the steps that were taken by the 1st Respondent pursuant to the complaint of the Petitioner. The response of the 5th Respondent to the said paragraphs is a complete denial– vide paragraph 9 of the affidavit of the 5th Respondent supporting the averments in her Statement of Objections. In other words, the 5th Respondent has denied the receipt of all the correspondence that the 1st Respondent sent, including

⁹ The definition of 'common element' in Section 26 of the Apartment Ownership Law would apply under the Condominium Management Authority Act – vide Section 27 of the latter Act.

the receipt of 'P11', perhaps forgetting the fact that she had replied 'P11' by letter marked 'P12'.

However, by a further affidavit filed thereafter, the 5th Respondent has tendered letters dated 11th November 2011, 25th November 2011, 2nd December 2011, 8th January 2012 and 27th January 2012 marked 'R5e' – 'R5i', respectively. The dates of these letters coincide with some of the letters that were sent by the 1st Respondent to the 5th Respondent, although the contents are more or less the same. Thus, after denying the receipt of the said letters in her first affidavit, the 5th Respondent has changed her position, and *admitted* receiving the letters sent by the 1st Respondent.

However, given the fact that the Inquiry Officer has recorded that the 5th Respondent has not responded to the letters sent by the 1st Respondent – vide 'P8', 'P8X', 'P9' and 'P10' - I find it difficult to accept the position of the 5th Respondent that she sent the letters marked 'R5e' – 'R5i'. The result is that the 5th Respondent has lost credibility in the eyes of this Court. Be that as it may, even if the position in the further affidavit is accepted, it is clear that the 5th Respondent had avoided participating at the inquiry, and thereby deprived herself of the opportunity afforded to her by the 1st Respondent of placing her side of the story.

Even then, the 5th Respondent could have filed at least with her Statement of Objections, any material including photographs to demonstrate that she has in fact not erected any unauthorised structures, and that the Inspection Report and the observations of the Inquiry Officer in '2AR1', are not factually correct. None of this has been done. In my view, this is critical as the 1st Respondent's decision to proceed with an inquiry was based on the Site Inspection that was carried out by its Assistant General Manager. Thus, I have no reason to doubt the findings of fact arrived at by the 1st Respondent. I am therefore satisfied that *the factual situation envisaged by the empowering statute exists in reality* and that the Petitioner is entitled to a Writ of Mandamus directing the 1st Respondent to demolish all unauthorised structures obstructing the common elements of the said Condominium Property.

I shall now consider the several explanations offered by the 1st Respondent as to why it did not act at the request of the Petitioner and implement its order, in order to decide if I should proceed to issue the Writ of Mandamus prayed for.

The first is that the Order 'P11' has been made in June 2012, and that since a significant period had lapsed by the time the request was made by the Petitioner in November 2014, it was felt that it would not be prudent to implement its Order. In other words, the 1st Respondent is claiming that there has been a delay in filing this application, and for that reason, the writ should be refused. In paragraph 28 of its petition, the Petitioner has stated that it did make representations to the 1st Respondent to implement its Order, a position which has been denied by the 1st Respondent.

In my mind, the fact that the Petitioner did not seek the implementation of the Order earlier than November 2014 is immaterial, for the reason that the violation is continuing. What is important is the fact that the 1st Respondent has held that the unauthorised constructions that the 5th Respondent is said to have carried out, are contrary to the Condominium Plan relating to the said premises. If the said unauthorised constructions still exist, which can be ascertained by a site inspection, then, I am of the view that the 1st Respondent must take steps to implement the provisions of the Act. As already observed, demolition of unauthorised constructions is one of the objects of the 1st Respondent, and the legislature has empowered the 1st Respondent to demolish such structures.

The second ground adduced by the 1st Respondent not to implement its Order is the underlying dispute between the Petitioner and the 5th Respondent. Although the 5th Respondent had not uttered a single word in her affidavit about this dispute, she has done so in her subsequent affidavit.

In his first complaint to the 1st Respondent marked 'P5', the Petitioner referred to the fact that the 5th Respondent is a tenant, and that the 5th Respondent is not vacating the said premises. 'P5' was sent by the 1st Respondent to the 5th Respondent by letter 'P7', but the 5th Respondent did not respond. In July 2014, the Petitioner had filed Case No. 16/14 DRE in the District Court, Colombo against the 5th Respondent, seeking to eject the 5th Respondent from the premises that are the subject matter of this application.

I have examined the plaint which has been produced with the second affidavit of the 5th Respondent marked 'R5a', and observe that the unit in question has been rented out to the 5th Respondent by the Petitioner's predecessor in title, and that the 5th Respondent has not attorned to the Petitioner, which has resulted in action being filed in the District Court to eject the 5th Respondent from the said unit. What is important to note is that the premises that have been given on rent to the 5th Respondent is Unit No. 3. An owner cannot give on rent or lease common elements of a Condominium Property. The complaint of the Petitioner to the 1st Respondent was with regard to a structure erected by the 5th Respondent in a common element, which fact has subsequently been confirmed by the Inspection Report of the 1st Respondent, and the site inspection of the Inquiry Officer. Thus, it is clear that the Petitioner is not seeking to interfere with the tenancy rights of the 5th Respondent by complaining to the 1st Respondent. Thus, I am of the view that the underlying dispute between the Petitioner and the 5th Respondent is not an impediment to the 1st Respondent implementing its Order.

It would perhaps be appropriate to refer at this stage to the position taken up by the 5th Respondent in 'R5e' – 'R5i' that she is unaware of the ownership rights of the Petitioner to the said Unit, and the reluctance on the part of the 1st Respondent to implement its Order due to this reason.¹⁰ Section 9A(1) does not require the complaint to be originated by the owner, and makes it clear that the 1st Respondent can act on *a complaint or information received by it of an unauthorized construction*. Thus, the fact that the Petitioner became the owner of the said unit while the 5th Respondent was the tenant and the fact that the 5th Respondent does not recognise the Petitioner as the owner is in my view immaterial to the 1st Respondent carrying out its statutory duty.

Prior to concluding, there are two other matters that I wish to advert to.

In its written submissions, the 1st Respondent has pointed out that the Management Corporation of the said Condominium Property has the power in terms of Section 20C(2)(f) of the Apartment Ownership Law No. 11 of 1973, as amended, to demolish

¹⁰ Vide paragraph 12(b) and (c) of the Statement of Objections of the 1st Respondent.

unauthorised structures, and that the 1st Respondent can do so, as set out in 'P11'.¹¹ In other words, the 1st Respondent is stating that its assistance is not required to demolish the unauthorised structure. While there is no dispute that the Management Corporation has the power to do so, that does not take away the public duty that the 1st Respondent owes the Petitioner to take steps in terms of the Act. In fact, Section 20C(2)(f) specifically provides that the Management Corporation may seek the assistance of the 1st Respondent to remove the unauthorised constructions.

Furthermore, I must state that the factual circumstances of this application do not warrant the Management Corporation taking such steps. I say so for two reasons. The first is that the entire building is owned by the Petitioner. The second is that the Management Corporation is controlled by the Directors of the Petitioner. In the backdrop of the District Court case filed by the Petitioner to eject the 5th Respondent, I am of the view that this is not a fit situation where the Management Corporation must demolish the unauthorised structures in terms of Section 20C(2)(f) of the Apartment Ownership Law.

The second matter that I wish to advert to is the submission of the learned President's Counsel for the 5th Respondent that the Condominium Plan 'P3' has not been registered. He has referred to the Statement of Objections of the 1st Respondent to support his position. However, what the 1st Respondent has stated in paragraph 6 of its Statement of Objections is that 'P3' has not been approved by it as the 1st Respondent was not in existence in 1973. In fact, the registration of the Condominium Plan is a matter that has been considered by the Inquiry Officer, as borne out by the final paragraph in 'P10',¹² and paragraph No. 5(10) and (11) of '2AR1'.¹³

¹¹ Section 20C(2)(f) reads as follows: "The powers of the management corporation shall include the following – (f) to take every steps to prevent and to remove all unauthorized constructions effected to the Condominium Property or Semi Condominium Property in contrary to the approved building plan and to request or assist the Condominium Management Authority or the Urban Development Authority or any local authority to remove such unauthorized constructions."

¹² Vide P10 - ඉහත ඉදිරිපත් කරන ලද කරුණු අනුව සහාධපනය කළමනාකරන අධිකාරියේ නියෝගය හිකුත් කිරීමට කටයුතු කරන අතර ඊට පෙර ඉහත සඳහන් සහාධපනය ප්‍රකාශනයේ සහතික පිටපතක් මෙම අධිකාරිය වෙත ඉදිරිපත් කරන ලෙස පැමිණිලිකරැට දන්වයි.

¹³ Vide '2AR1' – මෙම පරීක්ෂණයේදී පහත සඳහන් ලිපි ලේඛන මා විසින් පරීක්ෂා කරන ලදී

10. ප්‍රසිද්ධ නොතරිස් එම්. නේසදරේ විසින් සහතික කල 1973-12-30 දිනැති අංක 109 දරණ සහාධපනය ප්‍රකාශනය
11. ඉහත සහාධපනය පිහුර කොළඹ ඉඩම් රෙජිසට්‍රාර් කාර්යාලයේ ලියාපදිංචි කල ඔවට ලබාගත් A/1/27 දරණ පත් ඉරුවේ සහතික පිටපතක්.

Thus, the issue of the registration of the Condominium Plan has been considered by the 1st Respondent, and:

- (a) In the absence of any retraction of that position by the 1st Respondent;
- (b) The failure by the 5th Respondent to support its position with any material,

I do not see any merit in the said submission of the 5th Respondent.

In the above circumstances, I issue a Writ of Mandamus directing the 1st Respondent to act in terms of Section 9A(3), and demolish the unauthorised constructions referred to in 'P6', '2AR1' and 'P11'. 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