

**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 prohibition, writ of
certiorari and a writ of mandamus, under and in
terms of Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka*

CA /WRIT 0240/19

Mohamed Miya Hajamiyan
No. 75/1, Gamieepura, Hatton

Petitioner

1. **Janaka Kumaragith Perera,**
Chairman, Urban Development
Authority
6th and 7th Floors, Sethsiripaya,
Battaramulla.
2. **Kulakarasuriya Amanual Vichnses**
Nihal Fernando
Member of the Management
Committee, Urban Development
Authority, 6th and 7th Floors,
Sethsiripaya, Battaramulla.
3. **Chairman**
Hatton Dick-oya Town Council
Hatton
4. **Secretary**
Hatton Dick-oya Town Council
Hatton
5. **Hon. Attorney General**
Attorney General's Office,
Colombo. 12

Respondents

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

Counsel : Pradeep Kumarasinghe for the Petitioner
Chathura Dilhan for the 3rd and 4th Respondents

Supported on: 18.01.2021

Decided on: 25.01.2021

Dhammika Ganepola, J.

The Petitioner invoked the writ jurisdiction of this Court seeking a writ of mandamus requiring the 1st - 4th Respondents (hereinafter referred to as "**Respondents**") to issue a letter of approval to the Road Development Authority (hereinafter referred to as "**RDA**") and a writ of prohibition preventing the Respondents from carrying out any unlawful administrative action to demolish the building in dispute until the final determination of this action. The Learned Counsel for the Petitioner before making submissions agreed to release the 5th Respondent from these proceedings.

The facts of the case at hand, in brief, are as follows. The building in dispute had been constructed by the Petitioner in a plot of land situated along the Hatton-Dick Oya road, which belongs to the RDA, with an encroachment of 8.6 meters from the center of the road.

On 23.07.2018 RDA had instituted action bearing case No. UC/12883 before the Hatton Magistrate's Court against the Petitioner in terms of the Municipal Councils Ordinance and Urban Development Authority Act in order to obtain an order of demolition against the scheduled property. At the conclusion of the said Magistrate's Court action, the learned Magistrate had issued an order for demolition as prayed for.

Long before the institution of the said Magistrate's court action the Petitioner by his letter dated 30.09.2012 marked as P3, has requested the 3rd Respondent for certain documents allegedly required in obtaining a license in terms of Section 42 of the National Thoroughfare Act, from the RDA.

The Petitioner claims that the 3rd and 4th Respondents, misusing their executive powers, have refrained from issuing such letter of approval and have prevented the Petitioner from

obtaining a license from the RDA, under Section 42 of National Thoroughfare Act. Further, the Petitioner claims that the 4th Respondent has conducted itself in malice in submitting the Petition and Affidavit to the Magistrate's Court, Hatton with an intention of causing irreparable damage to the Petitioner. The Petitioner also states that the 4th Respondent had no authority / power to seek an order of demolition against the disputed building from the Magistrate's Court.

However, it is pertinent to note that a writ of mandamus, as sought by the Petitioner, is a discretionary remedy and the Court may therefore withhold the same if it deems fit. It is observed that the Petitioner had submitted to the 3rd Respondent his request letter for required documents on 30.09.2012 , marked as P3. Though the Petitioner contends that there was no response to the said request, no proof has been presented before this Court to convincingly conclude that the Respondents have conducted themselves in such manner.

Further, the Court sees no evidence to establish that the Petitioner has not taken any interest thereafter to follow up with the said request filed in 2012. As such, this Court has taken cognizance of the relatively long delay, i.e. a lapse of more than 9 years, in Petitioner making this application against the Respondents. Hence, it appears that the Petitioner has slept on his rights and has failed to explain himself as to why there has been a delay in seeking a discretionary relief. As held in (*Dassanayake vs. Fernando* 71 NLR 356) it is essential on the Petitioner's part to state reasons in the Petition for his delay in seeking relief. Hence an unexplained delay of this sort is considered a ground for withholding the remedy at Court's discretion.

Furthermore, the demolition order against the unauthorized construction was issued by the Learned Magistrate on the 23.07.2018. The Petitioner's contention is that the Respondent had no authority/power to seek an order from the Magistrates Court to demolish the disputed construction. However, it appears that the said order by the Learned Magistrate has not been challenged before a higher forum.

Hence, it is observed that the Petitioner's plea in the present case to seek a writ of prohibition, preventing the Respondents from carrying out any unlawful administrative actions to demolish the scheduled property, as an implicit attempt to challenge the order dated 23.07.2018 of the Magistrate's Court, which essentially amounts to an abuse of

judicial process. Furthermore, the Petitioner seeks no relief in the instant application upon the legality of the order issued by the Learned Magistrate on 23.07.2018.

On the other hand, since the order for demolition has already been issued by a Court of law and that no appeal has been filed against the same, no further administrative action by the Respondents appears to be necessary. Hence there exists no administrative decision to be challenged. Therefore, granting an interim relief as sought by the Petitioner would be futile.

Further, it is also futile to issue a writ of mandamus at this juncture, compelling the 3rd and 4th Respondents to issue documents as requested by document marked P3, since the 3rd and 4th Respondents as well as the Petitioner continue to be bound by the order of the Learned Magistrate dated 23.07.2018, which has not been set aside or varied by a higher court. The Court at this point notes the latin phrase "*lex nil frustra facit*" which translates to state that 'the law does not perform acts or pronounce decrees which are useless or without practical effect'.

In view of the foregoing reasons, I believe that an issue of the writ of mandamus as prayed for in this application would be futile. Justice K.T. Chitrasiri also has taken a similar view in CA Writ 45/2008 and states that this position of law is clearly seen in the cases including that of *P.S. Bus Co. Ltd v. Ceylon Transport Board (61 NLR 491)*, *Samarasinghe v. De. Mel [1982 (1) SLR 123]*, *Pathirana v. Victor Perera [2006(2) SLR 281]*, *Centre for Policy Alternatives v. Dayananda Disanayake [2003 (1) SLR 277]*.

In the circumstances, I take the view that the Petition of the Petitioner should be dismissed *in limine* as the Petitioner has not made out a prima facie case for issuance of notice. Therefore I proceed to dismiss this application.

Judge of the Court of Appeal

Sobhitha Rajakaruna, J.

I agree.

Judge of the Court of Appeal