

**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 Writs of Certiorari, Prohibition and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.*

**C.A. Writ Application No.  
278/2023**

1. M.S.M. Asaf  
334/1/1, Jumma Masjid Road,  
Maligawatta, Colombo 10.
2. K.M.M. Fawmy  
B 11, U.07, Sirimuthu Niwasa,  
Colombo-12.
3. M.M.M. Siddeeq  
83/25, 1/1, Parathi Bimara Place,  
Kalubowila, Dehiwala.
4. M.F.M. Hilmy  
No. 399/7, Maligawatta Road,  
Jumma Masjid Road,  
Colombo 10.
5. A.R.M. Haniffa  
125/3, Stace Road,  
Grandpass, Colombo 14.
6. M.F.M. Askar  
No. 399/7, Maligawatta Road,  
Jumma Masjid Road,  
Colombo 10.

7. S.K.M. Ubaidullah  
450/6, Takkiya Road,  
Daluwakotuwa,  
Kochchikade.
8. A.M.M. Muzammil  
111/44, Abdul Hameed Street,  
Colombo 12.

**PETITIONERS**

**Vs.**

1. Officer in Charge  
Colombo Crimes Division,  
Colombo 09.
2. Senior DIG T.M.W.D.  
Tennakoon  
Senior DIG (Western Province)  
DIG Colombo Office,  
Olcott Mawatha,  
Colombo 11.
3. C.D. Wickremaratne  
The Inspector – General of Police,  
The Police Headquarters,  
Colombo 01.
4. Urban Development Authority  
6<sup>th</sup> , 7<sup>th</sup> and 9<sup>th</sup> Floors,  
“Sethsiripaya”  
Battaramulla.

5. Nimesh Herath  
Chairman,  
Urban Development Authority  
6<sup>th</sup> , 7<sup>th</sup> and 9<sup>th</sup> Floors,  
“Sethsiripaya”  
Battaramulla.
6. N.P.K. Ranaweera  
Director General  
Urban Development Authority  
6<sup>th</sup> , 7<sup>th</sup> and 9<sup>th</sup> Floors,  
“Sethsiripaya”  
Battaramulla.
7. Colombo Municipal Council  
Colombo 01.
8. J.M. Badrani Jayawardana  
Municipal Commissioner  
Colombo Municipal Council  
Colombo 01.
9. R.P.S.P. Amarasinghe  
District Engineer (Works)  
District 2A Office,  
Colombo Municipal Council,  
Colombo 01.
10. Honorable Additional Magistrate  
Magistrate’s Court No. 03  
Magistrate’s Court, Colombo 01.
11. The Registrar,  
Magistrate’s Court, Colombo 01.

12. Hon. Attorney General  
Attorney General's Department  
Colombo 12.
13. Ramachandran Ashok Kumar  
No. 29, De Vos Lane,  
Bambalapitiya,  
Colombo 04.
14. B.M. Naseer  
No. 132/229, de Mel Watta,  
Grandpass, Colombo 14.

**RESPONDENTS**

**AND NOW BETWEEN**

1. M.S.M. Asaf  
334/1/1, Jumma Masjid Road,  
Maligawatta, Colombo 10.
2. K.M.M. Fawmy  
B 11, U.07, Sirimuthu Niwasa,  
Colombo-12.
3. M.M.M. Siddeeq  
83/25, 1/1, Parathi Bimara Place,  
Kalubowila, Dehiwala.
4. M.F.M. Hilmy  
No. 399/7, Maligawatta Road,  
Jumma Masjid Road,  
Colombo 10.

5. A.R.M. Haniffa  
125/3, Stace Road,  
Grandpass, Colombo 14.
6. M.F.M. Askar  
No. 399/7, Maligawatta Road,  
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7. S.K.M. Ubaidullah  
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8. A.M.M. Muzammil  
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Colombo 12.

**PETITIONERS – PETITIONERS**

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Colombo Municipal Council  
Colombo 01.

9. R.P.S.P. Amarasinghe  
District Engineer (Works)  
District 2A Office,

Colombo Municipal Council,  
Colombo 01.

10. Honorable Additional Magistrate  
Magistrate's Court No. 03  
Magistrate's Court, Colombo 01.

11. The Registrar,  
Magistrate's Court, Colombo 01.

12. Hon. Attorney General  
Attorney General's Department  
Colombo 12.

13. Ramachandran Ashok Kumar  
No. 29, De Vos Lane,  
Bambalapitiya,  
Colombo 04.

14. B.M. Naseer  
No. 132/229, de Mel Watta,  
Grandpass, Colombo 14.

**(Deceased)**

**RESPONDENTS – RESPONDENTS**

Yunoos alais Mohamed Nazeer  
Yunoos  
No. 225/12, Wolfendhal Street,  
Colombo 13.

**Party substituted in the room of  
the deceased 14<sup>th</sup> Respondent.**

Before : **Hon. Rohantha Abeysuriya PC, J.(P/CA)**  
: **Hon. K. Priyantha Fernando, J.(CA)**

Counsel : Faizer Musthapha, PC with Harshana M. De  
Silva with Amila Perera instructed by Sanjeewa  
Kaluarachchi for the Petitioners.

Abigail Jayakody, S.C. for the 1<sup>st</sup> - 6<sup>th</sup> and 09<sup>th</sup>  
Respondents.

Widura Ranawake with Bhathiya Dasanayake for  
the 7<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> Respondents instructed by  
Suraj Rajapaksha.

Written Submissions on : 30.01.2026 for the Petitioners  
30.01.2026 for the 7<sup>th</sup> - 9<sup>th</sup> Respondents.  
11.02.2026 for the 1<sup>st</sup> – 6<sup>th</sup> and 9<sup>th</sup> Respondents.

Supported on : 25.11.2025

Decided on : 23.03.2026

**K. Priyantha Fernando, J.(CA)**

1. The Petitioners have instituted this application primarily seeking Writs of Certiorari quashing the notices issued under Section 42A of the Municipal Councils Ordinance No. 29 of 1947, marked P10(b)(i), (ii), (iii) and (iv), the letter marked P10(c) and challenging the decision of the 1<sup>st</sup> Respondent to proceed in terms of section 98 of the Code of Criminal Procedure against the Petitioners in the Magistrate Court case bearing No. 61410/3/21.

### THE POSITION OF THE PETITIONERS:

2. The Petitioners are small scale traders who have been operating at No. 204, 202, 200 and 198 all on 2<sup>nd</sup> Cross Street, Colombo 11. Following a complaint by the 13<sup>th</sup> Respondent, (the owner of a competitor business) to the 7<sup>th</sup> respondent Council, the 9<sup>th</sup> Respondent (District Engineer-Works) issued notices under Section 42A of the Municipal Councils Ordinance. Following the same, the 6<sup>th</sup> Respondent (Director General of the Urban Development Authority) in representation of the 4<sup>th</sup> Respondent (Urban Development Authority) requested the 2<sup>nd</sup> Respondent Senior DIG (Western Province) to report facts to the Magistrate Court and evict the Petitioners. The 1<sup>st</sup> Respondent (OIC of the Colombo Crimes Division) then reported facts to the Magistrates Court and sought an order under sections 98(1)(a) and (b) of the Code of Criminal Procedure.
3. The Section 42A (1) of the Municipal Councils Ordinance stipulates that the Mayor of the Council may serve a notice on the occupier of an unauthorized building for the demolition of that building. However, the Petitioners stated that the notices issued to them were signed by the 9<sup>th</sup> Respondent (District Engineer-Works) and not the Mayor. Furthermore, the Petitioners contended that the powers of the Mayor under Section 42A of the Ordinance are non-delegate. Thus, it was submitted that the notices were issued without legal authority and are hence *void ab initio*.
4. The Petitioners also contended that the involvement of the Colombo Crimes Division (CCD) in this case is improper. It is **generally** the local police who deals with Municipal trading disputes alongside the CMC. However, It was stated that the ‘extraordinary’ involvement of the CCD began following a letter addressed by the UDA to the 2<sup>nd</sup> Respondent (Senior DIG of Western Province). The Petitioners also put forth that they are aware of other schemes perpetrated by the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondents to evict certain other lessees from their business premises under the guise of public nuisance. The Petitioners stated that this court has in the past issued limited interim orders in such cases; CA/WRIT/188/2023.

5. The Petitioners contended that the provisions of the Criminal Procedure Code (CCP) on public nuisance cannot be utilized in place of the Municipals Councils Ordinance (MCO). In any event, where the Petitioners were to be evicted from these properties for any reason, the due and proper process ought to be followed, and eviction should not be done in a surreptitious or contrived manner in order to demolish the shops.
6. Additionally, the Petitioners submitted that neither the CMC nor the Mayor have taken any subsequent steps under Section 42A for the past few years; from this conduct they have drawn the inference that the notices were in fact unenforceable.
7. In terms of Section 42A of the Ordinance, the statutory enforcement sequence is as follows:
  - a. Issuance of written notice by the Mayor;
  - b. Grant of time for compliance; and
  - c. Upon non-compliance, the Mayor causing demolition or removal to be carried out by the Municipal Council.
8. The Petitioners stated that instead of the CMC taking steps to enforce eviction under Section 42A, the Respondents have resorted to ‘external criminal process mechanisms’ through the Colombo Crimes Division (CCD).
9. Finally, the Petitioners put forth that on 28.10.2024, a settlement was reached by the parties (Petitioners and the 13<sup>th</sup> Respondent). It was specifically acknowledged that no public nuisance is being caused by the 1<sup>st</sup>, 2<sup>nd</sup> and 8<sup>th</sup> Petitioners. Furthermore, the Petitioners contended that the terms of settlement is *ipso facto* evidence that the allegations of public nuisance were merely to evict the Petitioners. Thus, the Petitioners were of the view that the involvement of the 2<sup>nd</sup> Respondent and the involvement of the CCD to evict the Petitioners is an unlawful and arbitrary attempt at using criminal law to solve a civil dispute.

THE POSITION OF THE 7<sup>TH</sup> TO 9<sup>TH</sup> RESPONDENTS:

10. The 7<sup>th</sup> Respondent is the Colombo Municipal Council. The 8<sup>th</sup> and 9<sup>th</sup> Respondents are Municipal Commissioner and District Engineer - Works, respectively. These Respondents took up a preliminary objection on the ground of *laches*. They were of the view that the Petitioners have not come to this court promptly, *bona fide*, or without delay, all of which are contended to be essential factors when invoking the jurisdiction of this court. The Respondents submitted that the Petitioners having not explained their delay in approaching this court are guilty of *laches*.
11. The delay referred to by the Respondents is that of the 6 years which lapsed between the time of receipt of notices by the Petitioners (P10(b)(i), (ii) and (iii)) which were issued in 2017 under Section 42A of the Municipal Councils Ordinance, yet seemingly challenged only in 2023 when this case was instituted. Since the Petition is silent on the reason as to why relief was not sought promptly, these Respondents contended that the Petitioners are guilty of delay and *laches* and call for dismissal of the application *in limine* on that basis.
12. Secondly, the 7<sup>th</sup> to 9<sup>th</sup> Respondents questioned the merits of the Petitioner's challenge of the authority of the 9<sup>th</sup> Respondent. They submitted that at the time the notices were issued on **28.06.2017**, there was no Mayor at the Colombo Municipal Council at the time, as the council was dissolved. Section 170(4) of the Municipal Councils Ordinance states that in such an event, the Municipal Commissioner becomes statutorily vested with the powers of the vacated office of the Mayor. Section 171(1) of the Ordinance provides that the Commissioner is empowered to delegate the authority vested to him by this Ordinance with the consent of the Council. As such, the Respondents submitted that the 9<sup>th</sup> Respondent (District Engineer of the CMC), being a member of the council was lawfully empowered to exercise the authority being called into question by the Petitioners.

THE POSITION OF THE 1<sup>ST</sup> TO 6<sup>TH</sup> AND 9<sup>TH</sup> RESPONDENTS:

13. The 1<sup>st</sup> Respondent is the OIC of the Colombo Crimes Division; the 2<sup>nd</sup> Respondent is Senior DIG of Western Province; the 3<sup>rd</sup> respondent is the IGP; the 4<sup>th</sup> Respondent is Urban Development Authority (UDA); the 5<sup>th</sup> Respondent is the Chairman of the UDA and the 9<sup>th</sup> Respondent is the District Engineer (Works) of the Colombo Municipal Council.
14. These Respondents submitted that although the Petitioners were aware of and participated in the Magistrate Court proceedings (case bearing No. 61410/3/21), they, instead of taking steps to challenge those proceedings, chose to come to this court after a lapse of almost one year since 7<sup>th</sup> of December 2021 (vide the report of facts under Section 98(1)(a) and (b) of the Code of Criminal Procedure marked as P10(a) which clearly states that the 1<sup>st</sup> complaint was made by the 13<sup>th</sup> Respondent, namely Ramachandran Ashok Kumar.
15. The application before this court being one centered on the legality of the decision to proceed in the Magistrate Court under Section 98 of the Code of Criminal Procedure, the Respondents have addressed the contentions brought by the Petitioners alleging *ultra vires* decision making.
16. The first contention of the Petitioner as per the Respondents was that the Respondents acted on the basis of the letter sent by the 6<sup>th</sup> Respondent to the 2<sup>nd</sup> Respondent [P10(c)] in initiating the action against the Petitioner's in the Magistrate Court (MC). In response, it was submitted that as per the complaint [P10(a)] the case in the MC was filed based on a complaint made by the 13<sup>th</sup> Respondent. Moreover, the Respondents were of the view that since the Petitioners have failed to challenge the complaint marked P10(a) they have acquiesced to the same and thus the Petitioners are barred from denying what they have acquiesced to.
17. The second contention of the Petitioners as per the Respondents was that in bringing proceedings under Section 98(1) of the Code of Criminal Procedure as opposed to

Section 42A of the Municipal Councils Ordinance, the Respondents have acted *ultra vires*.

18. These Respondents argued that Section 42A of the Municipal Councils Ordinance refers only to ‘unauthorized building’ whilst Section 98(1) of the Code of Criminal Procedure provides for ‘any unlawful obstruction or nuisance’ and as such contended that the stalls manned by the Petitioners cannot be fit wholly into either definition and hence fall within an ambiguity. However, the Respondents stated that since the Petitioners have failed to challenge the same during the Magistrates Court inquiry, and as a result have come before this court.
19. Additionally, these Respondents questioned whether the Petitioner came to court with clean hands as they willingly and knowingly participated in the inquiry held in the Magistrate Court and yet failed to participate in the said case. They chose to challenge the application only after the matter was reserved for judgment. This behaviour, the Respondents alleged showed that the Petitioner did not come before this court with *uberimmae fides*.
20. The Respondents relied on the following authorities which highlight the nature of the relief of writ as a discretionary one dependent on the conduct of the Petitioner; Mohamed Ismail Fairoze Hameed and another v Union Bank of Colombo PLC and another CA/WRIT/805/2023 decided on 08.05.2024; Jayaweera v Asst. Commissioner of Agrarian Services Ratnapura and another 1996 2 SLR 70. The issuance of writs, a discretionary relief also depends on if the Petitioner has come with clean hands, and disclosed all material facts while also not suppressing material facts; Udesh Kumara Seneviratne and others v K L T G Perera and others CA/WRIT/281/2007 decided on 30.04.2021.
21. Finally, the Respondents were of the view that the Petitioners have failed to pursue the alternative remedy available to them resulting in *laches*. The Respondents submitted that, the Petitioner without solving matters in the Magistrate Court sought to enter into a settlement before this court without allowing the Magistrate to consider the evidence placed before the court. Following the discussion of possibility of settlement,

the Respondents state that they objected to the withdrawal of the case as it was revealed that the 3<sup>rd</sup> Petitioner continued to obstruct the entry way to lot 202.

- 22. In any event, the Respondents contended that since the facts of the instant case are in dispute, the matter cannot be gone into by way of writ and should instead be heard in the Magistrate Court.**

THE LAW RELATING TO THE DISPUTE:

23. Section 42A of the Municipal Council Ordinance is reproduced as follows:

*“42A. (1) The Mayor of a Municipal Council may cause a written notice to be served on the occupier of any unauthorized building directing such occupier to demolish that building.*

*(2) Where a notice served under subsection (1) on the occupier of an unauthorized building is not complied with within fourteen days reckoned from the date of such service, the Mayor may cause that building to be demolished ; and any person or persons acting under the authority of the Mayor may enter the land on which such building is situated and do all such acts as may be necessary for the purpose of such demolition.*

*(3) The provisions of section 68 shall, mutatis mutandis, apply in the case of any building demolished under subsection (2) in like manner and to the same extent as they apply in the case of any building pulled down under section 67.”*

24. Section 98 of the Code of Criminal Procedure provides as follows:

*98. (1) Whenever a Magistrate considers on receiving a report or other information and on taking such evidence (if any) as he thinks fit –*

*(a) that any **unlawful obstruction or nuisance should be removed from any way, harbour, lake, river, or channel** which is or may be lawfully used by the public or **from any public place**;*

*(b) that any trade or occupation or the keeping of any goods or merchandise should by reason of its being injurious to the health or physical comfort of the community be suppressed or removed or prohibited; or*

*(c) that the construction of any building or the disposal of any substance should as being likely to occasion conflagration or explosion be prevented or stopped; or*

*(d) that any building or tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by and that in consequence its removal, repair, or support is necessary; or*

*(e) that any tank, well, or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public, such **Magistrate may make a conditional order requiring that the person causing such obstruction** or nuisance or carrying on such trade or occupation or keeping any such goods or merchandise or owning, possessing, or controlling such building, substance, tree, tank, well or excavation shall within a time to be fixed by such order –*

*(i) **remove such obstruction** or nuisance; or*

*(ii) suppress or **remove such trade** or occupation; or*

*(iii) remove such goods or merchandise; or*

*(iv) prevent or stop the construction of such building; or*

*(v) remove, repair, or support it; or*

(vi) alter the disposal of such substance; or

(vii) remove such tree; or

(viii) fence such tank, well. Or excavation as the case maybe.”

ANALYSIS:

25. Upon a request received by the 1<sup>st</sup> Respondent - (OIC of Colombo Crime Division) from the 6<sup>th</sup> Respondent - Chairman of the UDA (P10c) the 1<sup>st</sup> Respondent after subsequent investigations, has filed a complaint with the Magistrate’s Court, No. 3, Colombo 12. **The 1<sup>st</sup> complaint which the action was initiated has been made by the 13<sup>th</sup> Respondent.** (vide P10c).
26. A conditional order in terms of Section 98 of the CCP has been issued against the Petitioners who were cited as Respondents in the Magistrate Court case. Having participated in the Magistrates Court matter, prior to the delivery of the order, the Petitioners have come before this Court and taken an *ex parte* interim order against proceeding of Magistrates Court case. The Petitioners have not challenged the basis of which the said MC case was initiated in those proceedings. After having participated for one year and after a lapse of one year, they have challenged *vires* of section 98 case, in this Court.
27. During the pendency of this writ application, the MC case has been withdrawn upon a settlement entered between the Petitioners and the 13<sup>th</sup> Respondent. The other Respondents have informed this Court that they were unaware of such a settlement and there were other lots that were being blocked by the 3<sup>rd</sup> Petitioner and 14<sup>th</sup> substituted Respondent.
28. The main contention of the Petitioners was that the institution of proceedings by the Colombo Crimes Division is *ultra vires*. It is clear that in terms of the complaint marked P10c made by the 13<sup>th</sup> Respondent, Magistrate Court case was filed. In terms of Section 109, 116 and 136(b) of the Criminal Procedure Code, a duty is cast on ‘any peace officer’

to report facts to the Learned Magistrate in respect of a complaint made to such officer pertaining to a commission of an offence if it is well founded. The Colombo Crimes Division (CCD) functions as part and parcel of the Police Department.

29. It is apparent that the Petitioners have failed to challenge the complaint P10c at the time they became aware of the same but waited until the conclusion of the Magistrates Court case to challenge the same in this Court. Therefore, the Petitioners' act amounts to approbation and re-probation.

30. Section 42A(1) of the Municipal Council Ordinance stipulates as follows:

*“42A. (1) The Mayor of a Municipal Council may cause a written notice to be served on the occupier of any unauthorized building directing such occupier to demolish that building.*

*(2) Where a notice served under subsection (1) on the occupier of an unauthorized building is not complied with within fourteen days reckoned from the date of such service, the Mayor may cause that building to be demolished ; and any person or persons acting under the authority of the Mayor may enter the land on which such building is situated and do all such acts as may be necessary for the purpose of such demolition.*

*(3) The provisions of section 68 shall, mutatis mutandis, apply in the case of any building demolished under subsection (2) in like manner and to the same extent as they apply in the case of any building pulled down under section 67.”*

31. It is seen that the statutory language insofar as the person authorized to act under section 42A is mandatory. In the instant case, the section 42A Notices have been issued and signed by the District Engineer (9<sup>th</sup> Respondent) and not by the Mayor. The Petitioners have impugned notices marked P10(b)(i) to P10(b)(iv) primarily on the ground that the 9<sup>th</sup> Respondent, being the District Engineer of the Colombo Municipal Council (CMC),

lacked legal authority to issue those notices. This contention is untenable due to following reasons:

- 1) At the time the impugned notices were issued **on 28.06.2017**, there was no Mayor in office at the CMC as the Council has been dissolved.
- 2) This factual position is expressly recognized and addressed by the Municipal Council Ordinance itself, which makes clear provision for the continuity of municipal governance and administration in such circumstances.

32. The relevant statutory provision governing the situation is Section 170 (4) states as follows:

*“In the event of the vacation of the office of both the Mayor and the Deputy Mayor by death or resignation or for any other cause, then during the period intervening between the vacation of office of the Deputy Mayor and the election of the new Mayor, the Commissioner may exercise, perform and discharge all the rights, privileges, powers, duties and functions vested in or conferred or imposed on the Mayor by this Ordinance or any other written law”*

33. By virtue of the above provision, upon the vacation of the office of Mayor, the Municipal Commissioner becomes statutorily clothed with all mayoral powers and such powers are exercised by operation of law, without the need for any further act or resolution. Accordingly, during the relevant period in 2017, all powers which would otherwise have been exercised by the Mayor has been lawfully vested in the Municipal Commissioner.

34. Furthermore, there is express statutory authority granted to the Municipal Commissioner to act through officers of the Council. Section 171(1) of the Municipal Councils Ordinance provides as follows:

*“The Commissioner may, with the consent of the Council, by general or special order in writing, delegate to any officer of the council, any of the powers, duties*

*or functions conferred or imposed upon, or vested in or delegated to him as Commissioner by this Ordinance or any other written law”*

35. Hence, when Sections 170(4) and 171(1) are read together:

(a) In the absence of a Mayor, all mayoral powers are vested in the Municipal Commissioner by operation of Section 170(4);

(b) The Commissioner, being so vested with authority, was empowered to delegate such powers, duties, or functions to any office of the Council, including technical officers, by general or special order in writing, in terms of Section 171(1);

(c) The District Engineer (9<sup>th</sup> Respondent) of the Municipal Council, being an officer of the Council, was therefore competent in law to exercise delegated authority relating to municipal works, streets and structures;

(d) The 9<sup>th</sup> Respondent, as District Engineer of the CMC, acted not in his personal capacity, but as an officer of the Municipal Council, exercising powers lawfully vested in and delegated by the Municipal Commissioner, who at the material time was lawfully exercising the powers of the Mayor.

36. Accordingly, the issuance of notices P10(b)(i) to P10(b)(iv) is intra vires, lawful, and within the scope of the statutory authority.

IS THE MAGISTRATE EMPOWERED TO ACT UNDER SECTION 98(1) OF THE CODE OF CRIMINAL PROCEDURE CODE?

37. It was contended by the Petitioners that the Respondents should have proceeded under section 42A of the Municipal Council Ordinance on the notices issued thereunder but not under section 98(1) of the Criminal Procedure Code. At the same time they approbate and reprobate by challenging the notices sent under Section 42A of the

Municipal Council Ordinance.

38. Although notices under section 42A (1) were issued to the Petitioners in 2017, no subsequent steps were taken by the Respondents (vide paragraph 17k of the Petition). Instead, the Magistrates Court case was proceeded by the Colombo Crimes Division **on a complaint made by the 13<sup>th</sup> Respondent – a shop owner whose entry had been blocked by the Petitioners irrespective of the notices sent under Municipal Councils Ordinance.**

39. Section 42A of the Municipal Council Ordinance refers to ‘unauthorized building’ whereas section 98 of the Criminal Procedure Code refers to ‘any unlawful obstruction or nuisance’. It is clear that the stalls put up by the Petitioners fall within the definition of an unlawful obstruction or nuisance as opposed to a ‘building’ that is unauthorized. Since the section 42A only refers to unauthorized building, it would have been certain that the only provision to remove the structures is to proceed under section 98 of the Code of Criminal Procedure.

40. In terms of the complaint marked as P10(a), it is apparent that the Magistrates Court case has been filed on a complaint by the 13<sup>th</sup> Respondent but not upon a complaint of UDA or its Chairman.

41. Section 98 of the Code of Criminal Procedure provides as follows:

98. (1) *Whenever a Magistrate considers on receiving a report or other information and on taking such evidence (if any) as he thinks fit –*

*(a) that any unlawful obstruction or nuisance should be removed from any way, harbour, lake, river, or channel which is or may be lawfully used by the public or from any public place;*

*(b) that any trade or occupation or the keeping of any goods or merchandise should by reason of its being injurious to the health or physical comfort of the community be suppressed or removed*

*or prohibited; or*

*(c) that the construction of any building or the disposal of any substance should as being likely to occasion conflagration or explosion be prevented or stopped; or*

*(d) that any building or tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by and that in consequence its removal, repair, or support is necessary; or*

*(e) that any tank, well, or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public, such **Magistrate may make a conditional order requiring that the person causing such obstruction** or nuisance or carrying on such trade or occupation or keeping any such goods or merchandise or owning, possessing, or controlling such building, substance, tree, tank, well or excavation shall within a time to be fixed by such order –*

*(i) **remove such obstruction** or nuisance; or*

*(ii) suppress or **remove such trade** or occupation; or*

*(iii) remove such goods or merchandise; or*

*(iv) prevent or stop the construction of such building; or*

*(v) remove, repair, or support it; or*

*(vi) alter the disposal of such substance; or*

*(vii) remove such tree; or*

*(viii) fence such tank, well. Or excavation as the case maybe.”*

42. In terms of the Sections 109, 116 and 136(b) of the Code of Criminal Procedure Code, a duty is cast on ‘any peace officer’ to report facts to the Learned Magistrate in respect

of a complaint made to the said officer pertaining to the commission of an offence if it is well founded. The Colombo Crimes Division functions as part and parcel of the Police Department. Thus, the argument that the 1<sup>st</sup> and 2<sup>nd</sup> respondents illegally initiated proceedings in the Magistrates Court is untenable.

43. In any event the Petitioners have failed to challenge the complaint marked P10(a) made to the Colombo Crimes Division for nearly 2 years and waited until the conclusion of the inquiry to challenge the same in this Court. They have not explained this delay and thus are guilty of *laches*.
44. It was contended by the Petitioners' Counsel that invoking Section 98 of the Code of Criminal Procedure by 1<sup>st</sup> to 3<sup>rd</sup> Respondents, without taking any steps to secure the vested rights of the Petitioners is a dereliction of a public duty on the part of the Respondents and is accordingly ultra vires, arbitrary, illegal and bad in law. It was also submitted that section 98 cannot be used to dispossess parties. It is the view of this Court that all these issues could have easily been taken up as defences in the Magistrates' Court case filed under section 98.
45. By knowing that, they have approached this Court on the purported basis that the Colombo Crimes Division has no power to criminalize the procedure taken by the Colombo Municipal Council. The matters challenged by the Petitioners namely the reference of the matter by the Colombo Crimes Division to the Learned Magistrate and proceedings under section 98 were matters which the Petitioners were aware of when they were issued with the Conditional order in 2021. However, they have participated in the inquiry (leading to acquiescence) before the Magistrate and failed to challenge any of the matters raised above, up until the MC case No. 61410/03/21 was reserved for judgment in May 2023.
46. Thereafter, the Petitioners have obtained an interim order on **24.05.2023** from this Court have **continued to extend the same until now for nearly three years**. Clearly, the Petitioners have acquiesced to all matters raised in their Petition in the Magistrates Court and now seeking to challenge the same on the basis that those are ultra vires. Such conduct of the Petitioners is questionable and shows lack of *uberrima fides*. Their

conduct is far from satisfactory to obtain the discretionary relief of writs.

47. In the case of Mohamed Ismail Fairoz Hameed and Another vs. Union Bank of Colombo PLC and Another (CA Writ 805/23 decided on 08.05.2024) the Court noted as follows:

*“The conduct of the Petitioner is questionable. We hold that the 1<sup>st</sup> Petitioner’s conduct itself does not warrant to issue writs. Jayaweera v. Asst. Commissioner of Agrarian Services, Ratnapura and Another, 1996 (2) SLR 70 at page 73, Jayasuriya J. held that:*

*‘I hold that the Petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even he is entitled to relief, still the court has a discretion to deny him relief having regard to his conduct; delay, laches, waiver, submission to jurisdiction are all valid impediments which stand against the grant of relief.’”*

48. In Udesh Kumara Seneviratne and others v. K. L.T. G. Perera and others, CA/WRIT/0281/07 decided on 30.04.2021, Mohammed Laffar J. held that:

*“In my view, the conduct of the Petitioner does not warrant the issuance of the writs as prayed in the Petition. A party cannot ask for a writ as of right. It is a discretionary relief as well as an equitable relief. When granting such a relief, the conduct of the party applying for it is intensely relevant. It is settled law that a person who approaches the Court for the grant of discretionary relief, to which category an application for certiorari would certainly belong, has to come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case. In other words, he owes a duty of utmost good faith (uberrima fides) to the court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence.”*

EFFECT OF THE TERMS OF SETTLEMENT DATED 28<sup>TH</sup> OCTOBER 2024:

49. The Petitioners have belatedly sought to challenge matters to which they acquiesced in the Magistrates Court and sought to enter into a settlement before this Court with the complainant-13<sup>th</sup> Respondent. Meanwhile, the 13<sup>th</sup> Respondent has made representations to the UDA and the Colombo Crimes Division to withdraw the said complaint in the Magistrate Court. However, the 1<sup>st</sup> to 6<sup>th</sup> and the 9<sup>th</sup> Respondent have objected to the withdrawal on the basis that pursuant to further investigations by the police, **it has been revealed that the 3<sup>rd</sup> Petitioner continued to obstruct the entry to premises No. 202.**
50. Thus, it is revealed that rather than placing these matters before the Learned Magistrate, the Petitioners have sought to proceed with a settlement in this Court. It is clear that the Learned Magistrate is empowered to inquire in this regard and the Petitioners have failed to pursue the most effective and efficacious alternative remedies available to them.
51. This conduct has resulted in an abuse of process and caused a considerable delay in the Magistrate Court proceedings for three years, which in my view, would have been the correct remedy to conclude the dispute in one way or another.
52. As per the journal entry dated 18.12.2024, it can be observed that the Learned President's Counsel on behalf of the 13<sup>th</sup> Respondent has informed this Court that they will pay Rs. 2.5 million each for five parties (i.e., 3<sup>rd</sup> to 7<sup>th</sup> Petitioners) who are occupying the premises. However, the said proposal has not culminated in a resolution of the dispute.
53. It was the Petitioners' stance that by such settlement, the 13<sup>th</sup> Respondent has expressly acknowledged that no public nuisance is caused by the 1<sup>st</sup>, 2<sup>nd</sup> and 8<sup>th</sup> Petitioners; 13<sup>th</sup> respondent has undertaken to request the CCD to withdraw the complaint; once the factual foundation of 'nuisance' is disavowed by the complainant, the continued State action becomes arbitrary and irrational; terms of settlement dated 28.10.2024 is, *ipso facto*, evidence that the purported nuisance caused was merely to evict the Petitioners

and there is no basis for any allegation of public nuisance.

54. Again, it is my considered view that all these major factually disputed matters are for the Magistrates' Court to be resolved. When major facts are in dispute, writ shall not lie.

CONCLUSION:

55. In summation, I will lay down the views of this Court as follows:

- a) The Municipal Commissioner is lawfully vested with the powers of the Mayor under Section 170 (4) of the Municipal Councils Ordinance and is empowered to delegate such powers under Section 171(1)
- b) The 9<sup>th</sup> respondent, as District Engineer of the Colombo Municipal Council has acted within such lawful authority and the impugned notices are valid, lawful and intra vires.
- c) The Petitioners are guilty of *laches* since they have not provided any explanation for the extraordinary delay of nearly six years to challenge the notices.
- d) Since the complaint marked P10(a) has been made by the 13<sup>th</sup> respondent, the Colombo Crimes Division, being a part of the Police Department is empowered to report facts to the Magistrates Court under relevant provisions of the Code of Criminal Procedure.
- e) It is up to the Learned Magistrate to go into the matter and consider whether facts of this dispute falls under either Section 42A of the Municipal Council Ordinance or under Section 98 of the Code of Criminal Procedure Code and give a ruling according to law.

- f) There is clear, effective and efficacious alternative remedy of proceed with the Magistrates Court case is available for the petitioners. Thus, no writs will lie.
- g) The Petitioners are the wrongdoers in the eyes of the law and have abused the process of the law approbating and reprobating causing the proceedings in the Magistrates Court delayed and/or terminated preventing the learned Magistrate to conclude the case No. 61410/03/2021 in May 2023 which was due to be concluded three years ago.
- h) If the petitioners were aggrieved by an order of the Learned Magistrate, they could have appealed to a higher forum and could have got relief by now.
- i) Instead of following proper course of justice, they have reached this Court having all the valid impediments of delay, *laches*, waiver, submission to jurisdiction and dispute of major facts which stand against the grant of relief.

56. For all the above circumstances, this Court is of the view that there is no prima facie case which warrants formal notices to be issued and there are no arguable questions to be considered in this application. Accordingly, the application is dismissed without costs.

**Judge of the Court of Appeal**

**Hon. Rohantha Abeyesuriya PC, J.(P/CA)**

I agree.

**President of the Court of Appeal**