

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

In the matter of an appeal against the Order
dated 18.12.2013 in High Court Writ Case
No. 13/2012 of the Provincial High Court of
the Western Province (Holden at Gampaha)

1. S.K. Wasala Mudiyanse Ralahamilage
Dharshana Senevirathne,
2. S.K. Wasala Mudiyanse Ralahamilage
Lekha Dharshani Senevirathne,
3. S.K. Wasala Mudiyanse Ralahamilage
Jayamali Dharshika Senevirathne,

All of,
No. 108, Shri Bodhi Road,
Gampaha.

Petitioner-Appellants

C.A. Case No: **CA/PHC/182/2013**
WP/HCCA/Gam/Writ
Application No: **13/2012**

-Vs-

1. The Municipal Council of Gampaha,
Office of the Municipal Council,
Gampaha.

2. Eranga Senanayake, The Mayor,
The Municipal Council of Gampaha,
Office of the Municipal Council,
Gampaha.
3. Gamapaha District Thrift and Credit
Cooperative Societies Union Ltd.,
No. 99, Colombo Road,
Gampaha.
4. Mr. N.J.A. Lalitha Jayasooriya,
The Chairman,
Gampaha District Thrift and Credit
Cooperative Societies Union Ltd.,
No. 99, Colombo Road,
Gampaha.
5. The Director (Western Province) Urban
Development Authority,
6th and 7th Floor,
Sethsiripaya, Battaramulla.
6. The Director General,
The Central Environment Authority
“Parisara Piyasa”,
No. 104,
Denzil Kobbekaduwa Mawatha,
Battaramulla.

Respondent-Respondents

Before : A.L. Shiran Gooneratne J.

&

Mahinda Samayawardhena J.

Counsel : Sudharshani Coorey for the Petitioner-Appellants

Kalpani Pathirage with J.M. Wijebandara for the 3rd and
4th Respondents

Kanishka de Silva, SSC for the 5th and 6th Respondents

Written Submissions: By the Petitioner-Appellants on 02/10/2018

By the 3rd and 4th Respondents on 26/11/2018

Argued on : 22/05/2019

Judgment on : 28/06/2019

A.L. Shiran Gooneratne J.

The Petitioner-Appellants (Appellants), are seeking to set aside the judgment dated 18/12/2013, delivered by the learned High Court Judge of the Provincial High Court of the Western Province holden in Gampaha and *inter alia*, has sought a mandate in the nature of a writ of *certiorari* to quash the approval of the building plan marked P17 and P18, approved by the 1st and 2nd Respondent-Respondents (Respondents), permitting to construct an 8 storey apartment building by the 3rd and 4th Respondents.

When this case was taken up for inquiry, the Appellants alleged that the 3rd and 4th Respondents together with the 1st and 2nd Respondents, maliciously and unlawfully acted in order to construct a building without an approved building plan which the Appellants submit is illegal. The learned High Court Judge dismissed the said application on the basis that the Appellants were guilty of laches and the availability of alternate relief.

The Respondents have raised several preliminary objections. The most salient objection been that the Appellants are guilty of laches and has failed to adduce any acceptable reason to excuse the delay in coming before Court.

The Appellants are lawful owners of the land adjoining premises bearing No. 110 Sri Bodhi Road, Gampaha, where the disputed building is constructed. The Appellants allege that since the said building consists of more than 4 floors, in terms of Gazette Notification No. 1585/27, dated 23/01/2009, and the relevant planning and construction regulations applicable to the Gampaha development area valid for 2006-2026, marked P8 and P6, respectively, the maximum floors allowed to construct against a blind wall is 4 floors and for buildings over 4 floors, 1 meter space from either side to separate the building for access, construction and maintenance. Therefore, it is submitted that the non-fulfillment of the required criteria amounts to gross violation of the said regulations and the building

presently constructed is in violation of the said Regulations and therefore, contrary to law.

The Appellants invoked the jurisdiction of the Provincial High Court by Petition dated 12th October 2012, and thereafter, has filed an amended Petition dated 14/11/2012. At the time of submitting the amended Petition, the building had been constructed up to the 3rd floor. The Appellants submit that they raised their grievance at the first available opportunity with the Respondents by their letters of demand marked P20-P22. However, it is observed that Letters of Demand marked P20 and P21 are not supported with proof of registered postal article receipts. It is also observed that the letter seeking instructions from the 6th Respondent marked P16a, is an undated document.

The Appellant on 04/08/2011, by the information book extract marked P19a, complained to the police of an illegal intrusion to the land by certain unknown persons. A further statement to the police by the Appellant on 02/11/2011, marked 19b, makes it clear that the Appellant was aware that the 3rd Respondent was using heavy equipment in preparation of a construction in the land. By letters dated 15/09/2011, 13/10/2011 and 03/11/2011, marked P13a, P13b and P13c, the Appellant has drawn the attention of the Urban Development Authority (5th Respondent), regarding the damage and the hardship caused to the Appellant, as a result of the said construction by the 3rd and 4th Respondents.

Letter dated 15/09/2011, addressed to the 5th Respondent marked P13a, clearly indicates that the Appellant was aware that the 3rd and 4th Respondents were preparing the site to construct a building consisting of 8 floors, however, the Appellant has not taken any objection to the said construction. The Appellants concern was to protect the boundary wall of the land and also to protect the earth been washed away, causing damage to the land due to the said construction. It is noted that by letter dated 14/12/2011, the Appellants have been summoned for an inquiry regarding this matter by letter dated 31/10/2011, marked P15, and accordingly, the 5th Respondent has advised the respective parties to prevent any harm that could cause damage to the Appellants land.

In the above context, notably, when the Appellant addressed letter dated 15/09/2011, to the 6th Respondent, the Appellant was aware that the building to be constructed in the adjoining land consisted of 8 floors. However, it is admitted that by the time the Appellant supported the case in the High Court, the construction consisted of 3 floors. The Appellants delay in filing Petition is attributed to the Respondents failure to provide the necessary information and acting mala fide. The Appellants also contend that the delay in filling the objections by the Respondents in the High Court, has resulted in the construction reaching 8 floors.

As observed earlier, even though the Appellant, was aware in September 2011, (P13a) that a building consisting of 8 floors is to be constructed, the

Appellant came before the High Court when the building construction had reached 3 floors. By amended Petition dated 14/11/2012, the Respondents appeared before the High Court on notice, on 01/03/2017.

“the claimant must apply for permission promptly, and in any event, within three months of the date on which grounds for the claim first arose. When the claim is made outside these limits, the claimant must apply for an extension of time and provide adequate reasons for the delay.” (Judicial remedies in Public Law 5th Ed. Lewis at page 336.)

The Appellants attribute the delay on the Respondents for not filing objections on time in the High Court, however, has failed to explain the delay on the part of the Appellant coming before the High Court without undue delay. It is the duty of the Appellants to diligently prosecute an application filed before Court and if not should necessarily bare consequences of default. *“The court would also take into consideration the consequences which the issue of the writ will entail”.* *(Pradeshiya Sabawa, Hingurakgoda, and others v. Karunaratne and others (2006) 2SLR 410)*

Jayaweera vs. Assistant Commissioner of Agrarian Services (1996) 2 SLR 70, the Court held that,

“A 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 if 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.”

In ***Bisomenika vs. C.R. de Alwis, 1982 1 SLR 368***, the Court held that;

“A writ of Certiorari is issued at the discretion of the court. It cannot be held to be a writ of right or one issued as a matter of course. The exercise of this discretion by court is governed by certain well accepted principles. The court is bound to issue it at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, submitting to jurisdiction, laches, undue delay or waiver... The proposition that the application for writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chance of his success in writ application dwindles and the court may reject a writ application on the ground of unexplained delay... An application for a writ of certiorari should be filed within a reasonable time.”

Therefore, taking into consideration the delay on the part of the Appellants in filling this application and the prejudice that could be caused to the Respondents in granting the relief prayed for at this stage, the application for a writ of *Certiorari* should be refused.

Accordingly, the Petition is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL