

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

In the matter of an application on  
Fundamental Rights guaranteed by  
Article 12(1) of the Constitution of  
the Democratic Socialist Republic  
of Sri Lanka.

SC FR 654/09

1. Everad Anthony Payoe,  
Member, Hatton Dick Oya Urban  
Council, and also at Sirinsaru,  
Dick Oya.
2. M.I.M. Muhajarin,  
Member, Hatton Dick Oya Urban  
Council, Hatton, Dick Oya.
3. G.L.Kithsiri,  
32/25, Hatton House Road,  
Gaminipura, Hatton.
4. A. A. M. L. Lebbe,  
28, Hatton House Road,  
Gaminipura, Hatton.
5. H. A. Neelarathna,  
32/28, Hatton House Road,  
Hatton.
6. D. W. A. Buddadasa,  
32/17, Hatton House Road,  
Gaminipura, Hatton.

Petitioners

Vs

1. Hatton Dickoya Urban Council,  
Hatton-Dickoya.

2. A.P.Anura de Silva,  
Member, Hatton Dickoya Urban  
Council, Hatton Dickoya.  
And also at No. 72, Hatton House  
Road, Hatton.
3. Gopal Nadesan, No.1, Gaminipura  
Road, Hatton.
4. A. Nandakumar, Chairman &  
Member, Hatton Dickoya Urban  
Council, Hatton Dickoya.
5. Upali Alahakoon,  
Commissioner of Local  
Government(Central Province),  
Department of Local Government  
(Central Province), Secretariat  
Office, Kandy.
6. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

Respondents

7. Ms. Singaram Priyadarshini,  
Acting Secretary and Competent  
Authority of Hatton Dickoya Urban  
Council, Hatton Dickoya.

Added Respondent

BEFORE

**: S. EVA WANASUNDERA PCJ.  
UPALY ABEYRATHNE J. &  
H.N.J. PERERA J.**

COUNSEL : J.C.Weliamuna with Pasindu Silva and Sulakshana Senanayake for the Petitioners  
S.Mandaleswaran with P.Peramunagama, Weerasena Ranepura Hewage and M.A.M. Haleera for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents  
Dushith Johnthasan with Elisha Fernando for the 1<sup>st</sup> and 4<sup>th</sup> Respondents.  
Rajitha Perera SSC for the 5<sup>th</sup> and 6<sup>th</sup> Respondents.  
The Added 7<sup>th</sup> Respondent was not represented.

ARGUED ON : 21.02.2017.

DECIDED ON : 23.06.2017.

### **S. EVA WANASUNDERA PCJ.**

The Petitioners who filed this Fundamental Rights Application are two members of the Hatton Dickoya Urban Council and four other citizens of this country who live in their residencies in Hatton House Road, Gaminipura, Hatton. The Counsel for the Petitioners informed court that the 2<sup>nd</sup> Petitioner is not pursuing this Application any longer. The subject matter is totally with regard to the width of the Sunday Fair Road from the entrance point to upper division of Gaminipura and the unauthorized constructions as alleged to be hindering the upkeep of the width of the road.

Leave to proceed was granted on the 1<sup>st</sup> of April, 2013 for the alleged violation of Article 12(1) of the Constitution against the rights of the Petitioners by the 1<sup>st</sup> to 5<sup>th</sup> Respondents. From the time of the filing of this Application onwards, this Court has done its best to get the Respondents to do the needful to keep this road unobstructed to those who use the same. Due to the said action by this Court the matter had been addressed and partly resolved.

On 05.08.2015 the counsel for the Petitioners had moved to amend the caption to include the Acting Secretary and Competent Authority of the Hatton Dickoya Urban Council, due to the fact that the 4<sup>th</sup> Respondent had ceased to hold office

and as it was allowed. Amended caption was filed on 29.01.2016. to include the said 'Acting Secretary and Competent Authority' namely Ms. Singaram Priyadarshani as the 7<sup>th</sup> Respondent. Even though the Petitioners Attorney at Law on record had sent notices to her according to the Rules of this Court on 29.01.2016, she had failed to get herself represented in these Court proceedings. On 22.06.2016 this Court directed the Registrar to send another notice from court to the 7<sup>th</sup> Respondent to be present in court or arrange to send a representative to court and "submit the initial plan on which the said Road got initiated to be constructed at the very inception, i.e. around the end of year 2005 or at the beginning of year 2006." This Court sent a copy of the letter P5 (a) dated 05.05.2006 to the said 7<sup>th</sup> Respondent and directed her to comply with the order contained therein. The order given to the Chairman of Hatton Dickoya Urban Council by the Assistant Commissioner of Local Government, Nuwaraeliya was, to comply with the directions therein regarding the road problem. The Chairman had not complied with the said directions at any time.

Ms. Singaram Priyadarshani however, was present in Court on 12.08.2016, in person, on notice from court but to our dismay she said in open court that she can agree to give a roadway only 10 feet wide and added that she spelt that out according to the instructions given to her by 'government authorities'.

This Court thereafter took this case up for hearing on 21.02.2017 before this Bench. The parties moved for time to file written submissions till 21.03.2017 and all parties except the 7<sup>th</sup> Added Respondent have filed written submissions.

The Petitioners submit that the illegal obstructions made by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have adversely affected the public in general living in Hatton. The obstructions are : (1) "a sideway near the fuel station which connects the Main Street and the Sayeed Street " and (2) " a building which obstructs the entry point of the Road which starts near the Public Market and the Sunday Fair of the Hatton Town." The Sunday Fair Road leads to the Upper Division of the Gaminipura Housing Scheme. The Petitioners point out that the 1<sup>st</sup> Respondent which is the Hatton Dickoya Urban Council and which functions under the Chairman of the said Urban Council who was named as the 4<sup>th</sup> Respondent at the time of filing this Application **have failed to remove and/or to stop the said illegal obstructions causing inconvenience to the public.** It is alleged that the Hatton Dickoya Urban Council and its officers have abused their discretionary

powers acting in collusion with the 2<sup>nd</sup> Respondent, Anura Silva. It is also alleged and it has resulted in the 3<sup>rd</sup> Respondent Gopal Nadesan also having engaged in building unauthorized constructions.

As at present, the Petitioners have submitted that the issue with regard to the “obstruction of sideway near the fuel station which connects the Main Street and the Side Street “ have got resolved and therefore the only matter to be considered by this Court is the “obstruction of the road leading to the upper division of Gaminipura.”

This alleged obstruction starts near the Sunday Fair. It is alleged to be due to a building which has been built by the 2<sup>nd</sup> Respondent Anura Silva. He had been occupying the shop No. 58B (which exists as at present even today, at the entry point of the Sunday Fair Road which leads to the upper division of Gaminipura) ,at the Central Market of Hatton as a lessee of the said premises. This shop and premises is legally owned by the Hatton Dickoya Urban Council, the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent had been the lessee even prior to the year 2000. On 24<sup>th</sup> March, 2000 he had entered into a written Agreement with the Urban Council, the 1<sup>st</sup> Respondent, after having made an application to convert the shop which already existed there, into a three storeyed building. The Building Application No. BA/88/98 dated 15.12.1998 had been approved by the Urban Council. The ground floor had to cover only 136 square feet. His building Plan has been produced with his Objections and according to that also, the ground floor covers exactly 136 square feet and nothing more even though it is alleged by the Petitioners that it is more. After the building was completed also the 2<sup>nd</sup> Respondent remains to be the lessee of the Urban Council. He has no ownership rights according to Notarially executed agreement No. 566 dated 24.03.2000. This Agreement is produced by the Petitioners marked as P1(b).

The 1<sup>st</sup> Respondent Urban Council and the 4<sup>th</sup> Respondent Chairman of the Urban Council have filed objections to the Petition and totally denied the allegations made by the Petitioners. Yet, the **Urban Council has admitted the receipt of the document P5(a)** ( in paragraph 13 of its objections filed by way of an affidavit only) **which is the direction and an order given to the Urban Council by the 5<sup>th</sup> Respondent, the Commissioner of Local Government of the Central Province to discuss the problem with the Villagers and remove the obstructions to pave way for a road 14 feet wide.** The Urban Council states that at the time of filing their

objections , i.e. in 2013, **the road is developed and motorable**. The Objections of the 1<sup>st</sup> Respondent does not elaborate on how much the road is developed or what steps the Council has taken to get it developed or demonstrate the status of the road by way of any photographs. I feel that the objections contain only a denial and no attempt has been made to show that the Urban Council has done any work at all to resolve the matter.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have filed objections together, submitting to court that the 1<sup>st</sup> Petitioner is a rival of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and that they have filed this Application against them due to that fact alone. I observe that the 1<sup>st</sup> Petitioner and the 2<sup>nd</sup> Respondent are members of the Urban Council of Hatton Dickoya. However they submit that the alleged disputes or **complaints against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are not amenable to the Fundamental Rights jurisdiction**. They agree that the Petitioners except the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners had quite correctly complained to the Urban Council with regard to obstructions of the road. It is the paramount duty of the Urban Council to act according to the provisions made in the Urban Council Ordinance such as Sections 55, 80, 84 etc. which the Urban Council has failed to do. The Urban Council has not acted responsibly and thus failed to take steps to remove the obstructions , if there are any.

This Court has issued orders to survey the particular road and the entry point to the Sunday Fair Road even prior to the granting of leave to proceed. One such survey was done in October, 2010. Within the record of this case, the survey plan done by Licensed Surveyor T.R.De Zoysa dated 19.10.2012 bearing No. 50/20 is filed. According to that Plan, 100 meters of the road from the entry point had been surveyed, based on the Plan No. 066 (L.R.C. No. Co. 883) dated 18.09.1998 which was filed in Court by the Petitioners marked as **P2**. This plan No. 50/20 shows the width of the road as depicted in the older plan **in red lines, which can be assessed by scrutinizing the same to be about 14 feet wide**. It shows that the width of the road at different places are less than 14 feet, more than 14 feet and at the entrance point to the Sunday Fair Road to be 12 feet and 8 inches. The road in existence is marked in black lines.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents point out in their written submissions that the building which is alleged to have been built encroaching upon the entry point of the road is marked on this plan 50/20 to be **beyond the entry point**.

Thereafter, after granting leave to proceed this Court has issued a fresh commission on 04.06.2014. This survey and the report were submitted to Court with a covering letter by the 5<sup>th</sup> Respondent, the Commissioner of Local Government dated 08.08.2014. The survey filed of record in this instance is only a sketch and a report to the effect that there is no obstruction to traffic or people. The report further states that the land at the **entry point is part of the Sunday Fair land which belongs to the Urban Council.**

The 5<sup>th</sup> Respondent filed objections on 10.10.2013. The 5<sup>th</sup> Respondent had sent **P5(a) dated 05.05.2006** to the Urban Council directing the Council to look into the matter and to remove unauthorized constructions if any. P6, P7(b), P8, P9, P16, and P17 are admitted by the 5<sup>th</sup> Respondent and the Commissioner of Local Government has done his duty on the complaints made by the Petitioners. The powers of the Minister of Local Government in relation to removal of any chairman and dissolution of any Urban Council is contained in Sec. 184 of the Urban Council Ordinance No. 61 of 1939 read with Sec. 2 of the Provincial Council Act ( Consequential Provisions) No. 12 of 1989 and the Enactment of Supervision and Administration of Local Authorities Rule No. 07 of 1990 of the Central Province. The 5<sup>th</sup> Respondent submits that since the Minister is not a party to this application, the Petitioners cannot complain that the Commissioner has not taken steps to follow up the matter of the Urban Council not complying with the directions given to the Council, since the power to do so does not lie with the Commissioner but with the Minister. I fail to see any violation of a fundamental right by the 5<sup>th</sup> Respondent.

During the proceedings of this Court all parties have agreed at different times that the width of the road had been 14 feet from the very inception. The first plan done by the Land Reform Commission is dated in the year 1998. Plan 50/20 referred to above which was done on a commission as ordered by this court also shows the width as 14 feet. However the road is seen to be a gravel road in part and a concrete road at different lengths of the same road. This Court has not been able to get at the development plan proposed in 2005/2006 from the Urban Council to ensure the width of the road proposed to be developed and from which point to what point on the road, the development was approved. The 7<sup>th</sup> Added Respondent mentioned to Court when she appeared in person that it is

only 10 feet 'according to the instructions given by government officials ' , which could be allowed for the Sunday Fair Road.

The Urban Council is duty bound to serve the people of the area which this particular Urban Council has failed to do. Whether the Urban Council is politically with the party of the prevailing Central Government or not, it has to do its duty towards the people of the area. In the case of *Priyangani Vs Nanayakkara and Others 1996, 1 S.L.R. 399, at pg. 400*, Justice Mark Fernando stated thus: "Discretionary powers can never be treated as absolute and unfettered, unless there is compelling language; when reposed in public functionaries such powers are held in trust, to be used for the **benefit of the public, and for the purpose for which they have been conferred, not at the whim and fancy of officials, for political advantage or personal gain.** "

The availability of alternative remedies does not bar any citizen from moving the Supreme Court on a fundamental right. It was argued that the Petitioners should have gone to other forums on the same grounds alleged in this application. Every person has a choice in law to follow whatever action he intends to take with regard to his grievance.

I find from the documents filed in this case, that the Hatton Dickoya Urban Council has to commence the development of the Sunday Fair Road as decided and initiated long ago. The Council has to find the files, the plans, the decisions and find out the reason as for not having gone ahead with the development plan which was initiated in 2005/2006. The road, I find , is at different levels of the ground. It is flat in short distances, it is hilly and steep in other places. Moreover, the retaining walls are necessary on the side of the road unlike in Colombo or coastal areas of our country. In plan 50/20, I find that there are many retaining walls along the road. It can be observed that due to these retaining walls along the road which are done by the Urban Council as well as private land owners, the width of the road has got affected. It would not be easy to keep the width exactly at 14 feet all the way from the beginning of the road to the end. It is a difficult task mainly due to these existing retaining walls. It needs the expertise reposed in engineers and planners who are experienced in the subject of developing roads in the hill country.

I find that the 1<sup>st</sup> Respondent, the Urban Council of Hatton Dickoya has failed to use its authority and discretion in the proper manner with regard to the grievances of the Petitioners as well as the public at large who use this particular road. I hold that the fundamental rights of the Petitioners contained in Article 12(1) of the Constitution have been violated by the 1<sup>st</sup> Respondent. However, in the written submission filed by the Petitioners, it is specifically mentioned that the relief sought at this stage is only to ensure that the authorities are directed to develop the Sunday Fair Road as a 14 feet wide road. Yet, I find that the prayer to the Petition is to get relief as prayed for in the Petition. I hold that the Petitioners are entitled to **a declaration** that “ any construction carried out within the Hatton Dickoya Urban Council Limits circumventing the provisions of the Urban Council Ordinance (as amended), Rules and Regulations thereto, By-Laws and other applicable laws of the country is violative of law and therefore have to be removed and /or demolished”.

I make order directing specifically the 1<sup>st</sup> Respondent and its Acting Secretary and Competent Authority, the 7<sup>th</sup> Respondent, to take steps accordingly within one year, taking P2 ( Plan 066 - L.R.C. Co. 883) dated 18.09.1998 as the basic plan, which leads from the Upper Division of Gaminipura to the Public Market and the Sunday Fair of the Hatton Town, starting from the point of entry at the Sunday Fair.

Judge of the Supreme Court

**Upaly Abeyrathne J.**

I agree.

Judge of the Supreme Court

**H.N.J.Perera J.**

I agree.

Judge of the Supreme Court