

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

*In the matter of Appeal in terms of Article  
128 of the Constitution of the Democratic  
Socialist Republic of Sri Lanka, against a  
judgment of the Court of Appeal.*

SC Appeal No. 66/2013

SC (Special Leave) Application No.  
28/2013

CA Writ Application No. 878/2007

Neville Anthony Keil,  
50, Jambugasmulla Mawatha,  
Nugegoda.

**PETITIONER**

Vs.

1. Maharagama Urban Council,  
Maharagama
  
2. Kanthi Kodikara,  
Chairman,  
Maharagama Urban Council,  
Maharagama

**RESPONDENTS**

**AND NOW BETWEEN**

Neville Anthony Keil,  
50, Jambugasmulla Mawatha,  
Nugegoda.

**PETITIONER- APPELLANT**

Vs.

1. Maharagama Urban Council,  
Maharagama
2. Kanthi Kodikara,  
Chairman,  
Maharagama Urban Council,  
Maharagama

**RESPONDENT-RESPONDENTS**

Before : **P. PADMAN SURASENA, J**  
**YASANTHA KODAGODA, PC, J**  
**MAHINDA SAMAYAWARDHENA, J**

Counsel : Shiral Lakthilaka for Petitioner-Appellant  
S. M. S. Jayawardena for Respondent-Respondent

Argued on : 13-02-2023

Decided on : 15-09-2023

**P Padman Surasena J**

The Petitioner-Appellant filed a petition before the Court of Appeal praying *inter alia*, a Writ of Certiorari to quash the decision of the Maharagama Urban Council contained in item No. 10 of the Local Government Notice published in Gazette No. 1461/ 2006 dated 01-09-2006. The said Notice published in the afore-stated Gazette was to vest a by-lane in the Maharagama Urban Council (1<sup>st</sup> Respondent-Respondent) in terms of Sections 50 and 52 of the Urban Councils Ordinance. The said by lane has been depicted in the sketch produced marked **P 5(c)** which was annexed to the petition filed in the Court of Appeal. As per the said sketch, the said by-lane commences from the property bearing the Assessment No. 48 in Jambugasmulla Mawatha in Nugegoda and runs up to the property bearing the Assessment No. 50. The properties bearing the Assessment Nos. 48/1, 48/2 and 48/3 are on one side of that by-lane and the properties bearing the Assessment Nos. 52, 52/1 50/1 and 50 are on the other side of the by-lane.

At the outset, I must state that the Petition dated 16-10-2007 filed by the Petitioner in the Court of Appeal which had sought the above Writ, has not set out any legal basis upon which the Court of Appeal could have acted in order to consider issuing the writ prayed for by the Petitioner-Appellant.

When filing a writ application any petitioner is obliged to state in its petition the legal basis upon which he/she seeks the writs prayed for in its petition. This is necessary because the court is required to consider such application by applying the relevant law applicable to the legal basis stated in such application. For example, some of such bases which could be cited in such petitions are illegality, irrationality and procedural impropriety etc. whatever such basis would be, it must be clearly discernible from the petition filed by such petitioner in Court. This is because Article 140 of the Constitution has only empowered the Court of Appeal to grant and issue, **according to law**, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against any public authority. The law applicable to one ground differs from another and that is why the compliance of the requirement to clearly state the legal basis in a petition is necessary.

There is another important reason as to why this should be so. The public authorities who have been made respondents to such writ applications are required to defend themselves against the allegations that may have been levelled against them. They generally conduct their defences with the help of legal assistance from lawyers. Thus, it is of paramount importance not only for any such respondent in such writ application, but also for his/ her lawyers who would appear for such respondent, to know exactly the legal basis upon which a writ has been sought from court against such respondent under Article 140 of the Constitution. Any petition which does not comply with the afore-said requirement at least remotely, would therefore be a petition which is misconceived in law.

A closer look at the Petition filed by the Petitioner-Appellant, shows that the several averments in the Petition only contain the sequence of events of certain incidents. They merely have set out the factual background of a dispute to the relevant by-lane that had existed between the Petitioner-Appellant and certain other parties who are residents of some of the afore-mentioned plots of land situated by the side of the relevant by-lane. Having considered the several averments of the Petition filed by Petitioner-Appellant in the Court of Appeal, I am of the view that the said Petition is a petition misconceived in law as it does not set out any legal basis upon which the Court of Appeal could have considered the prayers for the issuance of writs.

I also have to observe at this juncture the followings: the Petitioner-Appellant has not made any of those persons who were involved in the above dispute, parties to the writ application he had filed in the Court of Appeal; some of the said parties had in fact subsequently filed an application to intervene in to the case filed by the Petitioner-Appellant in the Court of Appeal; the Petitioner-Appellant had objected to their intervention in the Court of Appeal; the Court of Appeal by order dated 07-03-2008 had upheld this objection and refused permission for those parties to intervene in this case. I observe that one such party that sought intervention in this case was Gamini Jayaweera Fernando who is admittedly the owner of the soil rights of this by-lane.<sup>1</sup>

In my view, it is not reasonable for the Petitioner-Appellant to take such high ground to ensure the exclusion of the afore-stated relevant persons involved in this dispute from these proceedings. In as much as the Petitioner-Appellant has agitated for some grievance, the afore-stated parties are also interested in placing their side of the story before court. This is particularly because, this is basically a dispute between two parties rather than a dispute between the Petitioner-Appellant and the relevant Urban Council. Indeed, the Urban Council has taken steps to publish the impugned Gazette notification produced marked **X 3**<sup>2</sup> (in the Petition to this Court dated 24-02-2012), only at the request of the afore-stated parties who made such request in **X 10** in the Petition to this Court dated 24-02-2012. For the above reasons, I am of the view that the Petitioner-Appellant had failed to add necessary parties to his petition filed before the Court of Appeal and that would be fatal to his case.

The Petitioner-Appellant relies on the Deed No. 416 attested on 01-04-1993 by Singappuliarachchige Don Susil Premajayanth Nortary Public<sup>3</sup>, to assert his right to the disputed by-lane. However, both according to the Petitioner-Appellant's Deed and his Pleadings, he has only acquired a servitude of a Right of Way over the relevant disputed by-lane. Thus, his interest to the relevant by-lane in the circumstances of this case, must be viewed only as an interest of a person who has acquired such servitude of right of way over that by-lane.

The 1<sup>st</sup> Respondent-Respondent in his statement of objections dated 04-04-2008 filed before the Court of Appeal<sup>4</sup>, has taken up the position that afore-stated Gamini Jayaweera Fernando who enjoys the soil rights of the relevant by-lane, together with several others occupying the

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<sup>1</sup> The Petitioner-Appellant had admitted this fact in para 9 of his petition dated 16-10-2011.

<sup>2</sup> Also produced marked **P 2** in the Petition to the Court of Appeal dated 16-10-2007.

<sup>3</sup> Produced **X 4** in the Petition to the Supreme Court dated 24-02-2012 and **P 1** in the Petition to the Court of Appeal dated 16-10-2007

<sup>4</sup> Produced marked **X 9** in the Petition to the Supreme Court dated 24-02-2012.

afore-stated several other plots of lands situated by the side of this by-lane, by the document produced marked **R 2**<sup>5</sup> (in the Court of Appeal) had requested the Urban Council to develop and maintain this by-lane. **R 2** is dated 21-09-2002 and signed by: Gamini Fernando (Owner of Assessment No. 50/1, 50/A and 50/B); D. S. Weerasuriya (Owner of Assessment No. 52); R. P. P. A. Samarasinghe (Owner of Assessment No. 48); S. J. P. A. Samarasinghe (Owner of Assessment No. 48/2); and S. P. A. Samarasinghe (Owner of Assessment No.48/3).

According to Deed No. 1596 attested on 14-09-1996<sup>6</sup>, the original owner Jayaweera David Fernando who is the father of Jayaweera Gamini Fernando had gifted the properties bearing Assessment Numbers 50 and 50/1 and the relevant by-lane to said Jayaweera Gamini Fernando. The three plots of land above mentioned, appear to have been depicted in plan No. 2470 dated 30-01-1990 prepared by D. C. Hettige Licensed Surveyor. The two plots of land bearing assessment Nos. 50 and 50/1, are Lot Numbers 1 and 2 depicted in that plan and the by-lane is depicted as Lot 2 in the said plan. The Petitioner-Appellant has not produced this plan in Court. According to deed No. 1596, Lot 2 is a road reservation dedicated for common use. Be that as it may, as per the Second Schedule of the Deed No. 1596 dated 14-09-1996 attested by S. R. Kalurathna Notary Public, Gamini Fernando has soil rights over the strip of land (in dispute) in extent of A0: R0: P0630 which is the by-lane relevant to this case. However, the Petitioner-Appellant's entitlement is only limited to the use of it as a right of way.

Since the Urban Council has acted under Sections 50 and 52 of the Urban Councils Ordinance, let me at this juncture reproduce those two sections here for convenience.

Section 50 of the Urban Councils Ordinance:

*Power of Urban Council to construct new, and improve existing, thoroughfares.*

*The Urban Council of each town may within that town—*

*(a) lay out and construct new roads, streets, bridges, or other thoroughfares;*

*(b) widen, open, or enlarge any street or other thoroughfare (not being a principal thoroughfare);*

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<sup>5</sup> Also produced marked **X 10** in the Petition to the Supreme Court dated 24-02-2012 and produced marked **Z** in the Counter Objections filed by the 1<sup>st</sup> to the 5<sup>th</sup> intervenient Petitioners in the Court of Appeal on 14-02-2008.

<sup>6</sup> Produce marked **R 1** in the statement of objections filed before the Court of Appeal on 04-04-2008.

*(c) turn, divert, discontinue, or stop up, whether in whole or in part, any public street or other thoroughfare (not being a principal thoroughfare),*

*making due compensation to the owners or occupiers of any property required for such purposes, or any person whose legal rights are thereby infringed.*

Section 52 of the Urban Councils Ordinance:

*Gifts of land required for diversion or enlargement of thoroughfares.*

*If in connexion with the turning, diversion, widening, opening, enlargement or improvement of any thoroughfare, it becomes necessary for any Urban Council to take possession of the land of any person for public use, and if the person claiming to be the owner of the land desires to make a free gift of the land to the Council for such purpose and to renounce all claim to compensation therefor, a record in writing to that effect duly signed by such person in the presence of the Chairman or of a person authorized by the Chairman in writing in that behalf shall be sufficient to vest the land in the Council. No such record shall be deemed to be invalid or of no effect in law by reason only that the requirements of section 2 of the Prevention of Frauds Ordinance have not been complied with as to attestation by a notary public and by witnesses.*

According to Section 52 of the Urban Councils Ordinance when the owner of the land makes a free gift of his land, to the Council for the purpose of developing it as a roadway, renouncing all his claims for compensation thereto, it would be sufficient for such land to be vested in the Council. The only other requirement under the above section is that such gift must be in writing, duly signed by such person in the presence of a Chairman or a person authorized by the Chairman in writing. The above requirements can be broken down to four distinct items to facilitate its convenient analysis. They are as follows:

1. The owner of the land who desires to make a free gift of the land must make a record in writing of his desire to make a free gift of the land to the Council for such purpose.
2. He must renounce all claims to compensation thereto.
3. He must duly sign such record by himself.
4. The signing must be done in the presence of the Chairman or of a person authorized by the Chairman in writing in that behalf.

Another important factor which needs specific attention is that the said section has also relaxed the application of Section 2 of the Prevention of Frauds Ordinance, which is the requirement of such writing to have been attested by a Notary Public and witnesses. Thus, such record will not be invalid for non-compliance of Section 2 of the Prevention of Frauds Ordinance. In other words, according to Section 52 of the Urban Councils Ordinance, the requirements of attestation by a Notary Public and making such record in the presence of witnesses are not mandatory requirements for a valid vesting as per that section.

Let me now consider the letter (produced marked **X 10**) written by said Gamini Fernando, gifting the relevant soil rights to the 1<sup>st</sup> Respondent Council has complied with the above requirements. It is this document that the 1<sup>st</sup> Respondent-Respondent relies on, to convince this Court that the 1<sup>st</sup> Respondent Urban Council had complied with the provisions in Section 52 of the Urban Councils Ordinance.

Let me consider the afore-stated first requirement. The first requirement is the presence of a record in writing, and this is satisfied by the letter produced marked **X 10** by the Respondents-Respondents. In the letter **X 10**, the signatories clearly and unconditionally request Maharagama Urban Council (the 1<sup>st</sup> Respondent-Respondent) to take steps to acquire this by-lane and develop it as a tarred public roadway. They also request the 1<sup>st</sup> Respondent-Respondent to fix streetlamps for the common benefit of all users. This letter by itself is evidence that the first of the afore-stated requirements has been complied with.

The second requirement is a renunciation of compensation by those who gift it to the Urban Council. What is required according to Section 52 is a record in writing to that effect. Looking at **X 10** as a whole, it is clear that those who had gifted the by-lane to the Urban Council have not sought any compensation in that regard from the Urban Council. They have not even made any such remote indication that they anticipate any compensation when the by-lane is vested in the Urban Council. For those reasons, I hold that there has in fact been a renunciation of compensation for the land by those who had gifted it to the Urban Council. Therefore, I hold that the second of the above requirements has also been complied with.

Thirdly, since the owner of the soil rights who made this free gift to the Council is a signatory to the letter **X 10**. Thus, the third requirement that the record must be signed by the maker of such free gift has also been complied with.

The fourth requirement is the signature of the Chairman, or an individual appointed by the Chairman in writing. On the face of it there is no record to establish that the letter **X 10** was signed before either the Chairman of the Urban Council, or an individual appointed by the Chairman.

The letter **X 10** has been directly addressed to Chairman Maharagama Urban Council which has been received by it according to the stamp placed thereon by Maharagama Urban Council).

The letter **X 10** indicates that it has been copied to R. H. Ranjith, a Member of Maharagama Urban Council.

The letter dated 10-02-2003 addressed to the Chairman Maharagama Urban Council by R. H. Ranjith (the member of the Maharagama Urban Council) has also made the same request to the 1<sup>st</sup> Respondent-Respondent. The Chairman of Maharagama Urban Council who stands as the 1<sup>st</sup> Respondent-Respondent in this case has never ever challenged the fact that the free gift has in fact been made as per the letter **X 10** by its signatories. Indeed, the position taken up by the 1<sup>st</sup> Respondent-Respondent is that Maharagama Urban Council set the rest of the procedure in motion as per the request in letter **X 10**. The said procedure was to have the by-lane vested in the Maharagama Urban Council in terms of Section 52 of the Urban Councils Ordinance. The Petitioner-Appellant himself, had admitted that the relevant vesting of the by-lane had been initiated upon a proposal presented to Maharagama Urban Council by one of its Member<sup>7</sup>.

While the 1<sup>st</sup> Respondent-Respondent or its Chairman has never ever challenged the letter **X 10**, the fact remains that they had indeed acted and relied upon **X 10**.

It is also of paramount importance that the 1<sup>st</sup> Respondent-Respondent Maharagama Urban Council, had even proceeded to conduct an inquiry before it had acted on the request made in **X 10**. This inquiry was conducted in view of the objection raised by the Petitioner-Appellant to the proposed vesting. It is relevant to note that even the Petitioner-Appellant has admitted that it was upon his request for an inquiry that the 1<sup>st</sup> Respondent-Respondent had summoned all parties to the dispute and proceeded to hold an inquiry. The Petitioner-Appellant had admittedly placed all material facts before this inquiry.<sup>8</sup>

On the other hand, it is not the position of the Petitioner-Appellant in the Court of Appeal, that **X 10** was invalid because it did not comply with the aforementioned 4<sup>th</sup> requirement. I find no trace of anything even remotely connected to non-compliance of Section 52 has ever been agitated as a ground for claiming the Writ of Certiorari in the Petition filed by the Petitioner-Appellant in the Court of Appeal. Therefore, that ground appears to be an afterthought entertained by the Petitioner-Appellant after conclusion of the case in the Court of Appeal. The Respondents have had no opportunity to meet or answer such ground when they had presented their case in the Court of Appeal. This appeal has been lodged against the Court of Appeal decision pronounced in respect of the case it had heard. Therefore, this Court cannot permit the Petitioner-Appellant to advance a case materially different to what was presented before the original court. It is trite law that no person in the course of hearing the

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<sup>7</sup> Paragraph 17 of Petition dated 16-10-2007 filed in the Court of Appeal.

<sup>8</sup> Paragraph 11 of Petition dated 16-10-2007 filed in the Court of Appeal.



Appeal, can advance a case materially different to what was presented before the original court.

For the above reasons, I am not inclined to hold that the vesting of the by-lane in Maharagama Urban Council through the process that the 1<sup>st</sup> Respondent had followed, is bad in law merely because one could not find any writing on the face of letter **X 10** to the effect that it was signed in the presence of the Chairman or of a person authorized by Chairman in writing in that regard. This is particularly because the authenticity of **X 10** was never in issue before the Court of Appeal.

Perusal of the Petition presented to the Court of Appeal by the Petitioner-Appellant produced marked **X 2** in this case, shows clearly that the main ground on which the Petitioner-Appellant had presented his case to the Court of Appeal is that the primary court of Gangodawila in an application filed before it under Section 66 of the Primary Courts Procedure Act, had made an order on 12-09-1996<sup>9</sup> that Premasiri Gamage (owner of assessment No. 52 Jambugasmulla Mawatha), had no right to use the right of way over this by-lane. The Petitioner-Appellant had also highlighted the fact that the High Court of Colombo upon an Application for Revision filed in that regard by said Premasiri Gamage, had affirmed the aforesaid primary court Order<sup>10</sup>. It was the position of the Petitioner-Appellant in the Court of Appeal that aforesaid Premasiri Gamage who had claimed a right of way in the aforesaid Primary Court case, has gained improper advantage due to this vesting despite a Primary Court ruling against him. With regard to this argument, suffice it to state here that any entitlement or non-entitlement for a servitude of Right of Way under Section 66 of the Primary Courts Procedure Act cannot hinder such person using a public road even if it is the same roadway which had earlier stood as a private road. Therefore, in my view this is not a valid ground for the Court of Appeal to issue a Writ of Certiorari which the Petitioner-Appellant had sought from it.

Although the Petitioner-Appellant in the Court of Appeal had stated that the 1<sup>st</sup> Respondent-Respondent had proceeded with the process of vesting without a proper technical report being obtained I see no merit or substance in such argument. This is because the identity of the by-lane was never in dispute between the parties and was clear in everyone's mind throughout the proceedings.

For the reasons set out above and having regard to the nature of the questions of law in respect of which this Court has granted Special Leave to Appeal I hold as follows:

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<sup>9</sup> Produced marked **P 7(b)** in the Petition to the Court of Appeal dated 16-10-2007 and produced marked **X 5** in the Petition to the Supreme Court dated 24-02-2012.

<sup>10</sup> Produced marked **P 8** in the Petition to the Court of Appeal dated 16-10-2007 and produced marked **X 6** in the Petition to the Supreme Court dated 24-02-2012.

- I. The letter dated 21-09-2002 produced marked **X 10** can be taken as a "free gift" within the meaning of Section 52 of the Urban Councils' Ordinance.
- II. the vesting of the disputed private roadway by the Gazette Notification No. 1461 dated 01-09-2006 (produced marked **X 3**) complied with the imperative requirements in Section 52 of the Urban Councils Ordinance.
- III. The fact that the Petitioner-Appellant has not signed the letter dated 21-09-2002 **X 10** is not relevant as he does not have soil rights to the by-lane. His right of way can continue without any hindrance even after vesting the by-lane in the Urban Council as a public road.

I hold that the Court of Appeal has correctly held that in the circumstances of this case, there is no illegality or irrationality in the vesting. I also hold that the Court of Appeal has correctly held that if the Petitioner challenges the free gift of the said by-lane by said Gamini Fernando on the basis that he has no soil rights on the said strip of land it cannot be decided in this case as it involves disputed questions of facts.

I proceed to dismiss this appeal but without costs.

**JUDGE OF THE SUPREME COURT**

**Yasantha Kodagoda PC J**

I agree,

**JUDGE OF THE SUPREME COURT**

**Mahinda Samayawardhena J**

I agree,

**JUDGE OF THE SUPREME COURT**