

**SUKUMAL
VS
MUNICIPAL COUNCIL OF COLOMBO**

COURT OF APPEAL,
AMARATUNGA, J.,
WIMALACHANDRA, J.
CALA 249/2003
D. C. COLOMBO 6086/SPL
MARCH 29 2004
AUGUST 9, 2004

Municipal Councils Ordinance - Section 49 (1), Section 177 - Appointment to any post or office in the Council - who could appoint? - Is it the Mayor or the Municipal Council Commissioner.

The Plaintiff Petitioner instituted action seeking a declaration that he be declared as the permanent caretaker of the Public Toilet of Colombo Municipal Council at a particular bus stand, and a permanent injunction restraining the Defendants from removing him from the said post. He claimed that he was appointed by the Mayor of the Council. Interim relief was refused by the District Court.

On leave being sought.

HELD :

- (i) The public toilet is the property of the Colombo Municipal Council, the Provisions relating to appointments are found in section 40(1) and section 177.
- (ii) It is the Municipal Council and/ or the Commissioner authorised by the Council who could make appointments. The Mayor had no authority to make such appointments.
- (iii) Court will grant an injunction only to support a legal right.

APPLICATION for leave to appeal from an Order of the District Court of Colombo.

Dr. Jayathissa de Costa with D. D. P. Dassanayake for Plaintiff Petitioner.
Ms. M. Silva for Defendant Petitioner.

Cur adv vult

November 3, 2004

WIMALACHANDRA, J.

This is a leave to appeal application against the order dated 26. 06. 2003 of the learned Additional District Judge of Colombo, refusing to grant an interim injunction against the 1st and 2nd defendants respondents (defendants) as prayed for in the paragraph.

The plaintiff - petitioner (plaintiff) instituted the action bearing No. 6086/Spl in the District Court of Colombo, seeking a declaration that the plaintiff be declared as the permanent caretaker of public toilet of the Colombo Municipal Council at the Gunasinghepura Bus stand, and a permanent injunction restraining the defendant - respondents (defendants) from removing the plaintiff from the position of the permanent caretaker of the said public toilet. He also prayed for an interim injunction against the defendants, restraining them from removing him from the said position until the determination of the plaintiffs action.

When the application for an interim injunction was taken before the learned Additional District Judge of Colombo the parties were directed to file written submissions and thereafter the learned Judge delivered the order on 26. 06. 2003 refusing the interim injunction prayed for by the plaintiff. It is against this order the plaintiff has filed this application for leave to appeal.

Admittedly, the said Public Toilet is the property of the 1st defendant, the Colombo Municipal Council. The plaintiff claims that he was appointed as the permanent caretaker of the said Public toilet by the then Mayor Mr. Ratnasiri Rajapakse in 1993. However the plaintiff did not produce the letter of appointment at the inquiry held before the learned Judge. The provisions relating to the appointments under the Municipal Council Ordinance are found in section 40(1) of the Municipal Council Ordinance. Section 177 of the Ordinance states as follows:

“Notwithstanding anythin in any orther written law, the Commissioner may, if so authorized by the Council, form time to time, appoint or promote any person to any post or office in the service of the Council (other than a post in the Local Government Service) the initial salary of which does not exceed such sum as may be specified in the resolution of the Council whereby such authority is delegated to the Commissioner.”

Therefore it is to be seen that is the Municipal Council and/ or the Commissioner authorized by the Council who makes such appointments. The Mayor has no authority to make such appointment.

The plaintiff admits in paragraph 9 of the affidavit annexed to the plaint that there was no contract between the plaintiff and the 1st defendant, the Colombo Municipal Council. The relevant portion in paragraph 9 reads as follows:

“මාගේ පත් කිරීම කිසියම් කාල පරිච්ඡේදයකට සීමා කරන ගිවිසුමක් මත පිළිකොටු අතර එය ස්ථිර පත් කිරීමක් විය. එය පැය ෧෫00කට පමණ පමණ පිළිබඳ කිසියම් තෝරා ගැනීමක් වූයේ නොවන අතර සභාව සහ මා අතර කොන්කිමක්ද මතාට පැහැදිලිවේ.”

The plaintiff's original position is that the then mayor, Mr. Rajapaksha appointed him as the permanent caretaker of the said Public Toilet and he states that it was a permanent appointment.

The plaintiff also takes a different position and states that he submitted sealed quotations for the post of caretaker of the Goonesinhepura Public toilet in response to a notice of invitation to tender, dated 28. 11. 1988 pulished in the Dinamina News Paper (a copy of which is annexed to the plaint marked “P4”) and the mayor, Mr. Rajapakse appointed him as the caretaker of the said Public toilet.

It is to be observed that the plaintiff claims that he became the caretaker of the said Public Toilet after being appointed by the former Mayor, Mr. Rajapakse. He has also taken up the position that he was appointed as the successful tenderer after he had tendered for the Gonnesinghepura Public toilet in response to a tender notice published in the Dinamina News Paper dated 28. 1. 1988 (a copy of which is annexed to the plaint marked “P4”). It appears that the plaintiff has taken two contrary positions with regard to how he became the caretaker of the said Public Toilet.

In any event he has failed to produce any letter of appointment given either by the Colombo Municipal Council or by the former Mayor, Mr. Rajapakse.

However, it will be seen that in terms of the provisions of the Municipal Council Ordinance it is the Municipal Council, acting by itself or through the Commissioner, which can make appointments. The plaintiff has also failed to produce a written agreement entered into with the Colombo Municipal Council relating to the Goonesinghepura Public Toilet. In these circumstances, it appears that the plaintiff does not possess any such valid document of appointment at all.

Admittedly, there is no agreement in writing between the plaintiff and the 1st defendant for the maintenance of the Goonesinghepura Public Toilet belonging to the 1st defendant. It is apparent on the material placed before Court that there has been no commitment on the part of the 1st and 2nd defendants to hand over the said Public Toilet to the plaintiff. The plaintiff has failed to establish the existence of a written agreement for leasing the said Public toilet to him.

In these circumstances, I am of the opinion that the plaintiff has failed to establish a *prima facie* case in his favour. The Court will grant an injunction only to support a legal right. The plaintiff first tried to show that he was appointed by the former Mayor, Mr. Rajapakse but failed to produce any letter of appointment. Thereafter he tried to show that he was the successful tenderer who was awarded the tender and on this ground he is entitled to be appointed as the caretaker of the said Public Toilet. But he failed to establish that he was the successful tenderer who was awarded the tender as the highest bidder by documentary evidence.

Accordingly, the plaintiff has failed to establish a *prima facie* case. It is only when there is a *prima facie* case the court would consider where the balance of convenience lie.

This Court therefore sees no reason to interfere with the order of the learned Additional Additional District Judge dated 26. 03. 2003. The application for leave to appeal is dismissed with costs fixed at Rs. 2,500/-

Amaratunge J. - I agree

Application dismissed.