FUNDAMENTAL RIGHTS - S/C

DR. K. MAHENDRARAJAH AND ANOTHER V THE CHAIRMAN, CONDOMINIUM MANAGEMENT AUTHORITY AND OTHERS

Fundamental rights - Article 12(1) of the Constitution - Equal protection of the law - Condominium apartment purchasers - Recalcitrant property developer - Unauthorized construction of restaurant and supermarket on approved parking space - Failure of statutory regulatory authorities to enforce their own orders and recommendations - Condominium Management Authority (CMA) - Colombo Municipal Council (CMC) - Urban Development Authority (UDA) - Loss of official building plans by statutory authorities - Whether executive inaction and negligence of state authorities constitutes a violation of fundamental rights - Held: yes - Liability of a private property developer in fundamental rights proceedings - Whether the Supreme Court may hold a private non-state actor liable under Article 126 of the Constitution - Expansion of the Court's just and equitable jurisdiction under Article 126(4) - Constitutional torts - UN Guiding Principles on Business and Human Rights - ECOSOC Norms on the Responsibilities of Business Enterprises - Universal Declaration of Human Rights, Preamble - Compensation of Rs. 10,000,000/- ordered against private developer to be deposited in escrow for upkeep of condominium - Directions to CMA to frame rules regulating promotional material, escrow deposits of purchase monies and sale agreements - Structural engineers to be appointed to assess feasibility of demolition of unauthorized structures - Attorney General directed to supervise implementation and file progress report - Faiz v. Attorney General followed - Janath S. Vidanage v. Pujith Jayasundara (Easter Sunday case) followed - Noble Resources International Pte Ltd v. Ranjith Siyambalapitiya applied.

SC / FR / 525 / 2011

Before	:	**A.H.M.D. Nawaz, J.** **Kumudini Wickremasinghe, J.** **A.L. Shiran Gooneratne, J.**
Counsel	:	Dr. Mahendraraja with K. Balendran for the Petitioners appear in person. Yuresha de Silva, DSG for the 1st, 3rd to 5th Respondents. Ruwantha Cooray and Kesara Hewavissa for 2nd Respondent. Harsha Soza, PC with Sreehan Samaranayake for the 6th Respondent.
Argued on	:	05.12.2024
Decided on	:	30.03.2026

- *The failure of the CMA, CMC and UDA to implement their own orders, inquiry officer recommendations and regulatory directions over a period spanning two decades, in circumstances where the rights of citizen apartment owners were directly at stake, constituted arbitrary and unreasonable conduct amounting to a violation of the equal protection of the law guaranteed by Article 12(1) of the Constitution. The loss of official building plans by both the CMC and the UDA was not an inconsequential administrative mishap but crass negligence and an abject dereliction of statutory duty, which enabled the developer to operate in a regulatory vacuum.*
- *The Supreme Court's jurisdiction under Article 126(4) of the Constitution to grant such relief as is just and equitable extends to the making of orders and directions against a private non-state actor where that actor's conduct is inextricably linked, through the nexus of executive acquiescence and inaction, to the infringement of fundamental rights. The UN Guiding Principles on Business and Human Rights, the ECOSOC Norms on the Responsibilities of Business Enterprises, and the Preamble to the Universal Declaration of Human Rights, which affirms the obligations of every organ of society, provide authoritative international support for holding a private property developer amenable to this jurisdiction.*
- *The private developer's persistent and contumacious deviation from the approved building plan, its appropriation of promised parking space for unauthorized commercial use, its obstruction of a regulatory site inspection, and its replacement of an unlawful restaurant with an equally unlawful supermarket following a demolition recommendation, constituted a deliberate and systematic subversion of the reasonable expectations of citizen apartment owners who had invested their life savings upon the faith of the developer's representations.*
- *Per Nawaz J.: "The conduct of the 6th Respondent in this case amounted to playing ducks and drakes with the money and expectations of apartment dwellers."*
- *The CMA is directed, without further delay, to frame rules requiring that all representations as to amenities, parking facilities, floor areas and common areas be embodied in legally binding and enforceable instruments, that all monies received from prospective and existing buyers be maintained in escrow accounts, and that effective dispute resolution mechanisms be put in place. The Attorney General is directed to supervise the implementation of the Court's orders and to file a progress report within four months.*
- *Application allowed. Compensation of Rs. 10,000,000/- ordered against the private developer, to be held in escrow under joint supervision of the CMA and UDA for the maintenance and upkeep of the condominium. The 1st, 2nd and 3rd Respondents directed to appoint structural engineers within sixty days to assess the feasibility of demolishing the unauthorized structures and restoring adequate parking.*

A.H.M.D. Nawaz, J.

1. This fundamental rights application has had a somewhat protracted and chequered history before this Court. The two Petitioners, who purchased residential apartments

upon the faith of representations and advertisements issued by a property developer, complain of an infringement of their fundamental rights. They attribute such infringement to the failure and inaction of certain statutory authorities to take appropriate steps in respect of what are alleged to be manifest violations of the law by the developer.

2. The narrative placed before Court discloses a prolonged grievance. The Petitioners aver that they were driven from one authority to another in search of redress, without any effective remedy being afforded to them. As the 2nd Petitioner, who addressed Court briefly in person, stated, it was only after such efforts proved unavailing that they were constrained to invoke the jurisdiction of this Court under Article 126 of the Constitution.

3. According to the averments in the petition, the 1st Petitioner, Kathiresanathan Mahendrarajah, is a consultant surgeon, while the 2nd Petitioner, Kanagasabai Balendra, is a retired Managing Director of a private company. The Petitioners appeared in person and presented their case before this Court. In view of certain deficiencies in the initial pleadings, an amended petition was tendered on 10 January 2013, wherein the Petitioners sought, *inter alia,* the following relief;

    1. An order directing the 1st to 4th Respondents to submit a comprehensive report concerning the property in dispute;
    2. An order directing the 1st Respondent, namely the Condominium Management Authority (CMA), to make a determination upon such inquiry;
    3. An order directing the 2nd and 3rd Respondents to recover the costs from the party found to be at fault; and
    4. An order directing the 2nd and 3rd Respondents to take steps to reconstruct files that are stated to have been misplaced.

4. It has to be borne in mind that in the exercise of its jurisdiction under Article 126 of the Constitution this Court exercises a just and equitable jurisdiction and now that leave was granted to the Petitioners under Article 12 (1) of the Constitution, the investigation that this Court conducts in the exercise of this jurisdiction and the findings reached will eventually determine the relief that the Court may deem appropriate to grant and such a just and equitable relief shall be commensurate with the liability that comes to be attached to any Respondents.

5. A perusal of the amended petition reveals a troubling account of the manner in which the Petitioners allege they have been treated by the 6th Respondent, the property developer called Seagull Property Developers (Pvt) Ltd. Induced by promotional material advertising a six-storeyed condominium in Hampden Lane, Wellawatte, and encouraged by representations that included the provision of adequate and dedicated

parking facilities, the Petitioners state that they invested substantial sums of money in the purchase of their respective apartments.

6. Whilst the 1st Petitioner submitted that he had received only certain receipts in acknowledgment of the payments made by him, the 2nd Petitioner stated that the 6th Respondent, the property developer, had entered into a formal agreement of sale with him. A perusal of that agreement reveals that the 6th Respondent had expressly represented that adequate parking facilities would be provided to purchasers of the apartments. However, the position that emerged in reality was markedly at variance with what had been represented. When the Petitioners tookpossession of their respective apartments in or about 2003, they found that the promised provision of adequate parking facilities had not materialized.

7. From 2003 to 2011, when the Petitioners first invoked the jurisdiction of this Court, the material placed before us discloses sustained efforts on their part to seek redress from the relevant authorities. The Petitioners appear to have approached several statutory bodies in an attempt to have their grievance addressed.

8. Notwithstanding these efforts, no effective remedial action was forthcoming. The Petitioners aver that their complaints failed to elicit a meaningful response, and that their attempts to hold the 6th Respondent accountable were met either with inaction or with responses that did not advance their cause. This was the pith and substance of the submissions we heard from the Petitioners, when they appeared before us in person and held out on their own.

9. Against the backdrop of the grievances ventilated by the Petitioners, a consideration of the timeline of events in this protracted litigation is quite instructive. In the course of submissions before Court, reference has been made to an original approved building plan dated 21 September 2001, as well as to a subsequent amended plan. The material placed before this Court suggests that the 6th Respondent developer sought to amend the original plan so as to introduce, *inter alia*, a restaurant within the premises. This amended plan, however, was rejected by the Urban Development Authority (UDA), and the developer was directed to revert to the original approved plan.

10. Notwithstanding such rejection, it would appear that the 6th Respondent proceeded to permit the operation of a restaurant within the premises. The 2nd Petitioner stated in his submission that this restaurant had been operating from the premises for years on end, until it was replaced by a super market. This course of conduct, ifestablished, would amount to a clear deviation from the concerns as to compliance with the applicable planning laws.

11. It is pertinent in this context to recall that a Certificate of Conformity dated 5 March 2004 was issued by the Colombo Municipal Council (CMC), the 2nd Respondent, in

respect of premises bearing No. 46, Hampden Lane, Colombo 06, for a shop and 36 dwelling units. The said Certificate of Conformity makes no reference to a restaurant and is expressly referable to the original approved plan bearing No. 05/02/CPS/47/663/01. Although the developer appears to have sought an amendment to this plan, such an attempt, as I said before, did not receive regulatory approval.

12. Indeed, by letter dated 10 March 2004, the Director (Enforcement) of the UDA informed the developer that the application for an amended building plan and a Certificate of Conformity had been rejected by the Planning Committee, and that the developer was required to adhere to the previously approved plan. It would therefore follow that the permitted use of the premises remained confined to a shop and 36 dwelling units, without any approval for a restaurant.

13. Turning to the subsequent events, it is to be noted that the Petitioners lodged a complaint with the 1st Respondent, the Condominium Management Authority (CMA), on 4 March 2005. An inquiry was initiated by the CMA in or about May 2005 and it concluded in 2011 with recommendations being made by the inquiry officer against the developer.

14. In parallel, proceedings were instituted by the CMC before the Magistrate's Court of Mount Lavinia against the developer in respect of unauthorized constructions. Those proceedings culminated in an order directing the demolition of certain structures erected contrary to the development permit and the approved building plan. Notwithstanding the issuance of such order on or about 26 May 2006, thedeveloper failed to comply with the same. Equally, there is no material to indicate that the relevant authorities took steps to enforce that order. The result was that the impugned structures continued to subsist, and the grievance of the apartment owners remained unresolved. Moreover, the CMC had not included the restaurant for a demolition order but rather it was a security hut which was part of the application for demolition. Insofar as only the security hut which occupies only a narrow strip was only identified by the CMC as an illegal construction, it defies logic as to how other illegal structures inclusive of the restaurant went a-begging for a demolition order in the application to the Magistrate's Court.

Leave to Proceed vis-a-vis the Inquiry Officer's Findings

15. Leave to proceed was granted to the Petitioners on 20 October 2015. A perusal of the journal entries of that date suggests that the matter had, at that stage, reached a point where a resolution appeared within reach. The serpentine inquiry initiated by the CMA had concluded with recommendations against the developer by the time the Petitioners came to support their application for leave. The recommendations made by the inquiry officer held out a glimmer of hope but what followed demonstrates that the matter was far from concluded.

16. On 20 October 2015, a Bench comprising Marasinghe J., Jayawardena PC, J., and Abeyrathne, J. granted the Petitioners leave to proceed in respect of an alleged infringement of Article 12 (1) of the Constitution. At that stage, learned Senior State Counsel Yuresha de Silva drew the attention of this Court to the report of the inquiry officer dated 15 December 2014. Learned Senior State Counsel further informed the Court that the CMA would take steps to implement the recommendations contained in that report in the event the developer failed to comply with them *within a month.*

17. However, the subsequent journal entries of this case in the Supreme Court reveal that the anticipated compliance did not materialize, and the enforcement of the order made by the inquiry officer for the demolition of the restaurant remained inchoate. The recommendations of the Inquiry Officer dated 15 December 2014 thus remain unimplemented even to date. The pendency of this case in the Supreme Court posed no hindrance to the CMA to pursue the legal mechanism at its disposal to put an end to the illegal constructions and the record does not bear out any acceptable explanations on the part of the CMA for its tardy approach to a pandemonium in a condominium.

18. The findings of the Inquiry Officer, following an inquiry that had its genesis in 2005 and concluded in 2014, were to the effect that the developer had erected unauthorized structures, including a restaurant, which required demolition. The 6th Respondent was accordingly placed under an obligation to remove such structures, thereby restoring, *inter alia* the parking facilities to which the apartment owners laid claim.

19. Thus, I arrive at the *dénouement* of this dispute. In disentangling the complex factual matrix that underlies the controversy between the parties, I have, as it were, cut to the chase and confined the analysis to those bare essentials which may properly be described as notorious facts.

20. When this Bench was constituted to hear the matter afresh, we were acutely conscious of the circuitous path this case had traversed. The extensive documentation annexed by both the Petitioners and the Respondents necessitated a careful and anxious scrutiny. It is only after undertaking that exercise that this Court has distilled the essential issues and now proceeds to its determination.

21. Before I proceed to turn to the case advanced by the 6th Respondent developer, let me hasten to summarize the pith and substance of the Petitioners' complaint once again;

    a) That a portion of the parking area of the condominium property has been converted into a restaurant without the consent of the Petitioners, thereby enabling the 6th Respondent, the developer, to derive a commercial benefit in a manner that is said to undermine the prior representation as to the availability of adequate parking facilities;

b) That there exist discrepancies between the floor areas declared to the 3rd Respondent, the Urban Development Authority (UDA), and the floor areas represented in the promotional material issued to prospective purchasers;

c) That, based on the floor areas advertised, provision ought to have been made for 30 parking stalls, whereas the declarations made to the UDA would support only 24 such stalls, and that, in any event, the Petitioners allege that even parking facilities for 24 vehicles have not been provided, the actual availability being limited to approximately 20 vehicles.

22. I would set forth some observations flowing from the proved facts in the case and it is useful to bear them in mind before I move to the 6th Respondent's case.

23. While the inquiry initiated by the CMA – the 1st Respondent was in progress, the Petitioners complained that it was meaningless to continue with the inquiry without physical verification of the site. By an order of the General Manager of the1st Respondent dated 1 March 2007, it was instructed that a site inspection of the said condominium property be carried out.

24. This order was however challenged by the 6th Respondent in the Court of Appeal in CA (Writ) Application No. 593/2007, whereupon the General Manager of the CMA withdrew the order made by him. I would like to point out that further inquiries and attempts to carry out site inspections proved abortive thereafter.

25. I would also draw attention to the fact that there was an enormous difference between the floor area advertised in the brochure and the floor area approved by the Colombo Municipal Council and the Urban Development Authority.

26. As a result, the minimum parking area which had been approved by the CMC had reduced below the minimum requirement. Further, the restaurant, which had been put up on the ground floor, was not shown in the brochure and had taken up the parking area.

27. Compounded by the existence of the said restaurant, the following impediments supervened.

a. The construction of the restaurant had reduced the parking area to vehicles, while a minimum of 30 parking spaces should have been provided according to the floor area advertised in the brochure.

b. As the commercial area (the restaurant) did not have a separate parking area, all customers made use of the road to park their vehicles, causing inconvenience to the apartment dwellers.

28. In the final analysis, the constant refrain running through the Petitioners' case is their asserted need for additional parking space. The central contention advanced was that such need should be addressed by the removal of the restaurant, whichwas alleged to have been operating unlawfully, and the consequent incorporation of that area into the existing parking facilities was posing a veritable difficulty.

29. I would also like to comment that in a joint inspection that followed during the pendency of this case, the second amended plan was not to be found and the 3rd Respondent (UDA) quite explicitly admitted that the file containing the amended plan was missing.

30. From the foregoing it is quite clear that the 6th Respondent developer had engaged with statutory authorities cited in this application as Respondents and the developer had been quite recalcitrant and obstinate in its singular motive to make economic profits at the expense of the apartment buyers but there has been a culpable failure on the part of some of these statutory authorities to arrest the rising tide of such obstinacy of a property developer, which should have been brought to book. The evidence produced in the case shows quite clearly that the developer had thrown to the winds all norms of a law-abiding company whose conduct in the end caused jeopardy to the welfare and common weal of the Petitioners and other apartment dwellers.

31. As opposed to these facts that are as clear as a pikestaff, the 6th Respondents has prayed for a dismissal of the case as the management corporation of the property has not been made a party and that the Petitioners' allegations all amount to "breaches of contractual obligations" which would not form the subject matter of a fundamental rights application.

32. I would repudiate this stance of the 6th Respondent and reject it out of hand as this Court takes the view that *prima facie* there is an infringement of Article 12 (1) of the Constitution insofar as the rule of law which requires non-arbitrariness to pervade in the lives of citizens has not been maintained as a result of the obstinate defiance of the planning laws of the country. Mere holding of inquiries will notprovide effective remedies to harried apartment buyers when their grievances could be addressed within the four corners of governing statutes but the statutory functionaries cannot receive the approbation of this Court when they have stood as mute bystanders.

33. The demolition order that followed the application of the Colombo Municipal Council did not mysteriously include a prayer for a demolition of the restaurant.

34. Moreover, the recommendations made by the inquiry officer for demolition of the restaurant as far back as 2014 remain unimplemented even to date. I take the view that the Supreme Court has expanded its jurisdiction under Article 126 of the Constitution so as to render ***even a private party or a non-state actor liable by awarding such***

relief or directions as it may deem just and equitable in terms of Article 126 (4) of the Constitution.

35. Having traced the factual contours of this protracted dispute, I now proceed to address the foundational legal question that animates the present application, namely, whether this Court in the exercise of its fundamental rights jurisdiction under Article 126 of the Constitution may hold a private entity such as the 6th Respondent, Seagull Property Developers (Pvt) Ltd, liable for an infringement of the fundamental rights of the Petitioners. The traditional view, consonant with the text of Articles 17 and 126 (1) of the Constitution, has been that the fundamental rights jurisdiction of this Court is triggered by infringement or imminent infringement of fundamental rights by *executive or administrative action.* This understanding, in its classical formulation, appeared to confine the jurisdiction of this Court to actions by the State and its organs, leaving private parties beyond its reach.

36. The seminal authority on this question is **Faiz V Attorney General and Others**[1], where this Court, per Mark Fernando J., held at page 383 that the act of a private individual would render that individual liable if, in the circumstances, that act is 'executive or administrative'. The learned Judge reasoned that the act of a private individual would be executive if done with the authority of the executive, which authority transforms an otherwise purely private act into executive or administrative action. Such authority may be express or may be implied from prior or concurrent acts manifesting *approval, instigation, connivance, acquiescence, participation and the like*, including inaction in circumstances where there is a duty to act, and from subsequent acts which manifest ratification or adoption. The learned Judge further held that responsibility under Article 126 would extend to all situations in which the nexus between the individual and the executive makes it equitable to attribute such responsibility. Crucially, the learned Judge added the prescient observation that *in any event* this Court would have power under Article 126 (4) to make orders and directions against a private individual in order to afford relief to the victim. I regard that observation as laying the groundwork for the expansive jurisdiction that this Court has since developed.

37. The jurisprudential genesis as inaugurated by **Faiz** has been carried forward with considerable vigour in the subsequent decisions of this Court. A watershed moment in this development was **Janath S. Vidanage and Others V Pujith Jayasundara and Others**[2], the celebrated **Easter Sunday case**. In that landmark judgment, this Court unequivocally embraced the concept of *'constitutional torts'*, acknowledging that courts in numerous jurisdictions abroad have embraced this concept in human rights law adjudications. This Court held that tortious or delictual principles are applicable in the adjudication of fundamental rights violations, and that such principles from statutory or common law could be engrafted onto public law remedies to determine liability. A constitutional tort, as this Court recognized in the **Easter Sunday case**, is a

violation of the fundamental rights of a person by the State or any of its agencies or instrumentalities. The significance of that pronouncement for the instant case is that it opened the door for the principles of constitutional tort to be applied as between private actors and affected citizens alike.

38. The further and critical development in this Court's jurisprudence is to be found in **Noble Resources International Pte Limited V Hon. Ranjith Siyambalapitiya**[3]. That case established the far-reaching proposition that this Court may grant relief under Article 126 (4) of the Constitution even without making a finding that there has been an infringement or imminent infringement of fundamental rights. In that case, the application was dismissed on preliminary grounds, yet this Court still thought it appropriate to issue directions in the interests of the rule of law. The principle that emerges from **Noble Resources** is that the just and equitable jurisdiction vested in this Court by Article 126 (4) of the Constitution is not conditioned solely upon a finding of infringement, but may be invoked whenever the interests of justice and the rule of law so demand.

39. The domestic constitutional developments outlined above are consonant with the evolution of international norms governing the obligations of private business enterprises with respect to human rights. The Economic and Social Council of the United Nations has adopted the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*[4] These Norms affirm, at page 4, that States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including by ensuring that transnational corporations and other business enterprises respect human rights. Equally, and of particular relevance to the facts of this case, those norms affirm that within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of vulnerable groups.

40. Subsequent to the ECOSOC Norms, the United Nations Human Rights Council unanimously endorsed the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*[5]. These Guiding Principles recognize the corporate responsibility to respect human rights in terms of the clearest possible language. They state that business enterprises should respect human rights, meaning that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. The responsibility to respect human rights is described in the *Guiding Principles* as a global standard of expected conduct for all business enterprises wherever they operate. Importantly, the *Guiding Principles* recognize that where such abuses occur, effective remedy must be accessible, and that remedy may include

apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions.

41. The Universal Declaration of Human Rights (UDHR), in its preamble, proclaims that *every individual and every organ of society*, keeping that declaration constantly in mind, shall strive by teaching and education to promote respect for human rights and freedoms. This Court, in **Centre for Policy Alternatives (Guarantee) Ltd and Three Others**[6], affirmed at page 393 that the fundamental rights declared and recognized in Chapter III of the Constitution are based on the Universal Declaration of Human Rights. I am of the view that the phrase *'every organ of society'* in the preamble of the UDHR, which has been recognized as authoritative in the jurisprudence of this Court is apt to encompass private business enterprises such as the 6th Respondent. Where such an enterprise, by its acts and omissions, tramples upon the rights and reasonable expectations of the very citizens who reposed their trust and invested their savings in its project, neither the Constitution nor international human rights norms permit such conduct to pass without consequence.

42. Applying the above principles to the facts of this case, I am satisfied that the 6th Respondent is amenable to the jurisdiction of this Court and is liable for a violation of the fundamental rights of the Petitioners on the basis of his complicity. The 6th Respondent cannot shelter behind the argument that it is a private party and that its conduct, however unconscionable, cannot be the subject of a fundamental rights application. The nexus between the conduct of the 6th Respondent and the executive inaction of the 1st, 2nd and 3rd Respondents is manifest and clearly established on the evidence before this Court. The 6th Respondent's persistent and contumacious deviation from the approved building plan which was the very plan by reference to which the statutory authorities granted regulatory approvals directly frustrated the ability of those authorities to enforce the law and thereby inextricably linked the conduct of the 6th Respondent with the executive inaction that is at the heart of this application.

43. Further and in any event, even if this Court were to apply the more cautious formulation of the test in ***Faiz***, which requires approval, instigation, connivance, acquiescence, or participation that threshold is satisfied in this case. The 6th Respondent obtained regulatory approvals from the statutory respondents on the basis of the original building plan and then proceeded, in deliberate disregard of both the plan and the subsequent rejection of its amended proposal, to construct a restaurant upon what was intended and approved as parking space. The 2nd Respondent (CMC) failed to follow through on a demolition order that it itself had obtained from the Magistrate's Court of Mount Lavinia. The order obtained was narrower in content in that it did not order the demolition of the restaurant. The 3rd Respondent (UDA) lost the very building plans that were the foundation of the regulatory framework. The 1st Respondent (CMA) failed to implement the

recommendations of its own inquiry officer made as far back as 2014. On the dayleave was granted, there was assurance to Court that the CMA would take steps to demolish the restaurant but there is no affidavit from the CMA as to how it shelved aside its steps. The inaction of these statutory bodies in circumstances where they were duty-bound to act constitutes, in terms of ***Faiz***, an implied form of acquiescence in and facilitation of the 6th Respondent's obstinate and unlawful conduct.

44. Even if this Court were to proceed on the basis articulated in **Noble Resources** namely that this Court may grant relief under Article 126 (4) even without a formal finding of infringement, the facts of this case cry out for intervention. The 6th Respondent, induced the Petitioners, through representations in its promotional material and sale agreements, to invest substantial sums of money in the purchase of their apartments upon the faith of an express promise of adequate parking facilities. That promise was never honoured. The restaurant erected without regulatory approval occupied the very space that should have been set aside for parking. When that restaurant was eventually the subject of a demolition recommendation by the CMA's inquiry officer, the 6th Respondent replaced it with a supermarket, thereby compounding its defiance with a fresh and equally unlawful encroachment upon the rights of the apartment dwellers. This conduct is not merely a 'breach of contractual obligations' as the 6th Respondent has sought to characterize it; *it is a deliberate and systematic subversion of the reasonable expectations of citizens* who had placed their trust and invested their life savings in the 6th Respondent's project.

45. I would also observe, in this context, that this Court in **Ganeshan Samson Roy V M.M. Janaka Marasinghe**[7] held that this Court cannot condone private parties instigating the executive to use its powers to achieve their ulterior motives unreasonably and/or in an arbitrary manner, and that permitting such conduct would lead to a breakdown of the rule of law and erode public confidence. That reasoning applies with equal force, and perhaps with even greater force, to a situation where a private party has exploited the inertia of statutory authorities to perpetuate an unlawful state of affairs to the detriment of citizen apartment owners. The conduct of the 6th Respondent in this case is, to borrow the memorable phrase, amounted to playing ducks and drakes with the money and expectations of apartment dwellers.

46. I turn now to the liability of the statutory respondents. The 1st Respondent, the Condominium Management Authority (CMA), initiated an inquiry upon the complaint of the Petitioners in May 2005. That inquiry concluded in 2014 with findings against the developer and a recommendation for demolition of the unauthorized structures. Almost a decade has elapsed since those recommendations were made, and they remain wholly unimplemented. No affidavit has been placed before this Court by the CMA explaining or even acknowledging the difficulties that it encountered in implementing the recommendations of its own inquiry officer. The silence of the CMA in the face of its statutory duty is itself eloquent of the abdication of responsibility that pervades the conduct of the statutory respondents in this case.

47. The 2nd Respondent, the Colombo Municipal Council (CMC), obtained a demolition order from the Magistrate's Court of Mount Lavinia on or about 26 May 2006. Over a period of many years, that order has not been given effect to, and no satisfactory explanation has been forthcoming from the CMC as to why it has been content to allow the order of a court of law to gather dust. Furthermore, this Court takes the most serious note of the admission made by the 2nd Respondent that the building plans relating to the property under dispute have been lost. A statutory authority entrusted with the custody of official building plans and charged with the enforcement of planning laws cannot simply lose the foundational documents of the regulatory framework and expect this Court to regard such loss as an inconsequential administrative mishap. This is crass negligence and an abjectdereliction of duty. The loss of such documents enabled the developer to operate in a regulatory vacuum and must be condemned in the strongest terms.

48. The 3rd Respondent, the Urban Development Authority (UDA), similarly admitted that the amended plan relating to the condominium property is missing from its files. The UDA had itself, by its letter of 10 March 2004, rejected the developer's application for an amended building plan and directed the developer to adhere to the previously approved plan. Yet, despite the developer's manifest non-compliance with that direction a fact that the evidence in this case makes abundantly plain, the UDA took no effective steps to enforce its own direction. The loss of official files and the failure to enforce regulatory decisions are not administrative peccadilloes; they are serious failures that directly undermined the rule of law and enabled the 6th Respondent to act in contumacious disregard of planning law. This Court does not wish to condone, and will not condone, such a pattern of negligence on the part of statutory functionaries. Where statutory bodies responsible for building plans and development regulations allow such plans to vanish without satisfactory explanation, this Court must pronounce, in no uncertain terms, that such conduct violates the fundamental rights of those citizens who are entitled to rely upon the faithful and diligent exercise of those statutory powers.

49. Accordingly, this Court holds that;

> The *1st, 2nd and 3rd Respondents have each been in violation of the fundamental rights of the Petitioners under Article 12 (1) of the Constitution,* ***by reason of the executive inaction and negligent conduct*** *that has been comprehensively established before this Court. The persistent refusal or failure of these statutory bodies to implement court orders, inquiry officer recommendations and their own regulatory directions, in circumstances where the rights of citizen apartment owners are directly at stake,* ***amounts to arbitrary and unreasonableconduct that violates the equal protection of the law guaranteed by Article 12 (1) of the Constitution***.

50. I wish to pause here and make some observations upon what might, at first impression, appear to be a narrow and quotidian dispute about parking facilities. In fact, the issue before this Court touches upon matters of considerable constitutional significance. Adequate parking is not a mere amenity or luxury. In the context of residential condominium living, it is an integral component of the value and utility of the property itself. The Petitioners and their fellow apartment dwellers invested substantial sums of money representing, in the case of a retired managing director and a practicing surgeon, years of hard-earned savings upon the express representation by the developer that adequate parking facilities would be provided. Parking forms an inseparable part of the benefit of the bargain that was struck. When the developer appropriated the parking space for an unauthorized commercial enterprise, it effectively and unilaterally diminished the value and utility of the Petitioners' properties without their consent and without any lawful justification. This is an infringement of the guarantee of equality before the law and equal protection of the law under Article 12 (1) of the Constitution, for it is the very antithesis of the rule of law that a developer should be permitted to enrich itself by depriving purchasers of the benefit of what they were promised, while statutory authorities charged with enforcement responsibilities stand by in silence.

51. This Court has also noted with disquiet the evidence regarding the practice of issuing mere receipts to apartment purchasers such as the 1st Petitioner, without any formal protection for prospective buyers. Buyers of apartments are amongst the most vulnerable participants in the real estate market; they commit their savings in advance, they depend upon representations made in promotional materials, and they have little practical recourse against a recalcitrant developer other than the jurisdiction of our courts. The practice of issuing bare receipts, devoid of legally enforceable commitments as to the amenities to be provided, is one that createsfertile ground for the kind of exploitation and misrepresentation that has occurred in this case. This Court calls upon the 1st Respondent, the Condominium Management Authority, to awaken from its slothfulness and to make rules regulating the conduct of developers so as to require that all representations as to amenities, parking facilities, floor areas and common areas be embodied in legally binding instruments that are enforceable against the developer. Only by the adoption of such regulatory measures can the pandemonium in condominiums of the kind disclosed by this case be averted in the future.

52. I now turn to the question of compensation, which is in many respects the most practically significant aspect of this judgment for the Petitioners and for the apartment dwellers of No. 46, Hampden Lane. The power of this Court to award compensation in the exercise of its fundamental rights jurisdiction is well established. In terms of Article 126 (4) of the Constitution, this Court in its fundamental rights jurisdiction may grant such relief or make such directions as it may deem just and equitable in the circumstances. That is a wide and unconfined jurisdiction. It is not constrained by the

requirement that compensation must represent an exact arithmetical computation of loss. As this Court observed in ***Saman v. Leeladasa***[8], the variety of matters that must be considered in assessing compensation for a violation of fundamental rights means that a verdict as to the amount to be awarded is the product of a mixture of inextricable considerations. This Court is not required to quantify and grant compensation which represents a full and final mathematical settlement of all damage suffered; the test is what is just and equitable in the circumstances.

53. The considerations that I regard as relevant in determining the quantum of compensation payable by the 6th Respondent are as follows. First, the duration and gravity of the wrong; the 6th Respondent has, for over two decades since 2003, deprived the apartment dwellers of adequate parking facilities that were expressly promised. Second, the degree of culpability; the 6th Respondent's conduct has been characterized throughout by a persistent, calculated and contumelious disregard for the rights of the apartment owners, the orders of statutory authorities and the directions of inquiry officers. It challenged even a site inspection ordered by the CMA's General Manager in the Court of Appeal. It replaced an unlawful restaurant with an equally unlawful supermarket after a demolition recommendation was made, thereby demonstrating an utter indifference to regulatory compliance. Third, the financial dimension; the inadequacy of parking has not merely caused inconvenience; it has diminished the market value of the Petitioners' apartments, deprived them of the utility value of adequate parking as an asset in any future sale, and subjected them to the daily indignity of being unable to park their own vehicles within the premises of their own homes. Fourth, the exemplary dimension; it is not sufficient for this Court to award a nominal sum that the developer may treat as a mere cost of doing business. The compensation must have a genuine deterrent effect upon developers who may be tempted to emulate the conduct of the 6th Respondent in future projects.

54. In this regard, I am mindful of the principle articulated in **Abasin Banda V S.I. Gunaratne and Others**[9] to the effect that the award of compensation is useful because it provides an opportunity to demonstrate society's abhorrence of the impugned conduct, and that the fact that a transgressor is personally required to pay a part of the compensation assessed as just and equitable will, to some extent, assuage the wounded feelings of the victim. I am also conscious of the consideration that, unlike compensation ordered to be paid by the State, compensation ordered to be paid by a private corporate developer does not impose any burden upon the taxpaying public. In several cases, this Court has expressed caution in awarding large sums against the State, noting that the burden thereof falls ultimately upon ordinary citizens as taxpayers. That consideration does not arise where, as in this case, the party against whom compensation is ordered is the corporate wrongdoer itself, whose misfeasance is both the cause of the violation and the source of any unjust enrichment that it has derived from its unlawful encroachments.

55. Taking all of the above considerations into account, I order that the 6th Respondent, Seagull Property Developers (Pvt) Ltd, shall pay a sum of **Rupees Ten Million (Rs. 10,000,000/-)** as compensation. This sum shall not be paid to the Petitioners individually but shall be deposited into an escrow account to be established and administered jointly under the supervision of the 1st Respondent (CMA) and the 3rd Respondent (UDA). The purpose of this escrow arrangement is to ensure that the compensation serves the broader interests of all the apartment dwellers at No. 46, Hampden Lane, and is utilized for the proper maintenance and upkeep of the condominium. To that end, the apartment dwellers and the Management Corporation of the condominium shall enter into a formal written agreement, to be supervised by the CMA, specifying the manner in which the monies deposited in the escrow account are to be applied for the future maintenance and upkeep of the condominium, including the restoration and maintenance of the parking facilities to which the apartment dwellers are entitled.

56. Beyond the award of compensation, it is necessary for this Court to issue clear and enforceable directions to the statutory respondents to give practical effect to this judgment. The unlawful structures (the restaurant), which has now been replaced by a supermarket that occupy the parking area must be demolished. The inquiry officer's recommendation to that effect, made as far back as 2014, has been allowed to remain on paper for too long. The conduct of the 6th Respondent in replacing the restaurant with a supermarket in the teeth of the demolition recommendation and during the pendency of these proceedings is particularly reprehensible and deserves to be condemned as an act of open defiance of the regulatory authorities and of this Court's process. This Court will not permit such conduct to be rewarded by inaction on the part of the authorities.

57. At the same time, this Court is conscious of the fact that the condominium at No. 46, Hampden Lane is an inhabited residential building, and that any demolition of the unauthorized structures must be carried out with the care and expertise necessary to ensure that the structural integrity of the building as a whole is not compromised. Accordingly, this Court directs that the 1st, 2nd and 3rd Respondents shall, within a period of sixty (60) days from the date of this judgment, jointly appoint a qualified team of structural engineers to assess the structural foundations and integrity of the condominium, with specific reference to the likely impact of the demolition of the unauthorized structures upon the safety of the building. The team so appointed shall include representatives drawn from the qualified staff of each of the 1st, 2nd and 3rd Respondents. The apartment dwellers shall also be entitled to be represented in the process through nominees of their choice, so as to ensure transparency and to protect their interests.

58. Upon the completion of the structural assessment referred to in the preceding paragraph, and subject to the engineers being satisfied that the demolition can be

carried out without rendering the building uninhabitable or otherwise compromising its structural safety, the 1st, 2nd and 3rd Respondents are directed to take all necessary steps to carry out in accordance with the applicable law the demolition of the unlawful supermarket structure (and any other unauthorized structures found to encroach upon the parking area) and thereby to restore adequate parking facilities to the apartment dwellers of No. 46, Hampden Lane. Having found executive inaction and negligence on the part of the 1st, 2nd and 3rd Respondents, this Court orders that these authorities appoint a team of engineers along with representatives from among the apartment dwellers to carry forward these directions, having regard to the structural foundation of the apartment building.

59. Given the chequered history of this litigation, the persistent non-compliance with court orders and inquiry officer recommendations that has characterized theconduct of the respondents, and the need to ensure that the directions of this Court are not permitted to become yet another set of recommendations that gather dust in official files, this Court considers it both appropriate and necessary to direct that the Hon. Attorney General shall exercise an overall supervisory role with respect to the implementation of the orders and directions contained in this judgment. The Attorney General shall file a Progress Report before this Court by way of motion within a period of four (04) months from the date of this judgment, setting out the steps taken by the respective respondents in compliance with the directions herein. This Court will retain jurisdiction to take such further steps as may be warranted in the event of non-compliance.

60. In the circumstances, this Court allows the fundamental rights application of the Petitioners and makes the following declarations and orders;

a) *This Court declares that the fundamental rights of the Petitioners under Article 12 (1) of the Constitution have been infringed by the 1st Respondent (CMA), the 2nd Respondent (CMC) and the 3rd Respondent (UDA) insofar as there have been omissions to regulate and supervise the activity of the 6th Respondent (Seagull Property Developers (Pvt) Ltd) notwithstanding evidence of unlawful constructions on his part and so long as there were no sanctions imposed on the 6th Respondent.*

b) *The 6th Respondent is ordered to pay compensation in the sum of* ***Rupees Ten Million (Rs. 10,000,000/-)*** *inasmuch as he has found to be in willful default of the planning laws of the country and he has been complicit in the perpetration of executive inaction in relation to his unlawful construction and defiance of all orders made against the developer. The 6th Respondent shall pay such compensation in the sum of Rupees Ten Million into an escrow account to be established under the joint supervision of the 1st and 3rd Respondents, to be applied forthe maintenance and upkeep of the*

condominium at No. 46, Hampden Lane, Colombo 06, pursuant to a formal agreement between the apartment dwellers and the Management *Corporation of the condominium, to be supervised by the CMA.*

c) *The 1st, 2nd and 3rd Respondents are directed to jointly appoint a team of qualified structural engineers, including representatives of each of those bodies and nominees of choice of the apartment dwellers, within sixty (60) days of this judgment, to assess the structural integrity of the condominium and report on the feasibility of demolishing the unauthorized structures that impede the provision of adequate parking space.*

d) *Upon a satisfactory structural assessment, the 1st, 2nd and 3rd Respondents are directed to take all steps necessary to demolish the unlawful structures occupying the parking area, thereby restoring adequate parking facilities to the apartment dwellers of No. 46, Hampden Lane, Colombo 06.*

e) *The 1st Respondent (CMA) is directed to employ its statutory powers to ensure that the formal agreement between the apartment dwellers and the Management Corporation for the utilisation of the escrow compensation is entered into, supervised and implemented.*

f) *The eventual demolition of the unlawful structure to make way for the adequate parking space must be undertaken in accordance with the law and the CMA is directed to supervise the progression of further steps including the steps to be taken in accordance with the law.*

g) *The Hon. Attorney General shall exercise overall supervision of the implementation of these orders and directions and shall file a ProgressReport before this Court by motion* ***within four (04) months from the date of this judgment****.*

h) *The 1st Respondent (CMA) is called upon to frame rules, without further delay, regulating the conduct of property developers in relation to the publication of promotional material, safe deposit of monies paid by prospective buyers in escrow accounts, the execution of sale agreements, and the provision of amenities in respect of condominium developments, so as to ensure that representations made to prospective purchasers are legally enforceable and that regulatory compliance is monitored effectively.*

i) *In view of the unsatisfactory practices employed by the 6th Respondent in issuing only receipts for payments made by buyers, the 1st Respondent – the CMA is directed to immediately frame rules and promulgate directions to the effect that all monies that are obtained from prospective buyers or have been*

obtained from existing buyers shall be maintained in an escrow account and if a dispute arises between such buyers and condominium developers, such disputes shall be immediately investigated and exit mechanisms for either party should be ordered if necessary in the event unconscionable practices are found to jeopardize the rights of parties and these directions on dispute resolution should apply to buyers and condominium developers who have already entered into agreements either orally or in a written manner.

This Court wishes to place on record its admiration for the tenacity, dedication and perseverance of the two Petitioners; a distinguished surgeon and a retired managing director who waged this legal battle single-handed, unrepresented by counsel, overmany years before this Court, in the vindication of their rights and the rights of their fellow apartment dwellers. Their persistence in the face of institutional inertia is a testament to the faith that citizens continue to repose in this Court as the ultimate guardian of their fundamental rights.

Application is allowed.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J.
I agree.

JUDGE OF THE SUPREME COURT

A.L. Shiran Gooneratne, J.
I agree.

JUDGE OF THE SUPREME COURT

Reference

1. [1995] 1 Sri LR 372
2. (SC/FR/163/2019, SC Minutes of 12.01.2023)
3. (SC/FR/394/2015, SC Minutes of 24.06.2016).
4. E/CN.4/Sub.2/2003/12/Rev.2, adopted on 13 August 2003
5. UNHRC Resolution 17/4 of 16 June 2011
6. [2009] 2 Sri LR 389
7. SC / FR / 405 / 2018, SC Minutes of 20.09.2023
8. [1989] 1 Sri LR 1 at page 44
9. [1995] 1 Sri LR 244