

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

In the matter of an Application under the  
Provisions of Article 154(P) of the  
Constitution.

Ivo Fernando  
No.173, Muhandiram Mawatha  
Colombo 03.

**Respondent-Petitioner-Appellant**

**C.A. (PHC) 26/2000**

Vs.

**H.C. Colombo 1337/98**

**Magistrate's Court,  
Fort No.45919**

Mudaliarachchige Somasiri  
Colombo Municipal Council  
Colombo 7.

**Applicant-Respondent-Respondent**

**BEFORE : SISIRA DE ABREW J.**

**K.T.CHITRASIRI J.**

**COUNSEL : C.G.Vitharana with M.N.Gamage and H.D.E.  
Guinatillake Attorneys-at-Law for the Respondent-  
Petitioner-Appellant**

**C.Nilanduwa Attorney-at-Law for the Applicant-  
Respondent-Respondent**

**ARGUED ON: 2<sup>nd</sup> October 2012**

**DECIDED ON: 31<sup>st</sup> October 2012**

**CHITRASIRI,J.**

Respondent-Petitioner-Appellant (hereinafter referred to as the Appellant) filed this appeal seeking to set aside the order of the learned High Court Judge dated 30<sup>th</sup> September 1999 and the two orders dated 13<sup>th</sup> May 1998 and 5<sup>th</sup> June 1998 of the learned Magistrate of the Fort Magistrate's Court in Colombo.

The orders of the learned Magistrate were:

- to demolish two buildings alleged to have been constructed by the appellant unlawfully or without permission being obtained; and
- the fine amounting to Rs.500/- imposed on the appellant by the learned Magistrate.

Being aggrieved by the said two orders of the learned Magistrate, appellant filed a revision application in the High Court. Learned High Court Judge having considered the law and the facts relevant thereto affirmed the decision of the learned Magistrate.

Pursuant to the demolition order made by the learned Magistrate, fiscal of the Fort Magistrate's Court arrived at the premises in question and demolished one of the buildings which was used by the appellant as his kitchen. However the fiscal could not demolish the construction adjacent to the main house due to the protest being made by the appellant. Appellant, in his petition to the High Court has stated that he objected to the demolition of the building adjacent to his main house because the summons received by him in respect of the action filed by the applicant/petitioner-respondent-respondent (hereinafter referred to as the

respondent) did not indicate that there were two separate unauthorized constructions. For easy reference, the said summons is reproduced herein below.

රනාගුණ මහේස්ත්‍රාත් අධිකරණයේදී ය.

1 (මුද්‍රිතයාගේ නම, පදවි නාමය හා පදිංචිය)

පදිංචි

වෙසට්ටි.

2 (වරද කළ ස්ථානය)

ඉහත කී කොට්ඨාසය ඇතුළත

දී

ඔබ වර්ෂ 19

ක් වූ

මස

වෙනි දින

3 (වෝද්‍යා කරනු ලැබූ වරද හා වේදිකයේ නම හා පදිංචි ස්ථානය කොට්ඨාසයේ පදනමක් සහිතව)

ජනවාරි 06 වැනිදා

බව ද

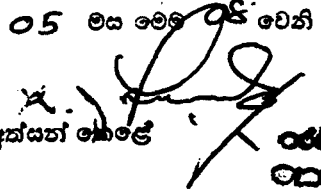
එසේ කිරීමෙන් (15 වැනි අධිකාරය වන) දණ්ඩ නීති සංග්‍රහයේ වැනි වගන්තිය යටතේ දඬුවම් කළ යුතු වරදක් ඔබ විසින් කරනු ලැබූ බවට එකී කොට්ඨාසයේ මෙහි පහත අත්සන් කරන මහේස්ත්‍රාත් ඉදිරියේ අද පැමිණිල්ලක් කර තිබෙන නිසා ඒ පැමිණිල්ලට උත්කර දෙන පිණිසත්, වැඩි දුරට නීති ප්‍රකාර ක්‍රියා කරනු පිණිසත්

(ඉබ හැ නගරය)

රනාගුණ මහේස්ත්‍රාත් අධිකරණයට

ලබන 98-05-13 පෙරවරු 9.00 ට සාක්ෂිකරුවන් සිටිත් නම් ඔවුන් සමඟ පෙනී සිටින ලෙසට ශ්‍රී ලංකා ජනරජයේ නාමයෙන් ඔබට මෙයින් අණ කරමි.

මා විසින් අත්සන් කොට දෙන්නට යෙදුණේ වර්ෂ 19 98 ක් වූ 05 මස මෙම 05 වෙනි දින ඉහත කී කොට්ඨාසයේදී ය.

අත්සන් කෙළේ  රනාගුණ මහේස්ත්‍රාත් අධිකරණය

පැමිණීමට අකමැති සාක්ෂිකරුවකු කැඳවීමට ඔබ කැමති නම් ඔහු බලෙන් ගෙන්වන පිණිස සිතාසියක් මේ කොට්ඨාසයේ මහේස්ත්‍රාත්වරයකුගෙන් භ්‍යාපමාව ඉල්ලා සිටිය යුතුය.

[අ.පී.බ]

Accordingly, the learned Counsel for the appellant contended that the appellant when he pleaded guilty was of the view that the only unauthorized construction was the kitchen that was demolished without a protest being made.

Learned Counsel for the respondent submitted that a notice (found at the last Page of the brief) had been sent to the appellant with a sketch showing the two unauthorized constructions prior to the summons been sent and therefore the appellant could not have been misled by the manner in which the summons were written. The said sketch and the notice were annexed to the application made to the Magistrate's Court marked as "31" and "32". Learned High Court Judge seems to have accepted this position and was of the view that the appellant is estopped from taking up the deficiencies in the summons as he was not misled by those deficiencies due to the said notice dated 29.10.1997 and the sketch sent by the respondent in terms of Section 23(5) read with Section 28A(1) of the Urban Development Authority Act.

In the circumstances the question arises whether the learned High Court Judge is correct when he disregarded the manner in which the learned Magistrate had proceeded, pursuant to the undated application filed by the respondent on 30.03.1998 in the Magistrate's Court.

The said application had been made in terms of section 28A(3) of the Urban Development Authority Act No.41 of 1978 as amended subsequently. Section 28A(3) reads thus:

*"(3) (a) Where any person has failed to comply with any requirement contained in any written notice issued under subsection (1) within the time specified in the notice or within such extended*

*time as may have been granted by the Authority, the Authority may, by way of petition and affidavit, apply to the Magistrate to make an Order authorizing the Authority to –*

- (a) to discontinue the use of any land or building;*
- (b) to demolish or alter any building or work;*
- (c) to do all such other acts as such person was required to do by such notice, as the case may be,*

*and the Magistrate shall after serving notice on the person who had failed to comply with the requirement of the Authority under subsection (1) if he is satisfied to the same effect, make Order accordingly.*

- (b) If such person undertakes to discontinue the use of the land or building or to demolish or alter the building or work, or to do such other acts as are referred to in paragraph (a) of subsection (3) of section 28A, the Magistrate may, if he thinks fit, postpone the operation of the Order for such time not exceeding two months as he thinks sufficient for the purpose of giving such person an opportunity of complying with such requirement.”*

As mentioned above, this application by the respondent made on 30<sup>th</sup> May 1998 was to seek a directive from the Magistrate under section 28A(3) of the Urban Development Authority Act. The above section envisages giving an opportunity for the person alleged to have built an unauthorized construction to discontinue the use of land or building or to demolish or alter the building or work, or to do such other acts.

Accordingly, it is clear that the Legislature has intended to give an opportunity for a person alleged to have built an unauthorized construction to have his construction removed or to take other steps by himself as mentioned in the said section 28A(3). Clearly, the learned Magistrate has ignored those steps referred to in the law. He, without taking those steps had sent a summons in the

form used in criminal cases. (vide page 3 in this judgment) Summons did not indicate of any violation under the UDA Act either.

Section 28A(3) under which this application was filed requires a Magistrate to authorize the Authority to take steps in accordance with subsections (a),(b) and (c) of Section 28A(3)(a). Acting under those provisions, a Magistrate is empowered to make an appropriate order under the last paragraph of Section 28A(3)(a) only when that person, to whom the said directives were sent, fails to act accordingly. Furthermore, Section 28A(3)(b) requires a Magistrate to consider giving a further opportunity to the person on whom the orders under sub subsection (a) of that section were made, if he seeks for a postponement of the operation of those orders.

Admittedly, these steps have not been followed by the learned Magistrate even though in the application filed in Court itself, clearly refers to Section 28A(3) in its caption. It reads thus:

“1988 අංක; 4 දරණ පනතින් සහ 1984 අංක; 44 දරණ (විශේෂ විධි විධාන) පනතින් සංශෝධිත 1978 අංක; 41 දරණ නාගරික සංවර්ධන අධිකාරිය පනතේ 28 අ (3) වගන්තිය යටතේ කරනු ලබන අයදුම්පත පිළිබඳව යි”

The steps stipulated in Section 28A(3) have been incorporated probably with a view to avoiding harassment to the parties concerned. Also, it will minimize the work of the employees of the Authority as well as the members of the Court staff.

Failure to act in terms of Section 28A(3) of the UDA Act by the learned Magistrate, in my opinion is a fatal irregularity. Therefore, the demolition order made by the learned Magistrate is erroneous. Accordingly, it is not correct for the learned High Court Judge too, to decide that the appellant was not misled by not taking steps under Section 28A(3) relying upon the notice sent under Section 28A(1) of the UDA Act. Hence, I cannot agree with the said finding of the learned High Court Judge as well.

Learned High Court Judge also has acted upon the non-compliance of Rule 46 of the Supreme Court Rules when he dismissed the Revision Application of the appellant. Admittedly, the appellant has failed to file the notice and the sketch that was sent to the appellant in terms of Section 28A(1), at the time the Revision Application was filed in the High Court. It is correct to state that the failure to file important documents in a revision application would be a reason to dismiss such an application under Rule 46 of the Supreme Court Rules.

Upon a perusal of the petition filed in the High Court, it is seen that the appellant had relied upon basically on the steps that should have been adhered to by the Magistrate in terms of section 28A(3) of the UDA Act when he sought relief from the High Court. Therefore, the notice sent under section 28A(1) by the Municipal Council may not have had much bearing on the issue at hand. Requirement under Rule 46 should be looked at, not merely to dispose of a matter before courts but to see the ends of justice avoiding any miscarriage of justice. If the necessary documents are before court then the court should have looked into

the matter. I also must state that the documents including the notice and the sketch that are necessary to inquire into the grievance of the appellant were before the learned High Court Judge when the original record was received by the High Court. Therefore, it is seen that the circumstances of this case did not warrant a dismissal of the revision application resorting to Rule 46 of the Supreme Court Rules, for non filing of the notice and the sketch sent by the Municipal Council.

Next issue is the legality of imposition of a fine of Rs.500/= on the appellant. Having received the summons the appellant came to Court as an accused person. According to the journal entry made on 13<sup>th</sup> May 1998, a charge was read out to the appellant and he has pleaded guilty to the said charge. Thereafter, a fine of Rs.500/- had been imposed on the appellant whilst making a demolition order.

When this matter was argued before this Court, learned Counsel for the respondent conceded that no charge sheet was issued to the appellant at the time he pleaded guilty. In fact a charge sheet was never filed in Court. The appellant was unaware of any charge even though he has pleaded guilty. According to him he had always accepted the position that he had built a kitchen without a permit. Accordingly, he had accepted the liability for the construction of the kitchen and allowed the authorities to demolish the same without any objection.

Such an acceptance cannot be considered as a pleading to a charge when there was no charge sheet been served. No charge sheet is found even in the case record. Learned counsel for the respondent also submitted that he is not



supporting the Magistrate's decision to impose a fine on the appellant. In these circumstances, it is irregular to allow the conviction to stand. Accordingly, both the conviction and the sentence imposed on 13<sup>th</sup> May 1998 by the learned Magistrate are set aside.

For the aforesaid reasons, the order of the learned High Court Judge dated 30th September 1999 and the two orders made on 5<sup>th</sup> June 1998 and 13<sup>th</sup> May 1998 by the learned Magistrate are set aside.

However, it must be noted that this decision shall not be a bar for the authorities to make a fresh application in terms of the law if any unauthorized construction is found.

Taking into consideration the circumstances of the case, I make no order as to the costs of the appeal.

Appeal allowed without costs.

JUDGE OF THE COURT OF APPEAL

**SISIRA DE ABREW, J.**

I agree.

JUDGE OF THE COURT OF APPEAL