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

M.A. Mary Margrate
Wanahangoda Hanwella

Respondent-Appellant

Vs

CA (PHC) 68/99
HC Avissawella 73/97

1. The Chairman,
   Road Development Authority.

2. The Executive Engineer,
   Road Development Authority.

3. The Chairman,
   Seethawaka Pradeshiya Sabahawa.

Applicant Respondents

Before : Sisira de Abrew J &
KT Chitrasiri J

Counsel Wijedasa Rajapaksha PC with S. Perera
for the Respondent-Appellant
Janak de Silva SSC for Applicant-Respondents

Argued on : 3.5.2011
Decided on : 24.6.2011

Sisira de Abrew J.

This is an appeal to set aside the order of the learned High Court Judge (HCJ) dated 15.12.98 wherein he affirmed the order of the learned Magistrate dated 10.10.97.

The Executive Engineer of the Road Development Authority (RDA), the 2nd respondent, by his letter dated 27.3.95, informed the respondent appellant (the appellant) to remove the building that she was constructing as the said building was being built within the building limit of the Colombo Hanwella road. The building limit is defined in Section 24 of the Thoroughfares Ordinance as amended by Act No.9 of 1988 (hereinafter referred to as the Act). He sent a further letter dated 22.5.95 stating that he would take steps to remove the building as she did not comply with the earlier letter. The appellant did not comply even with this letter. He thereafter sent a notice dated 22.7.95 in terms of Section 26 of the Act directing her to remove the building as it had been built within the said building limit. Since the appellant did not comply with the said notice the 2nd respondent made an application to the Magistrate Court (MC) of Avessawella in terms of Section 26(3)(a) of the Act to demolish the building. The learned Magistrate, by his order dated 10.10.97, allowed the application.

Learned President's Counsel contended that according to the notice sent by the 2nd respondent and the application filed in the MC, the building has been built in the building limit and that therefore the appellant had not violated Section 24 of the Act. His contention was that the 'building limit' is an area which is permitted by law to construct buildings. He therefore contended that the application should have been dismissed by the Magistrate. Although learned PC contended so, the 'building limit', according to Section 24 of the Act, is fifteen meters from the centre of the road in respect of 'A' class road and 12 meters in respect 'B' class road. Therefore the 'building limit' stated in the notice and the application filed in the MC is the area where no one is permitted to build any building without permission of the 2nd respondent. Therefore the above contention of the learned PC cannot be accepted.

Learned PC further contended that the learned Magistrate had ordered the demolition of the entire building. He contended that what can be demolished is only the portion that falls within the prohibited area. I am unable to agree with this contention when I consider Section 26(3)(a) and (b) of the Act. Under Section 26(3)(b) of the Act, person who violates Section 24 of the Act is given an opportunity to remove the building. Therefore when such an opportunity is given, he can remove the part of the building which falls within the prohibited area (building limit) and claim that construction of the building had not violated Section 24 of the Act. But if the construction of the building has violated Section 24 of the Act, the Magistrate is empowered under Section 26 (3)(a) of the Act to make an

order to demolish the building. It is difficult to believe that RDA must draw up a plan and demolish only the portion of the building that falls within the prohibited area. If the RDA is going to embark on such a project, it will definitely cause damages to the remaining portion of the building and will give an opportunity for the owner of the building to claim damages from the RDA. If that is so the RDA which is maintained by Government funds will be compelled to pay compensation for the wrongful act initiated by the owner of the building. It is difficult to believe that the legislature, by enacting the Act, intended to spend Government funds to pay compensation for the wrongful acts of the person who violated the law. For these reasons I reject the above contention of the learned PC.

Learned PC next contended that the RDA should have produced a survey plan under Section 32 of the Act indicating the portion of the building which falls within the prohibited area. In my view production of a survey plan in Court is not discussed in Section 24 and 26 of the Act. I am therefore unable to agree with this submission.

Learned PC contended that appellant had not violated Section 24 of the Act since his building plan has been approved by Seethawaka Pradeshiya Sabahawa. It is correct that said Pradeshiya Sabahawa had approved the appellant's building plan. This is evident by the letter dated 30.3.95 sent by the 3rd respondent (vide page 87 of the brief). But t he said letter reveals that the construction of the building has exceeded the 50 feet limit from the building to the centre of the Colombo Avissawella road. The 3rd respondent,

by the said letter, has even indicated that he would take steps to demolish the building. When I consider all these mattes, I am unable to agree with the above contention of learned PC.

For the above reasons I hold the view that the order of the learned Magistrate dated 10.10.97 is correct. Learned HCJ was also correct when he dismissed the appeal filed by the appellant.

Learned PC contended that the affidavit filed in the MC cannot be accepted as the jurat is wrong. I now advert to this contention. In my view, this is a technical objection. However I cannot conclude that contents of the affidavit are false. I therefore reject the above contention of learned PC.

There is another matter that I should consider. The point that I am going to discuss was not brought to the notice of Court at the hearing of this appeal. The appellant being aggrieved by the order of the Magistrate dated 10.10.97 filed an appeal in the High Court and the learned HCJ, in the exercise of its appellate powers, dismissed the appeal. It is against this order that the appellant has appealed to this Court. It is this appeal that is being decided in these proceedings (vide page 5 of the brief). When the HCJ, in the exercise of his appellate powers, dismissed an appeal filed against an order of the Magistrate, the person aggrieved by the said order cannot invoke the appellate jurisdiction of the Court of Appeal. He has to appeal to the Supreme Court. This view is supported by the Judgment of the Supreme Court in Wickramasekara Vs OIC Ampara [2004]1 SLR 257 wherein Justice

Bandaranayake held: "The Court of Appeal does not have appellate jurisdiction under Article 138(1) of the Constitution read with Article 154 (P) 6 in respect of the decisions of the Provincial High Court made in the exercise of its appellate jurisdiction and it is the Supreme Court that has appellate jurisdiction in respect of the appeals from Provincial High Court as set out in Section 9 of the High Court of the Provisions (Special Provisions) Act, No of 1990."

For the above reasons, I dismiss the appeal of the appellant. When I consider the facts of this case I do not intend to make an order as to costs.

Appeal dismissed.

Judge of the Court of Appeal.

KT Chitrasiri J.

I agree.

Judge of the Court of Appeal.