

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

In the matter of an appeal  
under 154(P) 6 of the constitution  
read with Section 9 of the  
Provincial High Court Special  
Provisions Act No. 19 of 1990.

**C.A.P.H.C No: 36/2007**

HC Colombo Case No: 858/2005

MC Gangodawila Case No:4449

W.A. Gunawardena,  
(Officer under U.D.A.Act)  
Dehiwala-Galkissa Municipal  
Council,  
Anagarika Dharmapala Mawatha,  
Dehiwala.

**Applicant**

**Vs.**

Deshini Irish Janes,  
No. 8/2, Sirigal Mawatha,  
Kalubowila,  
Dehiwala.

**Respondent**

**AND BETWEEN**

Deshini Irish Janes,  
No. 8/2, Sirigal Mawatha,  
Kalubowila,  
Dehiwala.

**Respondent – Petitioner**

***Vs.***

W.A. Gunawardena,  
(Officer under U.D.A.Act)  
Dehiwala-Galkissa Municipal  
Council,  
Anagarika Dharmapala Mawatha,  
Dehiwala.

**Applicant – Respondent**

M.A. Mariya Selin,  
14 A Kashshapa road,  
Kalubowila,  
Dehiwala.

**Aggrieved 2<sup>nd</sup> Party**

**Respondent**

***And now Between***

W.A. Gunawardena,  
(Officer under U.D.A.Act)  
Dehiwala-Galkissa Municipal  
Council,

Anagarika Dharmapala Mawatha,  
Dehiwala.

**Applicant - Respondent -  
Appellant**

***Vs.***

Deshini Irish Janes,  
No. 8/2, Sirigal Mawatha,  
Kalubowila,  
Dehiwala.

**Respondent - Petitioner -  
Respondent**

***And***

M.A. Mariya Selin,  
14 A Kashshapa road,  
Kalubowila,  
Dehiwala.

**Aggrieved 2<sup>nd</sup> Party  
Respondent - Respondent**

**Before : W.M.M.Malinie Gunarathne, J**

**: P.R.Walgama, J**

**Counsel : W. Dayaratne P.C with R. Jayawardane for the  
Applicant - Respondent - Appellant.**

**: Shanaka Ranasinghe P.C with P. Patmasiri for  
the Respondent - Petitioner - Respondent.**

**: Lasitha Chaminda for Respondent.**

**Argued on : 05.11.2015**

**Decided on: 31.05.2016**

CASE- NO- CA-(PHC)- 36/2007- JUDGMENT- 31.05.2016

**P.R.Walgama, J**

The instant appeal lies against the order of the Learned High Court Judge dated 15/03/2007 for having set aside the order of the Learned Magistrate dated 29.06.2005, for allowing an application for an order to demolish an unauthorised structure effected by the Respondent- Petitioner-Respondent.

The Applicant – Respondent – Appellant instituted action in the Magistrate Court of Gangodawila in terms of Section 28(a) (3) of the Urban Development Authority Act No. 41 of 1978 as amended by Act No. 4 of 1982 and Act No. 44 of 1984, sought an order to demolish an unauthorised structure effected by the Respondent at No. 8/2A, Sirigal Mawatha, Kalubovila, to viz;

1. At the back space of the land the part of building the extent of which is 33.9 X 14 & 7.6 feet,
2. In the northern boundary the part of the triangular building which is in extent 42 X 15

feet and fixed a door frame which is in extent 2 X 6 X 6.0 on the boundary wall in the same building

3. Boundary wall which is in extent 17 X 9.6

The Section under which the above action is instituted states thus;

Section 28 A.(1)

“Where in a development area, any development activity is commenced, continued, resumed or completed without a permit or contrary to term or condition set out in a permit issued in respect of such development activity, the Authority may, in addition to any other remedy available to the Authority under this law, by written notice require the person who is executing or has executed such development activity, or has caused it to be executed on or before such date as shall be specified in such notice, not being less than seven days from the date thereof.

- a. To cease the development activity forthwith; or
- b. To demolish or alter any building or work;
- c. To do all such other acts as such person was required to do such notice, as the case may be,

The Learned Magistrate in the said impugned order has considered the documents marked P1-P4. By the document marked P4 the Applicant – Respondent –

Appellant has given time to regularise the unauthorised construction, but it is apparent that the Respondent has not complied with the same.

The Learned Magistrate before making an order to demolish the unauthorised structure had afforded an opportunity to the Respondent to show cause why the said constructions should not be demolished. In response to the above, the Respondent has stated that the said constructions are not unauthorised and had not tendered an approved plan but had placed the facts in writing and stated that Dehiwala- Mount Lavinia, Urban Council is delaying the approval without any reason.

It is salient to note that, by letter marked 'M' the Dehiwala - Mount Lavinia Municipal Council has refused to authorise and give permission for construction as stated above.

Further the Learned Magistrate has also considered the fact that many times the Respondent had attempted to obtain permission for the alleged construction.

In the said back drop the Learned Magistrate was satisfied with the fact that the Respondent had constructed the structures afore said without proper authority, and as such the afore said structures should be demolished.

Being aggrieved by the said order the Respondent – Petitioner – Respondent had by way of a Revision made an application to the High Court to have the said order revised.

It is seen from the said impugned order of the Learned High Court Judge, was persuaded by the fact that Applicant – Respondent – Appellant is not the Municipal Commissioner, to whom the Urban Development Authority authorised to prosecute under Section 23 (5) of the Urban Development Authority Act No.41 of 1973 as amended by Act No.4 of 1984 and No. 44 of 1984.

It is apparent from the letter marked P1 dated 01<sup>st</sup> April 1985, the Board of Members of the Urban Development Authority had delegated the powers stated there under to the Municipal Commissioner/Mayor of Dehiwala/Mount Lavinia.

~~But~~ It is viewed from the document marked P1 it is the Municipal Commissioner has instituted action in the Magistrate Court Gangodawila and moved for notices on the Respondent.

It is also contended by the Applicant- Respondent- Appellant that the relevant Section that propelled the Applicant to exercise his powers is stated below;

Section 23(5) of the UDA Act as amended by Act No. 4 1982

“ the Authority may delegate to any officer of a local authority in consultation with the local authority, any of its powers, duties and functions relating to planning, within any area declared to be a development area under Section 3, and such officer shall exercise , perform <sup>or</sup> ~~of~~ discharge any such power, duty of function so delegated, under the direction, supervision and control of the Authority.”

The said powers were recognised in the case of KURANGAMAGE HARISCHANDRA PERERA .VS. MUNIYANDI PANEER SELVAM (sc appeal 123/09) which held thus;

In the above case it was observed that the Court of Appeal had held that the Petitioner had acted without jurisdiction in making the application to the relevant Magistrate's Court and that the Urban Development Authority had no power or jurisdiction to delegate its powers to the Petitioner to file action against the First Respondent, as Section 23(5) of the UDA Act as amended by Act No. 4 of 1982 permitted delegation of powers duties and functions relating to planning only to the Petitioner.

Thus, the Court of Appeal by its judgment held as follows;

“ hence any unauthorized structures put up by the Respondent falls within the definition of “development activity” as provided in Section 29 of the Law.



When any "development activity" is commenced, continued, resumed, or completed without a permit issued by the third Respondent in the development area, action has to be taken only by the Urban Development Authority, in terms of Section 28A of the UDA Law and not by the officers of the Local Authority..."

But it is seen from the document marked P1 the members of the board of Urban Development Authority, acting in terms of Section 23(5) of the UDA law No. 41 of 1978, had nominated~~d~~ authorised, and appointed the Mayor/ Municipal Commissioner of Dehiwala - Mount lavinia, to act, implement, and make representation, and attend to all matters pertaining to planning and development regulation functions of the Urban....,

Therefore it is apparent that the Municipal council was empowered to take any action regarding not only matters relating to planning but also any matter in respect of development activity. It is contended by the Respondent that the Applicant-Appellant has failed or neglected to satisfy the Learned Magistrate that the required procedure prior to an application for demolition has been duly served on the Respondent.

The categorical position of the Respondent is that at least notice of 7 days were not given. But

nevertheless it viewed from the notices on page 45 and 51 dated 22.04.2004 has given a date as on or before 18<sup>th</sup> of May for the demolition of the said unauthorised structure.

The Counsel for the Respondent has adverted this Court to the order of the Learned Magistrate which has dealt with document marked P4, and it is emphasized of the fact that P4 refers to construction of an unauthorized parapet wall. It is stated by the counsel that the Learned Magistrate has issued an order to demolish the following constructions purported to be unauthorised.

1. At the back space of the land the part of building which is in extent 33.9 X 14 & 7.6 feet
2. In the Northern boundary the part of the triangular building which is in extent 2 X 6 X 6'.  
O on the boundary wall in the same building.
3. Boundary wall which is in extent 17'. X 9.6"

Therefore it is contended by the Respondent that she was not served with a notice as required by law namely in terms of Section 28 A (1) of the Urban Development Authority Act No. 41 of 1978 as amended by Act No. 4 of 1982 and 44 of 1984, and there by had caused a great miscarriage of justice, by not serving the required legal notice.

Hence it is reiterated by the Counsel for the Respondent that the applicant - appellant has not

followed the proper procedure, before making an order for demolition.

The Counsel for the Respondent has also stressed the fact the Learned Magistrate has failed to give proper notice with regard to the unauthorised constructions by only referring to a 'WALL.

But it is seen from the document marked as P4 which is the notice under Section 28 A (1) of the above Act, the Applicant - Appellant had given a vivid description of the nature of the unauthorized structures effected by the Respondent.

It is pertinent to note that in the impugned order the Learned Magistrate has made a reference to the fact that the Applicant - Respondent - Appellant has not authorised the construction of the alleged wall.

In the last paragraph of the said impugned order of the Magistrate refers not only to one construction but to 'unauthorised constructions' to be demolished. Therefore the argument of the Respondent is baseless and unmeritorious and should stand rejected.

Besides it is pertinent to note that the Respondent-Petitioner - Respondent has not alleged the said reason in the Revision application and no order regarding the said issue had been made by the Learned High Court Judge.

In the said impugned order of the High Court Judge deals with only one issue, viz - a - viz whether the plaint to the Magistrate Court was tendered by the proper officer, who is authorised to do so.

It is also worthy to note that the Respondent has not taken up the above objection in the High Court. Nevertheless this court is of the view that the Respondent was not prejudice by the said contents.

In addition it is to be noted that the Respondent has not taken up the afore said objection in the Magistrate Court. Nevertheless this court is of the view that the above action was filed by the authorised officer from the Dehiwala- Mount Lavinia Municipal Council, and as such the objection of the Respondent is a mere technical objection, which will not vitiate the proceedings in acting <sup>under</sup> Section 23 of the said Act.

It is the contention of the Respondent that the Appellant did not have any authority to make the purported application to the Magistrate Court for the demolition of the construction effected without a prior approval of the UDA.

The Respondent planks her contention on the premis that the Authority can delegate powers, only in respect of matters relating to planning and not for any act of development activity.

As per Section 23 subsection 5 of the Urban Develop Authority states thus;

“The Authority may delegate to any officer of a local authority, in consultation with that local authority, any of its powers, duties and functions relating to planning within any area.....”

But it is salient to note after the said amendment came in to operation in 1982, and the said document marked P1 by which the UDA delegated its powers to the Mayor / Municipal Commissioner to attend to all matters relating to planning and development activities was much later than the above amendment.

Therefore in the above setting it is abundantly clear that the Mayor/ Municipal Commissioner was authorised to attend to matters relating to planning and development activities too. Further it is abundantly clear that the notice in terms of 28 (a)(1) read with 28(a)(1) has been sent by Municipal Commissioner. Therefore this Court is of the view that the Applicant – Appellant has followed the proper procedure and the Respondent was not denied procedural fairness.

For the reasons as set out above it is apparent that the Learned High Court Judge has erred in the above vital issue by allowing the application of

the Respondent – Petitioner – Respondent by setting aside the order of the Learned Magistrate.

Hence I set aside the order of the Learned High Court Judge and give effect to the order of the Learned Magistrate accordingly.

Thus I allow the appeal.

**JUDGE OF THE COURT OF APPEAL**

W.M.M.Malinie Gunarathne, J  
I agree,

**JUDGE OF THE COURT OF APPEAL**