IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

Court of Appeal case no. CA/PHC/32/2011 and 33/2011

H.C. Kegalla case no. 3208 and 3206

M.C. Warakapola case no. 40355

Chairman,

Pradeshiya Sabha, Warakapola.

Petitioner

Vs.

Abusalee Sitti Fareeda,

No. 76, Aguruwella Road, Kegalla.

Respondent.

AND

Abusalee Sitti Fareeda,

No. 76, Aguruwella Road, Kegalla.

Respondent Petitioner.

Vs.

Chairman,

Pradeshiya Sabha, Warakapola.

Petitioner Respondent

AND NOW

Abusalee Sitti Fareeda,

No. 76, Aguruwella Road, Kegalla.

Respondent Petitioner Appellant.

Vs.

Chairman,

Pradeshiya Sabha, Warakapola.

Petitioner Respondent Respondent

Before : H.C.J.Madawala J.

: L.T.B. Dehideniya J.

Counsel : D.H. Siriwardane for the Respondent Petitioner Appellant.

: Buddika Gamame for the Petitioner Respondent Respondent.

Written submissions filed on ; 19.09.2016 and 25.11.2016

Decided on : 17.01.2017

L.T.B. Dehideniya J.

These are appeals from the High Court of Kegalla.

The Respondent Petitioner Appellant (the Appellant) was charged under the Urban Development Authority Act before the Magistrate Court of Warakapola for constructing a building without obtaining the relevant permit from the Pradeshiya Sabha. While this case is pending, the Appellant instituted action in the Court of Appeal seeking for a writ of *certiorari* and *mandamus* against the Petitioner Respondent Respondent (the Respondent). When the case was called before the learned Magistrate on 03.08.2007, the Counsel for the Respondent informed Court that there is a case pending before the Court of Appeal and for the time being he does not intend to proceed the application. The learned Magistrate considered the submission and fixed the case to be called on 07.09.2007. On that day the Respondent submitted a copy of the proceeding in the Court of Appeal and informed that there is no order to stay the proceedings in the Magistrate Court. Accordingly the learned Magistrate proceeded and concluded the application and issued the demolition order. The Appellant moved in revision as well as appealed against the decision in the High Court of Kegalla, was dismissed. These appeals are against the said orders.

When these matters were taken up for argument on 20.06.2016, the Appellant was absent and unrepresented, the Counsel for the Respondent agreed to dispose the argument by way of written submissions. The Counsel though obtained several days to file written submissions, without filing the same kept himself absent on 13.09.2016. The Court issued notice on both parties and in response to the said notice, both parties appeared through their Counsel in Court 03.10.2016 and moved for further time to file written submissions. On 30.11.2016 it was recorded in the journal entry that "Both parties have filed their written submissions in respect of the preliminary objection, there is no right of appeal." Until that day, no preliminary objection is recorded in the journal entries. In the written submissions of the Respondent also there is no preliminary objection formulated. Therefore I will consider the merits of these appeals. These two appeals are being on the same issue this judgment is for both cases.

The Appellant argue that the application filed by the Respondent in the Warakapola Magistrate Court case no 40355 is under the Pradeshiya Sabha Act No. 15 of 1987 and the sections referred in the application, that is sections 8 I (1) and 28 A (3) has nothing to do with the unauthorized construction. This is a totally misconceived argument. The Respondent has not made the application under the Pradeshiya Sabha Act, but the application was made under the Urban Development Authority Act No. 41 of 1978 amended by Act Nos. 4 of 1982 and 44 of 1984. The section 28 A (3) of the Urban Development Authority Act 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 requirements of the Authority under subsection (1), if he is satisfied to the same effect, make order accordingly.

The Respondent has issued notice under section 28 A (1) to the Appellant but the Appellant without responding to the said notice, continued to construct the building. Therefore the Urban Development Authority is entitle to proceed under section 28 A (3) of the Act. The area where the construction was done by the Appellant was declared as a Development Area by the Gazette Extraordinary No. 1140/17 dated 12.07.2000. The Chairman and the Secretary of the Pradeshiya Sabha of Warakapola has been authorized by the Urban Development Authority to perform the functions under the Act by letters dated 31.12.1991 and 28.02.2003. Therefore, the Chairman has the authority to institute this action. On the other hand section 8(1) of the Pradeshiya Sabha Act No. 15 of 1987 empowers the Chairman to act on behalf of the Pradeshiya Sabha. The section reads thus;

8. (1) The Chairman of a Pradeshiya Sabha shall be the chief executive officer of the Pradeshiya Sabha, and all executive acts and responsibilities which are by this Act or any other written law directed or empowered to be done or discharged by the Pradeshiya Sabha may, unless the contrary intention appears:; from the context, be done or discharged by the Chairman.

Therefore the argument of the Appellant that the Chairman cannot institute this action cannot stand.

The appellant's main argument in the petitions of appeal is that the submission of the Counsel for the Respondent in the Magistrate Court made on 03.08.2007 that *"for the time being he is not proceeding the application"* amounts to a withdrawal of the application and the learned Magistrate without giving a further date, should have dismissed the application. He argues that the Court has no jurisdiction to hear and conclude the case after the Counsel submitting that he is not proceeding.

I do not agree with this submission. The learned Magistrate has recorded in the journal entry dated that the Respondent is not proceeding *for the time being.* (දැනට) It does not mean that the Respondent is not proceeding at all. The Respondent has come to know that there is a case pending before the Court of Appeal and brought it to the notice of the Magistrate Court. It is obvious that his intention was not to proceed with the case only until he obtains a copy of the proceeding in the Court of Appeal because he has tendered the said copy to the Magistrate Court on the very next date and obtained permission from Court to proceed. Therefore the word "for the time being" (දැනට) used in the journal entry is very crucial.

The Appellant's argument is that the words used in the said journal entry dated 03.08.2007 amounts to a withdrawal of the application. A complainant in a Magistrate Court cannot withdraw an application in that manner. Section 189 of the Criminal Procedure Code provides that the withdrawal can be done only with the permission of the Court. The section reads;

> *189. If a complainant at any time before judgment is given in any case under this Chapter satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw the case the*

Magistrate may permit him to withdraw the same and shall thereupon acquit the accused, but he shall record his reasons for doing so;

In the present case the learned Magistrate has not permitted the complainant to withdraw the case. Therefore there cannot be any implied withdrawals, it has to be express and clear withdrawal with permission of Court.

It has been held in the case of Ramachandran v. The Queen 64 NLR 512 referring to a withdrawal of indictment that;

If what learned Crown Counsel purported to do at the trial was to seek the permission of the Court and with its permission withdraw the indictment, then the learned District Judge should have made order staying all proceedings on the indictment and discharging both accused.

The learned Magistrate has correctly decided that since no stay order has been issued by the Court of Appeal, the application can be proceeded. I see no reason to interfere with this finding.

Appeals dismissed subject to costs fixed at Rs. 10,000.00

Judge of the Court of Appeal

H.C.J. Madawala J.

I agree.

Judge of the Court of Appeal