

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

In the matter of an Appeal in terms of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with the provision contained in the High Court of the Province (Special Provision) act No. 19 of 1990.

Executive Engineer
Badulla Division
Road Development Authority
Badulla.

Appellant

CA (PHC) 84/2011

UVA PHC No. Rev/ 32/10

Passara Magistrates Court
No. 12228

VS

M. Rasindu
No. 345, Maha Veediya,
Passara.

Respondent

AND NOW BETWEEN

M. Rasindu
No. 345, Maha Veediya,
Passara.

Respondent/Petitioner

Vs

1. Executive Engineer,
Badulla Division,
Road Development Authority,
Badulla.

Applicant/Respondent

2. Road Development Authority
"Sethsiripaya"
Battaramulla.

3. Hon. Attorney General
Attorney General's Department
Colombo 12.

Added Respondent

AND NOW BETWEEN

M. Rasindu
No. 345, Maha Veediya,
Passara.

**Respondent/Petitioner/
Appellant**

Vs

1. Executive Engineer,
Badulla Division,
Road Development Authority,
Badulla.

Applicant/Respondent/Respondent

2. Road Development Authority
"Sethsiripaya"
Battaramulla.

3. Hon. Attorney General
Attorney General's Department
Colombo 12.

Added Respondents/Respondents

Before: P.Padman Surasena J. (P/CA)

K.K.Wickremasinghe J.

Counsel: AAL D.P.L.A Kasyapa Perera for the Petitioner

SSC U.P. Senasinghe for the Respondents

ARGUED ON: 15/09/2017

Written submission of the Respondent Petitioner Appellant submitted on:
06/11/2017

Written submission of the Applicant Respondent Respondent submitted on:
26/10/2017

DECIDED ON: 02/03/18

JUDGEMENT

K.K.Wickremasinghe J.

The court of the first instance namely Passara Circuit Magistrate court heard the case on filing of an application in that court by the 1st Applicant/Respondent Respondent of this case on 19/10/2009 under the provisions of Thorough Fares Ordinance No 10 of 1861 Amended by Act No. 81 of 1988 and Act No. 9 of 1988. After hearing of all parties the Learned Magistrate delivered the order on 22/04/2010 and ordered to demolish the premises mentioned in the schedule of the Application. Thereafter the respondent/petitioner/appellant petitioned to the Badulla High Court against that order of the Learned Magistrate to revise the said order.

Having heard the revision application of the Respondent/Petitioner/Appellant learned High Court Judge dismissed the petition. Being aggrieved by the said order the Appellant has filed this application to set aside the decision dated 22/04/2010 and 19/07/2011 of the Learned Magistrate and the Learned High Court Judge respectively.

The Learned counsel for the appellant states that in sub section 6 (1) and 6 (2) of the Interpretation Ordinance No. 21 of 1901 was amended as follows;

6(1) "Whenever any written law repealing either in whole or part a former written law is itself repealed should not in absence of any express provisions to that effect revive or be deemed to have revived the repealed written law or any right office privilege matter or thing not in force or existing when the repealing written law comes into operation".

6 (2) "Whenever any written law repeals in whole or part a former written law and substitutes therefor some new provisions, such repeal shall not take effect until such substituted provisions comes into operation".

The Learned High Court Judge in her judgment has stated that applicable law in respect of this case under Thoroughfares ordinance No. 10 of 1861 as amended by Acts No's 9 and 81 of 1988 and not the Thoroughfares Ordinance Act No. 40 of 2008.

Therefore the learned counsel for the petitioner states that the judgment of the Learned High court Judge cannot stand and it's bad in law.

When considering Sub sections 6 (1) and (2) of the Interpretation Ordinance No.21 of 1901 and Section 90(1) of the Thoroughfares Act and gazette No. 1612/18 of 30th July 2009 together, the Application filed in the Magistrates Court is bad in law because at the time of filing the Thoroughfares Act was amended and has repealed and there is no action, matter proceeding instituted under the repealed Ordinance. And pending on the day proceeding the appointed date of 1st August 2009 on which the Thorough Fares Act No.40 of 2008 declared effective.

Therefore the notice served on the respondent/Petitioner / Appellant of the brief issued under the interims of the repealed Acts and it cannot at all consider as an

Institution of Action against the respondent/ petitioner/ appellant under the said repealed act.

In the case of **Dissanayake vs Samurdhi Authority of Sri Lanka**[2005] 2 Sri **L.R 388** held that; “ *Filing of a report setting out the facts that a suspect has committed an offence does not amount to an institution of proceedings in the Magistrates Court. Equating a report under Section 116(1) to an institution of criminal proceeding is wrong.* ”

According to the above decision even filing of a B report in the Magistrate Court not amounting to an institution of an action. As such the learned counsel for the respondent/petitioner/appellant seeks for a judgment in favor of the respondent/petitioner/appellant.

The learned counsel for the applicant respondent respondent states that the petitioner has filed this action stating inter-alia; the 1st respondent to this application (Executive Engineer – Badulla Division-RDA) has made an application in the Magistrates court under and in terms of section 26(3) (a) of the Thoroughfares Ordinance No. 10 of 1861 as amended, for a mandatory order of the demolition of the unauthorized structure indicated in the said application.

The petitioner showed cause in the said Magistrates court case to the effect that the 2nd schedule is part of the land mentioned in the 1st schedule hereto which in turn is a private property of the petitioner and the same was built upon due permission from the Passara Pradeshiya Sabha .

However, the Magistrate court allowed the application of the 1st Respondent. Subsequently the petitioner took steps to revise the said order, but the revision application was dismissed. Therefore the appellant has instituted the instant appeal against the said High Court order.

In reference to the factual submissions made by the learned counsel the appellant has been served with ample notice as to the identity and period of removal of the relevant structure. The reason behind the issuance was that the relevant structure has been constructed within the building limits of the Peradeniya-Badulla-Venkaladi High way, which falls under the category of Grade A5 roads and as per section 24(1) (a) (i) of the Thoroughfare Ordinance No. 10 of 1861 as amended,

which stipulates that no structure could be built within a distance of 15m from the center of such road except under the due permission of the relevant executive engineer.

The appellant mainly contended that the relevant unauthorized structure rested on his private land and the same has been constructed upon the building permission obtained from the Passara Pradeshiya Sabha. The Respondents submitted the above stance of the appellant had been expressly vitiated by a plain perusal of notice which clearly indicates that the said structure to be removed before 21/02/2008. Furthermore, the said application clearly shows that the unauthorized structure said lies within a distance of 15m from the relevant Peradeniya-Badulla-Venkaladi High way.

The learned counsel for the respondent states that it was always open for the appellant to make inquiries from the 1st respondent or the RDA as to the extent of such unauthorized structure, however, such non-action of the appellant indicates that he was never confused or misled as to the extent of such unauthorized structure.

Furthermore the learned counsel for the respondent states that the validity of the proceedings came into operation after the National Thoroughfare ordinance came into force. The appellant has been stating that the proceedings should have been recommenced in view of the repeal and replacement of the thoroughfare Ordinance, stating that the current Act carries substantially different provisions as to the building limits.

Therefore the learned counsel for the respondent submits that the aforesaid position is grossly erroneous, for the following two reasons;

- As per section 01 of the current Act, the said Act shall be effective only from the appointed date specified therein which was 1st August 2009.
- The notice under section 24 was the initial commencement point of the Magistrate Court case and thus the same had been served on the appellant on 07/02/2008 well before the coming in force of the current Act.

- Importantly, section 90(20(b) of the current act contains transitional provisions which allows for all actions and proceedings commenced under the old Act to continue uninterrupted under the current Act.
- In the view of the foregoing, the argument of the appellant is rendered nugatory, as there was no legal or other needs whatsoever to commence the proceedings afresh.

Perusal of both section 24 of the old Act and section 42, 43 of the current act clearly reveals that the sole entity authorized to grant any license for the purpose of those provisions would be the “Executive Engineer of the RDA”. Thus, it follows that the alleged purported authority granted by the Passara Pradeshiya Sabha, become irrelevant and hence, the stance of the appellant that he had obtained valid permission prior to putting up the relevant unauthorized structure becomes null and void.

It is amply clear that the said relevant structure is an unauthorized structure due to the failure of the appellant to obtain license and permission from the proper authority before putting up the unauthorized building. Therefore, it is evident that the said order was made after due consideration of the cogency of the respondents position vis-à-vis all the aforesaid lacunas of the appellant’s stance. Hence, it follows that the said order is in accordance with the relevant law and facts.

Considering the above, this court sees no reason to overrule the order of the Learned High Court Judge. Thus, this court is hereby dismiss the appeal without costs.

JUDGE OF THE COURT OF APPEAL

P. Padman Surasena J.(P/CA)

I agree,

PRESIDENT OF THE COURT OF APPEAL