

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

In the matter of an appeal against
judgment of Provincial High Court
exercising its revisionary jurisdiction.

C A (PHC) / 136 / 2016

Provincial High Court of

Western Province

(Colombo)

Case No. HCRA 68 / 2013

Magistrate's Court of Colombo

Case No. 16315/2013

Urban Development Authority,

No 27,

D R Wijewardhana Mawatha,

Colombo 10.

Now

Sethsiripaya,

Sri Jayawardhanapura Kotte,

Battaramulla.

PETITIONER - RESPONDENT -

PETITIONER

-Vs-

Jayanthi Wijelatha,

No 155 - 157,

Nanayakkara Mawatha,

Obeysekarapura,

Rajagiriya.

RESPONDENT - PETITIONER -

RESPONDENT

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

K K Wickremasinghe J

Counsel; Ikram Mohamed PC with P W Kulathillake, Nadeeka Galhena and Charitha Jayawickrema for the Petitioner - Respondent - Petitioner.

Milinda Pathirana DSG for the Respondent - Petitioner - Respondent.

Decided on : 2018 - 05 - 10

JUDGMENT

P Padman Surasena J (P/CA)

Learned President's counsel for the Petitioner – Respondent - Petitioner as well as the learned Deputy Solicitor General for the Respondent - Petitioner - Respondent when this case came up on 2017-10-11, requested this Court, to pronounce the judgment after considering the contents of the written submissions the parties would file. They further informed court that it would not be necessary for them to make oral submissions. Therefore this judgment would be based on the material adduced by parties in their written submissions.

The Petitioner - Respondent - Petitioner (hereinafter sometimes referred to as the Petitioner) has made an application to the Magistrate's Court of Colombo seeking a mandatory order from the learned Magistrate under section 28 A (3) of the Urban Development Law (hereinafter sometimes referred to as UDA Law), to demolish an unauthorized construction. This was pursuant to the Respondent- Petitioner - Respondent (hereinafter sometimes referred to as the Respondent) defaulting the compliance with a notice issued under section 28 A (1) of the UDA Law.

As the Respondent has failed to attend Court on summons, the Petitioners had taken steps to serve summons on the Respondent by way of substituted service also. A report to this effect had also been filed in the Magistrate's Court by the fiscal. Thereafter, the learned Magistrate having considered the material before him, had pronounced his order dated 2013-03-08, granting power to the Respondent, under section 28 A (3) of the UDA Law, to demolish the said construction.

After the learned Magistrate delivered the order, the Petitioner having filed a motion in the Magistrate's Court, had obtained permission of Court to implement the order dated 2013-03-12. Accordingly, the fiscal had carried out the said order and filed a report in that regard in Court on 2013-03-18.

The Provincial High Court of Western Province holden at Colombo, upon an application for revision filed by the Respondent, has by its order dated 2016-09-13, directed that a course of action had arisen for the Respondent to recover compensation and to file separate action in a Court of law for recovery of damages and compensation.

This Court observes that the fundamental basis upon which the learned Provincial High Court Judge had proceeded to arrive at the impugned conclusion, is the alleged failure to serve summons on the Respondent. However, this Court is of the view that the learned Provincial High Court Judge had clearly misdirected himself when he had concluded that the Petitioners had defaulted serving summons at least by way of substituted service. The record bears testimony to the fact that the Petitioner indeed has served the summons on the Respondent by way of substituted service. The journal entries dated 2013-02-15, 2013-03-08 make this position amply clear. Unfortunately, the learned Provincial High Court Judge had failed to focus his attention on them. In these circumstances, this Court is of the view that the order dated 2016-09-13 pronounced by the learned Provincial High Court Judge is clearly erroneous and therefore should not be permitted to stand.

Further, this Court is unable to find any basis upon which the learned Provincial High Court Judge could have concluded that the Respondent had acted within law in constructing the impugned construction and interfered with the order granted by the learned Magistrate to demolish the said unauthorized construction. In any case, the said construction has now been demolished.

In these circumstances, this Court decides to set aside the order dated 2016-09-13 of the Provincial High Court Judge and proceed to restore all the orders made by the learned Magistrate with regard to the said demolition of the said unauthorized construction.

Appeal is allowed.

PRESIDENT OF THE COURT OF APPEAL

K K Wickremasinghe J

I agree,

JUDGE OF THE COURT OF APPEAL