

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

In the matter of an Appeal under
Article 154(ϑ) of the Constitution
read with Provisions in the
Provincial High Courts (Special
Provisions) Act No.19 of 1990.

Shantha Priyanthi Liyanage
Commissioner,
Sri Jayawardenapura Kotte
Municipal Council,
Rajagiriaya.

Applicant-Petitioner-Appellant

C.A.(PHC)Appeal No. 199/2011

P.H.C. Colombo Case No. HCRA 214/2008

M.C. Mt. Colombo CaseNo. 16795/5/7

Vs.

H.W.Lasantha de Silva,
No.185/39 A,
Alakeshwara Road,
Ethul Kotte.

**Respondent -Respondent-
Respondent**

BEFORE : JANAK DE SILVA, J. &
ACHALA WENGAPPULI, J.

COUNSEL : Neville Abeyratne P.C. with Shashika
Dissanayake & A. Dayaratne for the
Applicant-Petitioner-Appellant
Sunil Jayakody with Shella Jayawardena
for the Respondent-Respondent-
Respondent.

WRITTEN SUBMISSIONS

TENDERED ON : 26-09-2018(by the Appellant)
01.10.2018 (by the Respondent)

DECIDED ON : 26th October, 2018

ACHALA WENGAPPULI, J.

This is an appeal filed by the Applicant-Petitioner-Appellant (hereinafter referred to as the "Appellant") against the order of dismissal of her revision application HCRA 214/08 by the Provincial High Court of the Western Province holden in Colombo on 20.10.2011.

In her application to the Magistrate's Court of Colombo, the Appellant sought an order of Court enabling her to act under Section 28A(3) of the Urban Development Act No 41 of 1978 as amended (hereinafter referred to as the "Act") against an illegal construction by the

Respondent-Respondent-Respondent (hereinafter referred to as the "Respondent").

The sketch the Appellant relied on, in support of her application, shows that the Respondent, having built a house in the premises bearing assessment No. 185/39A, Alakeshwara Road, Ethul Kotte, had constructed 10 windows along its western boundary wall.

It is evident that the Appellant made her application to the Magistrate's Court on 22.10.2007 for an order under Section 28A(3) of the said Act. After an inquiry, the Magistrate's Court made a short order on 17.10.2008 by which it has held that the Respondent had engaged in the disputed "development activity" upon a valid permit issued to him under reference No. W2/CN/43/2000, a fact admitted by the Appellant and therefore it refuses her application.

Thereafter, the Appellant sought to revise the said order of the Magistrate's Court on the basis that it had erroneously held that the Respondent had a valid permit, purely on the development plan and without considering the other documents that are relied upon by the Appellant in support of her claim. After inquiry, the Provincial High Court refused the Appellant's application on the basis that she failed to establish exceptional circumstances.

In support of her appeal, the Appellant contended that both the lower Courts had failed to consider the fact that the Respondent had no valid permit to carry out the development activity that had been clearly identified and described in her application and in addition, the Courts

have also failed to note that the development permit initially issued to the Respondent had subsequently been revoked.

The Respondent, in his submissions resisting the appeal submitted that the amended plan submitted to the Appellant under reference BA/N/188/2016 had been approved but he was not issued with a Certificate of Conformity by the Appellant upon intervention of a local politician and therefore the Provincial High Court was correct in refusing the revision application of the Appellant. He further claims that the UDA by its letter dated 11.10.2017 informed the Appellant that it had no objections to the approval of the said amended plan "as those changes are internal and does not affect the height and the foundation."

When the material placed before Magistrate's Court by the contesting parties, it is apparent that there had been an ongoing dispute as to the compliance to the conditions stipulated in the development issued to the Respondent.

In view of this observation, it is appropriate to refer to the chronology of events which finally led to the application under Section 28A(3) of the Act.

The development permit was issued to the Respondent on 27.08.1998 by the Appellant. On 15.10.2001, Director (Enforcement) of UDA informs the Appellant that the Respondent had failed to comply with the conditions of the development permit by illegally constructing certain sections of the house and he would initiate legal action if the Respondent failed to tender amended plans for approval.

Thus, it is clear that even in 2001 the Respondent was in violation of the development permit and was given opportunity to rectify the illegality by submitting amended plans. The Appellant also had informed of this position to the Respondent on 21.11.2001. It is also evident that the Respondent had failed to comply with the directive and by letter dated 28.10.2004, UDA directed the Appellant to initiate legal action against the Respondent for violation of the terms of development permit.

Sub committed report of the Western Provincial Council confirms that the windows along the boundary wall of the Respondent's house.

On 10.09.2007 the Respondent informs the Appellant that he would submit an amended plan in respect of the windows he had constructed along the western boundary wall and it was tendered eventually only on 18.09.2007.

An inspection was carried out by an officer from the Appellant's Council on 26.10.2007 and it was reported that the amended plan could not be recommended since certain segments of the construction was not provided for sunlight and air. There were windows on the western boundary wall.

The Appellant's application under Section 28A(3) to the Magistrate's Court is dated 22.10.2007.

With the letter dated 14.11.2007, the Appellant informed the Respondent that upon his failure to submit an amended plan fulfilling the requirements, his application is refused.

When the Magistrate's Court pronounced its order on 17.10.2008, that there was an approved building plan and as such it refuses the Appellant's application under Section 28A(3) of the Act, these documents had already been tendered to that Court by the parties. Nonetheless, it made the impugned order.

Thus, it is clear that the Magistrate's Court order dated 17.10.2007 was made without proper appreciation of the attendant circumstances which clearly established that the Respondent's "development activity" had no legal sanction.

The claim by the Respondent that the Western boundary shown in the sketch is not the exact boundary as he is in the process of obtaining additional strip of land to make up for the extent of land he lost due to acquisition for archaeological site cannot be considered by the Court as it had to decide the matter as it stood at the time of the application.

Similarly, the Provincial High Court, although referred to these circumstances, has erroneously held that the Appellant has failed to establish exceptional circumstances, when in fact the order of the Magistrate's Court obviously made without a valid basis.

In the circumstances, we allow the appeal of the Appellant by setting aside the orders of the Provincial High Court as well as the Magistrate's Court as prayed for. The Appellant is entitled to the reliefs prayed for in her application to the Magistrate's Court.

Parties will bear their costs.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL