

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

H.A.L. Perera of

No.407, Laksevana,

Welipillewa,

Ganemulla.

Respondent-Petitioner-Appellant

C.A.(PHC)Appeal No. 174/2013

P.H.C. Gampaha Case No.32/12(Rev.)

M.C. Gampaha CaseNo. 80923/S

Vs.

Chairman,

(Authorised Officer under the Urban
Development Authority Act)

Mahara Pradeshiya Sabhawa,

Mahara.

Applicant -Petitioner-

Respondent

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent-Respondent

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

COUNSEL : M.C.M. Muneer for the Respondent-
Petitioner-Appellant
Yasas de Silva for the Applicant –
Petitioner-Respondent.
Asanthika Assalaarachchi for
J.A.S.A. for the Attorney General

WRITTEN SUBMISSIONS

TENDERED ON : 05-10-2018 (by the Appellant)
15-10-2018 (by the Respondent)

DECIDED ON : 07th November, 2018

ACHALA WENGAPPULI, J.

This is an appeal filed by the Respondent-Petitioner-Appellant (hereinafter referred to as the “Appellant”) against the dismissal of her revision application No. Rev. 32 of 2012 by the Provincial High Court of the Western Province holden in Gampaha by its order on 26.11.2013.

In his application to the Magistrate’s Court of Gampaha under Section 28A(3) of the Urban Development Act No. 41 of 1978 as amended (hereinafter referred to as the “UDA Act”), the Applicant-Respondent-Respondent (hereinafter referred to as the “Respondent”) sought an order of Court in respect of two unauthorised constructions effected by the

Appellant. It is alleged by the Respondent that he has already served notice on the Appellant under registered cover and that she had failed to comply with such directions upon service of notice. The annexed sketch and report to the said application shows there are two buildings that were constructed violating the building lines in respect of the two highways it faces.

The Appellant, in her "petition" filed before the Magistrate's Court had only raised several technical objections as to the validity of certain documents.

After an inquiry, the Magistrate's Court issued an order under Section 28A(3) of the UDA Act authorising the demolition of the "development activity" described as unauthorised constructions.

Thereafter, the Appellant sought to revise the said order before the Provincial High Court. During the inquiry before the Provincial High Court the Appellant submitted that:

- i. The said buildings were constructed prior to the date of the Gazette by which the area was declared a "Development Area",
- ii. the affidavit of the Respondent is defective,
- iii. no prior notice was served on the Appellant directing her to remove the unauthorised constructions.

In dismissing the application of the Appellant, the Provincial High Court has, whilst rejecting the objection on the validity of the affidavit as a mere technicality held that the Appellant has failed to tender any approved plan for the disputed "development activity" and that the Respondent had in

fact served notice prior to his application under Section 28A(3) of the UDA Act.

The Appellant, in challenging the legality of the said order of dismissal contended before this Court that the Provincial High Court was in error when it failed to note that the disputed construction is predated to the gazette by which the area was declared as "*Development Area*", the notice issued by the Respondent is ambiguous and in view of the unreported judgment of *Fernando v Somasiri* CA (PHC) 26/2000 decided on 31.10.2012, there was no opportunity afforded by the Respondent to the Appellant enabling her to demolish the said buildings and as such had no authority to seek a Court order.

Section 28A(1) of the UDA Act contemplates two situations under which the Urban development Authority or its delegate could by written notice require the person who carried out development activity:-

- (a) to cease such development activity forthwith; or
- (b) to restore the land on which such development activity is being executed or has been executed, to its original condition; or
- (c) to secure compliance with the permit under the authority of which that development activity is carried out or engaged in, or with any term or condition to such permit, and for the purposes of compliance with the requirement aforesaid,
 - (i) to discontinue the use of any building; or
 - (ii) to demolish or alter any building work.

The two situations that are contemplated could be identified as;

- i. any development activity commenced, continued, resumed or completed without a permit; or
- ii. development activity commenced, continued, resumed or completed contrary to any term or condition set out in a permit issued in respect of such development activity.

It is inferred from the submissions of the Appellant that she seeks to rely on the 1st situation referred to above to challenge the validity of the order of dismissal. Whether the Appellant "*commenced, continued, resumed or completed*" any development activity without a valid permit is obviously a question of fact. The Appellant claims that the disputed buildings did exist prior to the issuance of the gazette declaring the area as "*Development Area*".

However, the Appellant tendered no material to any of the lower Courts to show that the disputed buildings did exist prior to 1st March 2002. The sketch that had been tendered by the Appellant clearly shows that there are two buildings, used presumably as business premises that had been constructed violating the building lines. The sketch was prepared by Superintendent of Works (Civil) of Mahara Pradesheeya Sabha on 10.12.2009 and the Respondents application to the Magistrate's Court under Section 28A(3) was filed on 06.07.2011.

In the petition and affidavit filed by the Respondent under Section 28A(3) of the Act, it is specifically alleged that the Appellant had "*completed*" the disputed development activity without a permit.

Strangely, the Appellant, in her petition and affidavit, did not challenge this factual assertion by the Respondent nor did she offer any explanation as to her claim of non-applicability of Section 28A by stating that the buildings were already constructed prior to the declaration of "Development Area". Instead, she tendered documents marked X5 to X11 annexed to her revision application for the consideration of the Provincial High Court.

The Respondent contended that this Court should not consider these documents as they were never placed before the Magistrate's Court for its consideration even though she seeks to challenge the validity of the order it made before the Provincial High Court. In support of this objection, the Respondent relied on the judgment of CA (PHC) 41/14 decided on 02.05.2017 where it was held by this Court that:-

"As revision is supervisory in nature, and the learned High Court Judge in exercising the revisionary jurisdiction can only supervise what has already been submitted in the lower Court. The said document had not been tendered in the lower Court, hence the learned High Court Judge in exercising revisionary jurisdiction is debarred from supervising the said document"

In view of the fact that documents X5 to X11 were not placed before the Magistrate's Court for its consideration in making the impugned order and had only been tendered belatedly to the Provincial High Court, seeking to revise the said order made by the lower Court, this Court

should not consider its contents as per the reasoning of the said judgment. Therefore, we are of the considered view that this ground of appeal is without merit and accordingly fails.

The other ground of appeal as urged by the Appellant is the failure of the Respondent to afford an opportunity to the Appellant to comply with the demolition of the "development activity" before instituting action before the Magistrate's Court, should be considered next. The Appellant relied on the judgment of *Fernando v Somasiri* (supra) in support of her contention.

This complaint had been dealt with by both Courts below. The receipt of the registered articles confirms that the notice under Section 28A(1) of the UDA Act was posted to the Appellant on 17.11.2009. The Respondent in his application to the Magistrate's Court clearly stated that the notice was posted to the Appellant on 16.11.2009. In her affidavit tendered before the Magistrate's Court, the Appellant only challenges the value of postal receipt marked by the Respondent as "P4". However, she did not deny the service of notice by post. In addition, the Appellant did not claim that she was not served with notice in her affidavit filed in support of the revision application. It is clear from these circumstances, the Magistrate's Court was satisfied that the Appellant had failed to comply with the direction on her as per notice issued by the Respondent and thus satisfied the requirement as highlighted in the judgment of *Fernando v Somasiri* (supra).

These circumstances amply justify the inference that she was in fact served with the prior notice as required by Section 28A(1) of the said Act

and she did not comply with the directive contained therein. Therefore, this ground of appeal is also devoid of any merit.

In view of the above considerations, we affirm the orders of both Courts and dismiss the appeal of the Appellant with costs fixed at Rs. 10,000.00.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL