

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

An Appeal from the order made by  
the High Court of Panadura in the  
exercise of its Jurisdiction under  
Article 154P(3)(6) of the Constitution.

C.A.(PHC)Appeal No. 217/2011

P.H.C. Panadura Case No. 16/2008Rev.

M.C. Moratuwa Case No. 87139

Swarna Buddhi Pieris  
47 and 47A, 4<sup>th</sup> Lane,  
Kaldemulla, Moratuwa.

Accused-Petitioner-Appellant

Vs.

Victor Warnakulasooriya,  
Municipal Commissioner,  
Moratuwa Municipal Council  
Moratuwa.

Complainant-Respondent-  
Respondent

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

COUNSEL : Chatura Galhena for the Accused-  
Petitioner-Appellant  
Harindra Banagala for the Complainant  
Respondent-Respondent.

ARGUED ON : 15<sup>th</sup> October, 2018

DECIDED ON : 16<sup>th</sup> January, 2019

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ACHALA WENGAPPULI, J.

This is an appeal by the Accused-Petitioner-Appellant (hereinafter referred to as the "Appellant") against the order of the Provincial High Court of the Western Province holden in Panadura by which it had dismissed an application filed by him to revise an order of the Magistrate's Court of Moratuwa under a prosecution instituted by the Complainant-Respondent-Respondent (hereinafter referred to as the "Respondent").

In the said prosecution instituted by the Respondent, the Appellant was charged under Section 28A(3) of the Urban Development Authority Act No. 41 of 1978 as amended ( hereinafter referred to as the said "Act") for the annexation of a road to the land situated at No. 80, 4<sup>th</sup> Lane, *Kaldemulla, Moratuwa*, in violation of Section 8(1) of the said Act, without a permit.

The Respondent, in his affidavit addressed to the Magistrate's Court, stated that the *Moratuwa* Urban Council area has been declared as a "Development Area" on 30.09.1978 and the Appellant was served notice under Section 28(1) of the Act under registered cover to discontinue his act of erecting a retaining wall around a unauthorised well, on or before 30.10.2007 but had not complied with the direction contained in the said notice.

In his reply to the said affidavit, the Appellant claimed that there is no allegation of any violation of a Development Plan as per Section 8(1) of the said Act and the Respondent had intervened on behalf of another individual who had a dispute with the Appellant, in instituting action under the said law.

The Magistrate's Court, in its impugned order, has found that the Appellant had annexed a part of the common access road which runs adjacent to his property with his construction and therefore had created a situation by which the usage of the public road is obstructed and therefore ordered the demolition of the said construction under the provisions of Section 28A and 28C of the said Act.

Being aggrieved by the said order, the Appellant invoked revisionary jurisdiction of the Provincial High Court, seeking to set it aside. After an inquiry, the Provincial High Court concluded that the Appellant has failed to produce a permit for the construction activity and therefore no exceptional ground existed to interfere with the impugned order of the Magistrate's Court and had accordingly dismissed the Appellant's petition.

The Appellant had thereafter sought appellate jurisdiction of this Court, seeking to set aside the said order of dismissal made by the Provincial High Court.

At the hearing of her appeal, learned Counsel for the Appellant contended that the Respondent had failed to attach a Development Plan when he instituted proceedings against her to the application. He relied on the provisions contained in Section 8(1) of the said Act where it is stated that "... the Authority shall, having regard to the amenities and services to be provided to the community, prepare a development plan for such development area or part thereof" in support of his contention that of making reference to a mere sketch prepared by the Respondent that had been annexed to the application does not satisfy the requirement of a development plan and therefore the finding of the Magistrate's Court is bad in law.

He also contended even in the said sketch tendered by the Respondent, there is no existing roadway in the portion shown as encroachment and relied on the plan No. 8884 of the Surveyor General that she submitted to impress upon this Court that lot Nos. 10 and 12 which formed the northern and southern boundaries are both earth drains and not a roadway running up to the canal. Therefore, the Appellant contends that "... in the absence of a development plan, or any other plan produced by the Complainant to Court, the fact of encroachment cannot be decided" by the Courts below and hence her appeal be allowed.

It appears from the above, the Appellant's contention is essentially based on the premise that there should be a Development Plan if the

Respondent was to institute proceedings before the Magistrate's Court for any construction that had been carried out in a development area.

In this context, it is very relevant to consider the application of the Respondent that had been filed naming her an accused. As already noted earlier on this judgment, the Respondent complains of the Appellant's failure to carry out his direction during the stipulated time given in the notice that had been served on the Appellant.

Section 28A(1) of the Act states that "where in a development area, any development activity is commenced, continued, resumed or completed without permit or contrary to any term or condition set out in a permit issued in respect of such development activity ... the Authority may ... by written notice require the person who is executing or has executed such development activity, or has caused it to be executed, on or before such day as shall be specified in such notice," to do the following;

- 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 of such permit, and for the purposes of compliance with the requirements aforesaid

- i. to discontinue the use of any or building; or
- ii. to demolish or alter any building or work.

The judgment of *Jayasinghe v Secretary Seethawakapura UC and Others* (2004) 3 Sri L.R. 108, having considered the relevant statutory provisions of the Act, their Lordships states thus:-

*"One of the powers and functions of the third respondent as stated in Section 8 (p) of the UDA law is to approve, co-ordinate, ' regulate any development activity in a "development area". The ambit and scope of the UDA law clearly shows the intention of the legislature, namely, that no "development activity" shall be carried out except with a permit issued by the third respondent in that behalf. The learned Counsel for the first and second respondents submitted that acting under Section 84 (1) of the Urban Councils Ordinance the first/second respondent has the authority to order the removal of any obstruction and encroachment. I am unable to agree with this submission in situations where a "development activity" is carried out in an area declared as a "development area" by the Minister under the UDA law. The object of an order in terms of Section 3 of the UDA law necessarily involves certain built-in assumptions. One such assumption is that the power to issue permits for the purposes of carrying out any*

*development activity in any "development area" vests in the third respondent. Similarly, if any "development activity" continues without a permit issued by the third respondent. I agree with the learned President's Counsel that action has to be taken by the third respondent to whom the power is committed in terms of Section 28A of the UDA law. The said provision specifically provides for the procedure to be followed in such a situation."*

Thus, in this instance, the Respondent had noticed the Appellant to comply with the direction it had issued in respect of the development activity that she had "commenced, continued, resumed or completed without permit" following the procedure laid down in the Act.

There is no dispute to the fact that the Appellant did not comply with the directive issued by the Respondent on or before the stipulated date by the Respondent.

Section 28(1) is as follows:-

*"Every person who contravenes or fails to comply with any provision of this Law or any regulation, rule, order, direction or requirement made or given the render shall be guilty of an offence under this Law, ...".*

Thus, it is clear what the Legislature has intended by enacting this provision of law is to make the failure by the person, on whom the notice

has been issued under Section 28A(1) of the Act to comply with it on or before the stipulated date, by imposition of certain statutory consequences. Section 28(1) made it a punishable offence while Section 28A(3) made such conduct liable to be issued with a demolition order with other monetary consequences such as costs. Therefore these provisions provide for two types of situations.

In the instant appeal, the Respondent issued notice under Section 28A(1) on the Appellant on 28.09.2007 directing him to comply with it on or before 30.10.2007 as per the affidavit of the Respondent tendered before the Magistrate's Court in support of his application. It is claimed by the Respondent that there was no compliance by the Appellant of the directive by that date. Thereafter, the Respondent has instituted proceedings before the Magistrate's Court on 27.12.2007.

In view of these considerations, it is clear that the existence of a Development Plan is not a condition precedent to institute proceedings under Section 28A(3) of the Act. The conditions precedent to such institution of proceedings are the issuance of the direction, its service and the noncompliance of it before the stipulated date. In his application to the Magistrate's Court, the Respondent only sought an order under Section 28A(3).



Section 28A(3) empowered the Magistrate's Court to issue an order to do the following;

- 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.

Having considered the material placed before it, the Magistrate's Court had issued order to demolish the development activity that had been done without a permit.

It was conceded by the learned Counsel for the Appellant that the disputed development work was demolished after the issuance of an order to that effect by the Magistrate's Court.

We are satisfied that the finding by the Provincial High Court that the impugned order of the Magistrate's Court is a legally valid order is correct. In the Judgment of the Supreme Court in *Divisional Secretary Kalutara & Others Vs. Jayatissa* SC Appeal Nos. 246 to 249 and 250 of 2014 - decided on 04.08.2017 - it has been held that:-

*"It must be noted that the Respondent had invoked revisionary jurisdiction of the High Court, which is a discretionary remedy. Thus, if relief is to be granted, the party seeking the relief has to establish that, not only the*

*impugned order is illegal, but also the nature of the illegality is such, that it shocks the conscience of the Court. the High Court, it appears had not considered the criteria aforesaid in setting aside the order of the Magistrate."*

In view of the said pronouncement of the apex Court we further hold that the dismissal of the petition of the Appellant is therefore justified.

The appeal of the Appellant accordingly fails as it is devoid of merit. Accordingly, the appeal of the appellant is dismissed.

In consideration of the factual considerations no cost is ordered.

**JUDGE OF THE COURT OF APPEAL**

**JANAK DE SILVA, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**