

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

Sailan International School,
Indonesian Haj Memorial
Building,
No. 76/1, Negombo Road,
Liyanegemulla,
Seeduwa.

Intervenient Respondent-
Petitioner-Petitioner

CASE NO: CA/PHC/APN/175/2005

HC NEGOMBO CASE NO: HCRA/133/2005

MC NEGOMBO CASE NO: H/46228

Vs.

The Chairman,
Katunayake Seeduwa Urban
Council,
Seeduwa.

Complainant-Respondent-
Respondent

The Director,
Sri Lanka Islamic Center,
No. 12, Rajapokuna Mawatha,
Colombo 10.

Respondent-Respondent-
Respondent

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Ruwantha Cooray for the Intervient
Petitioner-Petitioner.
Charaka Jayaratne for the Respondent-
Respondent.

Argued on: 25.10.2019

Decided on: 15.11.2019

Mahinda Samayawardhena, J.

The petitioner, the Chairman, Katunayake Seeduwa Urban Counsel, filed this application under section 28A(3) of the Urban Development Authority Law, No. 41 of 1978, as amended¹, in the Magistrate's Court of Negombo against the Director, Sri Lanka Islamic Center, No.12, Rajapokuna Mawatha, Colombo 10, as the respondent, seeking a demolition order in respect of a two-storied building and 20 toilets at No. 761, Liyanagemulla, Seeduwa, which have been constructed "by the respondent" without a Permit. The respondent did not contest the petitioner's claim. The respondent has, in fact, given his consent in writing for the demolition of those unauthorized buildings.²

¹ Hereinafter "the UDA Law".

² Vide page 2 of the High Court order at page 20 of the brief.

The respondent was not the person who constructed those unauthorized buildings. They have, admittedly, been constructed by the intervenient petitioner, Sailan International School, who is the lessee under the respondent in terms of the Lease Agreement No.1282.³

The learned Magistrate has, by order dated 21.02.2005, rejected the reliefs sought by the intervenient petitioner in its application dated 05.01.2004⁴ on the basis *inter alia* that the respondent has not complied with the Notice sent to him under section 28A(1) of the UDA Law.⁵ The High Court has also affirmed the Magistrate's Court order. The intervenient petitioner has filed this revision application against the said order of the High Court.

The only argument mounted by the learned counsel for the intervenient petitioner before this Court is that, without proper Notice in terms of section 28A(1) being first served on the intervenient petitioner as the person who "*has executed such development activity*", no demolition order could have been made by the learned Magistrate.

I am in total agreement with the aforementioned submission of the learned counsel for the intervenient petitioner.

Section 28A(1) of the UDA Law reads as follows:

Where in a development area, any development activity is commenced, continued, resumed or completed without

³ Vide pages 92-96 of the brief.

⁴ Vide the Application at pages 74-90 of the brief.

⁵ Vide paragraph 3 of the order at page 65 of the brief.

*permit or contrary to any term or condition set out in a permit issued in respect of such development activity, the Authority may, in addition to any other remedy available to the Authority under this Law, 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, not being less than seven days from the date thereof*

- (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 land or building; or*
 - (ii) to demolish or alter any building or work.*

Section 28A(2) states:

It shall be the duty of the person on whom a notice is issued under subsection (1) to comply with any requirement specified in such notice within the time specified in such notice or within such extended time as may be granted by the Authority on application made in that behalf.

Section 28A(3) spells out the procedure to be adopted by the Magistrate in the event the person who is executing or has executed such development activity without a valid Permit fails to comply with the Notice served on him. That section runs as follows:

28A(3)(a) Where any person has failed to comply with any requirement contained in any written notice issued under subsection (1) within the time specified in the notice or within such extended time as may have been granted by the Authority, the Authority may, by way of petition and affidavit, apply to the Magistrate to make an Order authorizing the Authority to-

(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,

and the Magistrate shall after serving notice on the person who had failed to comply with the requirements of the Authority under subsection (1), if he is satisfied to the same effect, make order accordingly.

(b) If such person undertakes to discontinue the use of the land or building or to demolish or alter the building or work, or to do such other acts as are referred to in paragraph (a) of subsection 3 of section 28A, the Magistrate may, if he thinks fit, postpone the operation of the Order for such time not exceeding two months as he thinks sufficient for the

purpose of giving such person an opportunity of complying with such requirement.

There is no doubt that, in terms of section 28A(1) of the UDA Law, the “*written notice*” shall be served not on the owner of the premises, but on “*the person who is executing or has executed such development activity, or has caused it to be executed*”. In the instant case, as I stated earlier, the person who executed the unauthorized development activity is not the respondent (who is the owner of the premises) but the intervenient respondent (who is the lessee of the premises).

The counter submission of the learned counsel for the respondent that: (a) the right person on whom Notice under section 28A(1) shall be served is the owner of the premises; (b) the intervenient petitioner knew about the Notice served on the respondent as the intervenient petitioner came before the Magistrate’s Court soon after the institution of the proceedings against the respondent; (c) no application has been made by the intervenient petitioner to regularize the unauthorized development activity are, in my view, unacceptable.

Service of written Notice under section 28A(1) is, in my view, a *sine qua non* to the filing of an application in the Magistrate’s Court seeking a demolition order under section 28A(3) of the UDA Law. The Urban Development Authority shall serve the Notice, and seek the demolition order, against the right person, who is none other than the person who is making or who made the unauthorized construction. Service of Notice on some other

person including the owner of the property is not sufficient compliance with section 28A(1) of the UDA Law.

During the course of argument, the learned counsel for the intervenient respondent drew the attention of the Court to the decision of this Court in *Ivo Fernando v. Somasiri*⁶ where this Court has held that failure to act in terms of section 28A(3) of the UDA Law by the Magistrate is a fatal irregularity. In that case, Notice under section 28A(1) had been served on the appellant who was the person who has constructed the unauthorized building, but the learned Magistrate has not followed the proper procedure as laid down in section 28A(3). In my view, the facts of the instant case are worse, in that, admittedly, no statutory Notice contemplated in section 28A(1) was ever served on the intervenient petitioner who constructed the unauthorized building.

In the middle of the argument, the learned counsel for the respondent stated that this argument was never taken up either before the Magistrate's Court or the High Court, and therefore this argument shall be rejected by this Court.

By reading the Magistrate's Court order, it is clear that this point has been raised before the learned Magistrate, but the learned Magistrate has taken the view that Notice has been served on the respondent.

⁶ CA/PHC/26/2000 decided on 31.10.2012

In any event, this is a pure question of law. It is trite law that a pure question of law, which does not require the ascertainment of new facts, can be taken up for the first time in appeal.⁷

For the aforesaid reasons, I set aside the order of the Magistrate's Court dated 21.02.2005 and the order of the High Court dated 22.06.2005, and allow the application of the intervenient petitioner, but without costs.

This will not prevent the petitioner to file a fresh application in the Magistrate's Court against the intervenient petitioner upon compliance with the procedure set out in the UDA Law.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal

⁷ Jayawickrema v. David Silva (1973) 76 NLR 427, Leechman & Co. Ltd. v. Rangalla Consolidated Ltd. [1981] 2 Sri LR 373, Simon Fernando v. Bernadette Fernando [2003] 2 Sri LR 158