

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

In the matter of an appeal in terms of Article 154(P),
6 of the Constitution read with the Rule 11 of the
Court of Appeals (Procedure for Appeals from High
Courts) rules 1988.

AND NOW

Jambugahawaththage Dona Kalyani Kumari,
No:84, Praja Shalawa Road, Wijayagama,
Kalutara South

Respondent-Petitioner-Appellant

C.A. (PHC) Application No: 141/2017

PHC/Kalutara/37/2015/Writ

MC Kalutara/33456

Vs.

Urban Development Authority,
No: 27, D.R. Wijewardhana Mawatha,
Colombo 10,

Presently

Sethsiripaya, Sri Jayawardenapura,
Kotte, Battaramulla.

Petitioner-Respondent-Respondent

Before:

PRASANTHA DE SILVA, J.

K.K.A.V. SWARANADHIPATHI, J.

Counsel: Priyantha Alagiyawanna
(For the Respondent-Petitioner-Appellant)

Subrina Ahamad, S.C.
(For the Petitioner-Respondent-Respondent)

Argument: By way of written submissions

Judgment on: 15.06.2022

K.K.A.V. SWARANADHIPATHI, J.

JUDGMENT

The Petitioner-Respondent-Respondent [hereinafter referred to as the Respondent] filed an action in the Magistrate Court of Kalutara under Case No.33456 for a demolition order, among other reliefs against the Respondent-Petitioner-Appellant [hereinafter referred to as the Appellant]. The said action was filed in Section 28(A)(3) of the Urban Development Authority Act No.41 of 1978 as amended by Act No.4 of 1982 and Act 44 of 1984.

After notice, the Appellant appeared before the Magistrate Court and filed her objections. Taking a preliminary objection, the Appellant took up the position that he is not the legal owner of the property.

The other objections were that as she had not done any illegal construction and the Respondent had failed to give any details of such construction, the Respondent cannot get an order under Section relied upon by them. After hearing both sides, the learned Magistrate delivered his order dated 27.03.2015. By that order, the learned Magistrate permitted to demolish the unauthorized construction done by the Appellant.

Aggrieved by this order, the Appellant had filed case No.37/2015 Writ in the High Court of Kalutara praying to quash the order of the learned Magistrate dated 27.03.2015.

With the party's consent, the learned High Court Judge fixed the matter for argument by written submissions. The order of the High Court of Kalutara in case No.37/2015 was delivered on 16.01.2017, dismissing the application of the Appellant. Aggrieved by this decision, the Appellants have invoked this court's jurisdiction.

When the matter was taken up for argument, the parties agreed to abide by the decision on written submissions already filed. Filing his written submissions, the Appellant supported his case stating that Section 28(A)(3) of the Act No.41 of 1978 requires the notice to be sent to the person who builds and not to the person who occupies. Therefore, before getting an order under this Section, the Respondents must satisfy the court that the Appellant was the person who built the unauthorized construction. Even though this argument was formulated from the beginning of the action, the Respondent failed to prove the point.

As proof of her tenancy, she had produced rent receipts. Therefore, proving that she had made improvements as a tenant is vital in exercising an administrative function. They argued that there is no legal authority to issue a writ against the Urban Development Authority.

The Appellant argued that as the person who had done the purported unlawful construction, the learned Magistrate had no jurisdiction to hear and determine the Respondent's application. As the 13th amendment to the constitution had listed powers of the Provincial Councils, Article 154(P)4 provides the power to High Court to issue Writs.

Planning and approval for building permits are within the powers of Urban Councils; a writ can be issued by Municipal Councils, which comes under Provisional Council Section 28A of the Urban Development Authority Act No.41 of 1978, as amended by Act No.4 of 1982, reads as follows: -

The Appellant argued that can the 28A notice is issued to her as a tenant

28(A)(1) speaks of a person executing or executing. It does not speak of the ownership of the premises. Therefore, the notice can be issued to a tenant.

When one receives the notice, he must prove that he has a valid permit. (*Urban Development Authority Vs. H.W. Kulasiri* (CA Revision Application 2226/2003 decided that "The existence of a permit is the only valid answer to the application under Section 28(A)(3). "

When perusing the Magistrate's court proceedings, the Appellant had not shown any valid permit. When the only remedy is a valid permit not forwarded to court, the act refers to what a Magistrate can do "Magistrate to make a mandatory order authorizing the authority to demolish or after the building or work".

When the Magistrate is satisfied that the person was served with notice and had failed to take steps in terms of the notice and had not produced a valid permit, there is no other order than issuing the demolition order prayed by the Respondent.

Therefore, the learned High Court Judge had not found any reason to reverse the order of the learned Magistrate. The learned High Court Judge had observed that the Appellant had not forwarded any valid permit. According to the High Court Judge, an order of this nature should be given at an early opportunity, but it had taken three years in this case.

Respondents had argued that the Appellant had not come with clean hands to pray for the intervention of this court.

Namunukula Plantation Limited Vs. Minister of Lands and Others S.C. Appeal No.46/2008 held, "If any party invoking the discretionary jurisdiction of a Court of law is found wanting in the discharge of its duty to disclose all material facts, or is shown to have attempted to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person".

As pointed out by the Respondents, Clause 7 of the Affidavit of the Appellant dated 14.11.2014 states that she did not receive a notice, and the Respondents had not followed the proper steps.

She had referred to paragraph 4 in paragraph 7 of the affidavit. Paragraph 4 speaks of her not being the owner, which has no bearing on not receiving a notice.

When perusing the case record, documents [PX4] produced by the Respondents of this case at the Magistrate court along with counter objection dated 21.01.2015 [PX4], a document sent by the Appellant to the Respondent on 04.03.2013 indicates that she had been running a business for eight years at the premises and had not construct any unauthorized construction. She had referred to a letter dated 21.02.2013 and No.13/61/8260(C). The Respondent marked a true copy of this document as [P2], which is the notice the Appellant had denied receiving. This shows that she had not constructed her pleadings truthfully. A person must come with clean hands to seek justice.

For the reasons set above, I see no reason to disturb the order of the learned Magistrate of Kalutara in case NO.33456 dated 27.03.2015 and the order of the learned High Court Judge of Kalutara in case NO.37/15 dated 16.02.2017.

Therefore, I dismiss the appeal subject to the taxed cost of Rs.10,000/-.

Judge of the Court of Appeal

PRESANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal