

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

In the matter of an application for appeal against the order given in the Revision application by the High Court dated 06.12.2018 in case no. 84/16 against the order dated 17.06.2016 by the Magistrate Court in case no 28844 under the Provincial High Court Act No. 19 of 1990 (Special Provisions) read together with Article 154(G) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:  
**CA PHC 208/2018**

Executive Engineer,  
Executive Engineer's Office,  
Kundasale

**Applicant**

High Court Case No:  
**84/16**

**Vs**

Magistrate Court Case No:  
**28844**

Kanaththage Premasiri Gunawardena  
No. 16/2B,  
Madimahanuwara

**Respondent**

**AND BETWEEN**

Kanaththage Premasiri Gunawardena  
No. 16/2B,  
Madimahanuwara

**Respondent –Petitioner**

Mulake Dissanayake Mudiyansele Dammika  
Samarakoon Bandara.

Executive Engineer,  
Executive Engineer's Office,  
Urban Development Authority,  
Kundasale.

**Applicant~ Respondent**

**AND NOW BETWEEN**

Kanaththage Premasiri Gunawardena  
No. 16/2B,  
Madimahanuwara

**Respondent –Petitioner~Appellant**

Mulake Dissanayake Mudiyansele Dammika  
Samarakoon Bandara.

Executive Engineer,  
Executive Engineer's Office,  
Urban Development Authority,  
Kundasale.

Applicant- Respondent-Respondent

**Before:** Prasantha De Silva, J.

K.K.A.V. Swarnadhipathi, J.

**Counsel:** Dasun Nagashena, AAL with Shihara Ekanayaka, AAL for the  
Respondent –Petitioner-Appellant  
Mr. Rajika Aluwihare, SC for the Applicant- Respondent-Respondent

**Written Submissions:** 17.01.2023 for the Applicant- Respondent-Respondent  
filed on

**Delivered on:** 28.03.2023

**Prasantha De Silva, J.**

## JUDGMENT

### Factual Background:

The subject of the dispute in the present case has arisen due to a construction of a building within the building limits of Kandy-Mahiyangana-Padiyathalawa Road by the Respondent-Petitioner-Appellant. The following consideration should be taken into account regarding the above subject matter;

- The above road was designated a national highway by Gazette no. 561/5 dated 06.06.1989.
- The Minister had not specified a building limit for the Kandy Mahiyangana Padiyathalawa road under section 42(1) of the Thoroughfares Act. Therefore, the default building limit set out in section 42(2)(a) – 15 meters (15 M) from the centre of the roadway is to be considered as the building limit.
- Therefore, any construction within a 15M from the centre of the highway of the impugned road is an illegal construction pursuant to the Act.

Section 45(3) of the National Thoroughfares Act No. 40 of 2008 (hereinafter referred to as the Act) stipulates that,

No person shall after the appointed date except under the authority of licence granted by the Executive Engineer erect, re-erect or make any addition to any building, gateway or any other structure or construct a basement or other underground structure or dig a well, pond shaft or any other structure (hereinafter in this Part of this Act referred to as "structure") within a building limit.

If a construction/structure is built in contravention of section 42(3) of the Act, then Executive Engineer is empowered to make an application for its demolition/removal under section 45 of the Act following the procedure set out therein. Under section 45(1) and (2) of the Act;

- (1) If any person erects any structure or makes any addition to an existing structure in contravention of the provisions of section 42, the Executive Engineer shall, by written notice, require such person to demolish or remove such structure or any addition thereto on or before such date as may be specified in such notice, being a date not earlier than seven days from the date thereof.
- (2) It shall be the duty of the person on whom a notice is issued under subsection (1) to comply with the requirements specified in such notice within the time specified therein or within such extended time as may be granted by the Executive Engineer, on application made in that behalf

In the present case, the Appellant has built a building within the building limit of the Kandy-Mahiyanganaya-Padiyathalawa road without a lawful permit. This is evident from the sketch attached to the notice marked P3 which was presented to the Magistrate court as evidence. According to the above, it seems that the Appellant has constructed a building within 6 meters (6M) from the centre of the carriageway, which is within the building limit in violation of section 42(3) of the Act.

Consequently, Executive Engineer has issued notice under section 45(1) of the Act. This Notice was not complied with by the Respondent. Thereafter, Petitioner being the Executive Engineer of the Executive Engineer's office, Kundasala had instituted action bearing no 28844 in the Magistrate Court of Theldeniya against Respondent K. P. Gunawardene under section 45(3) of the Act for demolition of the unlawful structure

When this matter was taken up for inquiry certain objections were raised on behalf of the said Respondent. However, the said objections were overruled by the Learned Magistrate. Afterwards, Learned Magistrate had ordered to demolish the impugned building of the Respondent.

Being aggrieved by the said order the Respondent-Petitioner had invoked the revisionary jurisdiction of the Provincial High Court of the Central Province holden in Kandy in case bearing no 84/16.

The learned High Court Judge having heard the aforesaid revision application had dismissed the same on the ground the impugned building was constructed without a valid permit and no exceptional grounds exist to revise the said order of the learned Magistrate. Thereafter, the Respondent-Petitioner-Appellant has in the instant case, has preferred this appeal seeking to set aside the order dated 06.12.2018 of the Learned High Court Judge and the order of the Learned Magistrate dated 17.06.2016.

The Respondent-Petitioner-Appellant (herein after referred to as the Appellant) had taken up the position that the Applicant, Executive Engineer did not have power to institute the action bearing no 28844 in the Magistrate Court of Theldeniya in his/her official capacity.

It was contended by the Appellant that since the name of the Executive Engineer is not a legal person, he in his official capacity does not have the power to institute the said action.

However, it has to be observed that under section 28 of the Thoroughfares Act no 40 of 2008, Executive Engineer is empowered to issue notice to any person to remove obstruction done to any road, any public road or national highway. In the event of failure to comply with such notice Executive Engineer is empowered to institute an action in the Magistrate court. As such, it clearly shows that the Executive Engineer has power to institute the instant action under the provisions of the said Act. Therefore, there is no merit for the objection raised by the Appellant.

Hence, I hold that Applicant-Executive Engineer is statutorily empowered to maintain the instant action in the way it was instituted. Thus, the said preliminary objection is untenable in law.

Second objection taken up by the Appellant in the High Court is that the Respondent had failed to specify when the unlawful structure had been erected as the section 42(3) only applies to structures constructed after the appointed date. According to Gazette No. 1612/18 dated 30.07.2009 the National Thoroughfares Act came into effect on 01.09.2008, which is considered as the 'appointed date' under the Act.

In the instant case, it has been argued that the Notice marked P3 which was issued after the Act came into operation, was served on the Appellant while he was constructing the shop. The sketch marked in notice P3 indicates that there was only a concrete slab at the time the sketch was being made. It seems that by the time the Appellant preferred objections to the learned Magistrate of Theldeniya Appellant had constructed the impugned building. Thus, we can conclude that the shop was completed between the time period in which the sketch was drawn, and the application was made to the learned Magistrate for the demolition of the construction. Furthermore, Appellant

was given ample opportunity to adduce evidence to establish that the impugned structure was built prior to the appointed date. However, multiple affidavits submitted on behalf of the Appellant and other such evidence adduced by the Appellant does not indicate the date in which the structure was built. Therefore, considering all of the above evidence, learned Magistrate has come to a correct find of fact and law and concluded that the impugned building was built after the Act has come into force.

In view of the aforementioned reasons it is apparent that the Appellant had not substantiated his contentions for this court to interfere with the orders of the learned High Court Judge as well as the learned Magistrate. Hence, the learned Magistrate had correctly made the order to demolish the impugned construction.

Since the Appellant has constructed the impugned building in contravention of section 42(3) of the Thoroughfares Act no. 40 of 2008, I hold that the said construction is unauthorised thus the learned magistrate had exercised jurisdiction within the purview of the power conferred to him in terms of the provisions in the Thoroughfares act no 40 of 2008

Hence, the learned Magistrate had rightly made an order to demolish the impugned construction. The learned High Court Judge too affirmed the order dated 17.06.2016 of the learned Magistrate and held that no exceptional circumstances exist for the Appellant to invoke the revisionary jurisdiction of the High Court.

As such we see no reason to interfere with the order of the learned Magistrate dated 17.06.2016 and the order of the learned High Court Judge dated 06.12.2018

Hence, we dismiss this appeal with costs.

**JUDGE OF THE COURT OF APPEAL**

**K.K.A.V. Swarnadhipathi, J.**  
I agree.

**JUDGE OF THE COURT OF APPEAL**