

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

In the matter of an application for appeal
against the Order/Judgment dated
16.11.2018 of the Provincial High Court of
Gampaha HCRA/6/0217 under Article 154
(3) (b) of the Constitution.

Court of Appeal Application No:
CA (PHC) 214/2018

Provincial High Court of Gampaha
Case No: HCRA 6/2017

Magistrate's Court of Mahara
Case No: 95318/16

Chairman (Now Secretary)
Officer exercising powers under the Urban
Development Authority Act,
Pradeshiya Sabha of Kelaniya.

Applicant Petitioner

Vs.

C.G. Perera
No. 20, Kandy Road,
Dalugama, Kelaniya.

Respondent

BETWEEN

C.G. Perera
No. 20, Kandy Road,
Dalugama, Kelaniya.

Respondent-Petitioner

Vs.

1. Chairman (Now Secretary)
Officer exercising powers under the
Urban Development Authority Act,
Pradeshiya Sabha of Kelaniya.

Applicant Petitioner-Respondent

2. Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent

AND NOW BETWEEN

C.G. Perera
No. 20, Kandy Road,
Dalugama, Kelaniya.

Respondent-Petitioner-Petitioner

Vs.

Chairman (Now Secretary)
Officer exercising powers under the Urban
Development Authority Act,
Pradeshiya Sabha of Kelaniya.

**Applicant-Petitioner-Respondent-
Respondent**

Before: **Prasantha De Silva, J.**
K.K.A.V. Swarnadhipathi, J.

Counsel: G. Ananda Silva for the Respondent-Petitioner-Petitioner.
Petitioner-Respondent-Respondent is not represented by a
Counsel.
Counsel for the Petitioner agrees to dispose this matter by way
of written submissions.

Written Submissions: 14.03.2022 and 11.01.2023 by the Respondent-Petitioner-
filed on Petitioner
03.11.2022 by the Applicant-Respondent-Respondent

Delivered on: 10.03.2023

Prasantha De Silva, J.

Judgment

The Applicant-Petitioner instituted action bearing No. 95318/16 in the Magistrate's Court of Mahara against the Respondent namely C.G. Perera and sought an Order under Section 28(A)3 of the Urban Development Act No. 41 of 1978 as amended to have a boundary wall built by the Respondent demolished on the basis that it was an unauthorized construction. It was alleged by the Applicant-Petitioner that the said Respondent-Petitioner-Petitioner has obstructed the flow of water along Dewata Road, 6 ½ Post, Dalugama.

The Respondent had filed objections with documents marked R1-R9A to the application of the Applicant-Petitioner and sought a dismissal of the said action. Thereafter, the Applicant Petitioner had filed counter objections. After written submissions were tendered by both parties, the learned Magistrate had delivered her order dated 19.01.2017 allowing the application of the Applicant-Petitioner to have the boundary wall erected by the Respondent removed.

Being aggrieved by the said Order, the Respondent-Petitioner-Petitioner, namely C. G. Perera had moved in revision to the Provincial High Court of Gampaha seeking to have the said order of the learned Magistrate set aside. Consequent to the said application, Applicant-Petitioner-Respondent [hereinafter referred to as the Applicant-Petitioner] had filed objections and thereafter the matter had been disposed by way of written submissions. The learned High Court Judge had affirmed the Order of the learned Magistrate and dismissed the revision application of the Respondent-Petitioner by Order dated 16.11.2018. Being aggrieved by the said Order, the Respondent-Petitioner-Petitioner, namely C.G. Perera [hereinafter sometimes referred to as the Petitioner-Appellant] has preferred an appeal to this Court.

It appears that the learned Magistrate had allowed the application of the Applicant-Petitioner to have the boundary wall built by the Petitioner-Appellant demolished on the basis that it was built without obtaining any permission or approval of the Pradeshiya Sabha of Kelaniya. The learned High Court Judge too had affirmed the findings of the learned Magistrate and held against the Petitioner (Appellant).

It was the contention of the Petitioner (Appellant) that he obtained a building permit before constructing the impugned wall in 1992, which has been marked and produced as R2 in the Magistrate's Court. Major part of the said document R2 has been attacked by termites. As such, the learned Magistrate had not accepted document R2 on the basis that it is not possible to draw an inference that Appellant had obtained prior approval from the relevant authorities to construct the impugned wall from document marked R2, which was severely damaged.

Court draws attention to the said document R2. It seems to be a building permit. However, a major part of that document has been attacked by termites and damaged. The parts left in R2 indicate that the said building permit was issued to C.G. Perera. It states:

“සී.ජී.පෙරේරා යන මා වෙත ඉදිරිපත් කරන ලද සැලැස්ම අනුව කොළඹ නුවර.....”

Petitioner (Appellant) has also marked and produced document R11, a building permit issued to his neighbor J. J. S. Seneviratne. According to document R11, it is clear that the said J. I. S. Seneviratne obtained a building permit to construct a wall on premises bearing No.../21. The said document R2 has been signed by ‘බලයලත් නිලධාරී දළඟම කැලණිය ප්‍රදේශීය සභාව උප කාර්යාලය’. When you compare the said signature of the issuing authority placed on R11 with part of the signature visible in document R2, they are somewhat similar to each other and appear to be issued around the same time. R11 was issued in 1992. Although the date of issue of R2 is not clear, it is evident that Respondent has not disputed the position of the Petitioner (Appellant) that the impugned wall was built in year 1992.

As the building permit is valid only for 1 year and the said building permit R2 was presumably issued in 1992 by Dalugama Kelaniya Pradeshiya Sabha, Applicant Petitioner seeking an Order for demolition of the wall 22 years later on the basis that the Appellant has not produced an acceptable building permit is unreasonable as the Petitioner (Appellant) cannot be expected to safeguard a document which was valid only for 1 year for 22 years.

Court takes cognizance of the order dated 15.12.2016 made by the Magistrate's Court of Mahara in case bearing no 95319/16 which is filed on record and marked as P4. The said case was filed by Chairman (now secretary) exercising powers under the Urban Development Authority Act by the Pradeshiya Sabhawa- Kelaniya against Sarath Senarathne, who is the recipient of the building permit marked R11. The said case was instituted on the basis that the said Sarath Senarathne had constructed a wall without obtaining a valid permit from the Pradeshiya Sabhawa and an application had been made to have the unauthorized construction demolished in terms of Section 28A (3) of the Urban Development Act.

The above case is similar to the facts of the instant case bearing No. 95318/16 instituted against Petitioner (Appellant) C. G. Perera. This court also observes that the said case 95319/16 had been filed just after the filing of the instant case bearing No. 95318/16. Furthermore, observing the addresses the Parties have given in both cases indicate that the cases refer to neighboring houses. The C. G. Perera - Petitioner (Appellant)'s address in case bearing No. 95318/16, is noted as No.20, Kandy Road, Dalugama Kelaniya. Sarath Senarathne's address - Respondent in case bearing No.95319/16 - is indicated as No.20B, 6 ½, Kandy Road, Dalugama Kelaniya.

It should be noted that the application of the Applicant-Petitioner in case bearing No. 95319/16 was dismissed by the learned Additional Magistrate of Mahara by decision dated 15.12.2016 on the ground that the impugned construction is not an unauthorized construction as the Respondent had obtained a building permit (R11) to construct the boundary wall.

However, the same Additional Magistrate had heard the instant case bearing No. 95318/16, where the Petitioner (Appellant) in this appeal was the Respondent. In this case, the learned Additional Magistrate had allowed the application of the Applicant-Petitioner to demolish the boundary wall on the basis that the Petitioner (Appellant) had not obtained a valid building permit from the Pradeshiya Sabha to construct the boundary wall.

The building permit R2 was produced in evidence by the Petitioner (Appellant). Although the learned Additional Magistrate has not refused to accept the document marked R2 which was

attacked by termites, she has held that R2 is an incomplete document and thus, no inference can be drawn that it is an approved building plan.

The learned Additional Magistrate had stated in her Order:

“R2 යනුවෙන් සඳහන් කර ඇති ලේඛනය ඉල්ලුම්කාර පෙත්සම්කරු බාරයේ ඇති බවට වග උත්තරකරු සඳහන් කර ඇත. ඒසේ නම් එම ලේඛනයෙහි සහතික කල හෝ සත්‍ය පිටපතක් ඉල්ලුම්කාර පෙත්සම්කරු වෙතින් ලබා ගැනීම සඳහා වගඋත්තරකරු කිනම් හෝ උත්සාහයක් ගත බවට සඳහන් වන ලේඛනයක් ඉදිරිපත් කර ඇත.

“R2 ලේඛනයෙහි අධිකරණයට නිරීක්ෂනය කල හැකි කොටස් මත වග උත්තරකරුට මෙම තාප්පය ඉදි කිරීම සඳහා පළාත් පාලන ආයතනයෙන් අනුමැතිය ලැබුනා යන්න නිගමනය කල නොහැක”.

In this respect, it is relevant to note that even if the Petitioner (Appellant) had requested from the Applicant-Petitioner to obtain a certified copy of document R2, it is unlikely that the Applicant-Petitioner-Pradeshiya Sabha would furnish a document which goes against the Applicant-Petitioner.

In such a situation, it is a duty of Court to ascertain the availability of such document from the Applicant-Petitioner in the interest of justice, particularly, when the Applicant-Petitioner has not contended the authenticity or the genuineness of the said building permit marked R2.

We observe that the learned Additional Magistrate had not rejected the document marked R2. She has however, held against the Petitioner (Appellant) on the ground he has failed to satisfy court that the impugned boundary wall was built with the approval of the Pradeshiya Sabha of Kelaniya (Applicant-Petitioner).

This Court should view the evidence placed before the learned Magistrate’s Court by the Petitioner (Appellant) on a ‘balance of probability’. The learned High Court Judge had not given enough credit to the evidence provided by the Petitioner (Appellant), particularly in the absence of any evidence to the contrary from the Applicant-Petitioner. Learned High Court Judge has not addressed his mind to the fact that for over 20 years, no issue has been raised regarding the impugned wall and the fact that similar building permit was issued to neighbouring house. Applicant-Petitioner has failed to provide any evidence challenging the building permit, the date of when the construction was actually done or any evidence regarding any objections raised by the Applicant-Petitioner. The Learned High Court Judge should have adequately analysed the evidence on a balance of probability. From the above evidence and the construction of the damaged document, this court can come to a conclusion

that document marked R2 was a building permit that was granted to the Petitioner (Appellant) to construct the impugned wall.

Furthermore, under section 106 of the Evidence Ordinance, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

According to Dr. U.L Majeed, in '*Applicability of the Evidence Ordinance in Civil Actions*' (at page 665),

“In the administration of justice, it is desirable that the burden of producing evidence be placed on the party best able to sustain it, and there is authority for the view that the burden of evidence as to an issue rest on the party having the greater means of knowledge...

In *Razik Ram Chouhan A.I.R. (1975) 4 S.C. 667*, it was held that section 106 applies to those matters which are supposed to be especially within the knowledge of a party and not capable of being known to any other.

In the instant case, Applicant-Petitioner-Respondent has failed to provide any proof to the effect that the Urban Development Authority or Pradheshiya Sabha has at any point issued notice or have raised any objection during or after the construction of the wall until twenty years later. This knowledge would be exclusively within the knowledge of the Applicant-Petitioner. Thus, the burden is on the Applicant-Petitioner to provide such proof. Failure to provide such proof by the Applicant-Petitioner, leads to this court to conclude that Applicant-Petitioner-Respondent has not raised any objection or have made any issue out of the construction of the boundary wall at the time or after such construction.

Furthermore, details on whether a building permit was registered or not/issued or not, is within the exclusive knowledge of the Applicant-Petitioner, as the Pradeshya Sabha would generally maintain a record of all the permits issued. Particularly, as it is unreasonable to expect the Respondent-Petitioner to keep the building permit in very good condition, when the building permit is only valid for a period of one year. Therefore, the burden is on the Applicant-Petitioner to establish the lack of such registration by providing a logbook or any other such file available for that period, to indicate the absence of such registration. However, Applicant-Petitioner has not provided such a document to discharge the burden under section 106 of the Evidence Ordinance. In light of failure to provide such evidence, the court has no other means of ascertaining the illegality of the said construction except by relying on the evidence provided by the Petitioner (Appellant).

In view of the aforesaid reasons, it is imperative to note that the document marked R2, which was attacked by termites was a building permit issued by the Pradeshya Sabha of Kelaniya

(Applicant-Petitioner) to Petitioner (Appellant) and no evidence exists to suggest the contrary. Thus, it is reasonable to presume that said building permit R2 was issued to the Petitioner (Appellant) in 1992 to construct the impugned boundary wall.

Therefore, I hold that the impugned wall is not an unauthorized construction and that learned Magistrate has erred in issuing an order for demolition in terms of Section 28A (3) of the Urban Development Authority Act No. 41 of 1978.

Therefore, we set aside the order of the learned Magistrate dated 19.01.2017 and order of the learned High Court Judge dated 16.11.2018 affirming the order of the Magistrate's Court.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

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

JUDGE OF THE COURT OF APPEAL