

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

E. Ranjani,
No. 14, Meegahawatta,
Peliyagoda.

Respondent-Respondent-Appellant

C.A. Case No: **CA/PHC/85/2015**
HC Colombo Case No:
167/2011 (Rev)
MC Colombo Case No: **53023/5**

-Vs-

K.D. Ananda,
Chairman, Municipal Council,
Peliyagoda.

Applicant-Petitioner-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

Mahinda Samayawardhena J.

Counsel : P.K. Prince Perera with Ishani Gunatilake for the
Respondent-Respondent-Appellant.

Neville Abeyratne, PC with Kaushalya Abeyratne Dias
for the Applicant-Petitioner-Respondent.

Written Submissions: By the Respondent- Respondent-Appellant on
29/05/2019

By the Applicant-Petitioner-Respondent on 19/06/2019

Argued on: 02/08/2019

Judgment on : 23/09/2019

A.L. Shiran Gooneratne J.

The Applicant-Petitioner-Respondent (hereinafter referred to as the Respondent) filed action against the Respondent-Respondent-Appellant (hereinafter referred to as the Appellant) in the Magistrate's Court of Colombo in terms of Section 28(A)(3), of the Urban Development Authority Law (as amended), (Act) praying for an order for demolition of an unauthorized construction by the Appellant. The learned Magistrate by order dated 17/06/2011, dismissed the action of the Appellant on the basis that the present owner of the building should be made a party and therefore, *inter alia*, directing that the case be reinstituted against the present owner of the building, the husband of the Appellant. The Respondent filed a Revision Application against the said order, where the learned High Court Judge by Order dated 13/03/2015, held that the Appellant is estopped from denying her ownership to the said building and accordingly set aside the order of the learned Magistrate.

The Appellant has invoked the jurisdiction of this Court, *inter alia*, to set aside the said Order dated 13/03/2015, given by the Provincial High Court of the Western Province holden in Colombo, which revised the Order of the learned Magistrate of Colombo.

The main ground of appeal of the Appellant is that the principle of Res Judicata will apply in this case since the cause of action between the parties are the same. At page 154 of the brief, the learned High Court Judge in her order dated 13/03/2015, held that the question of Res Judicata was not looked into since the Court was not invited to do so.

The Appellant submits that the question of Res Judicata arises from a previous action filed by the Respondent bearing No. 49225/5, in the Magistrate's Court of Colombo against the Appellant, where the learned High Court Judge has set aside the order of the learned Magistrate, which was based on the same cause of action between the same parties. However, as pointed out by the learned Counsel for the Respondent, the learned Magistrate correctly decided that since the case was not adjudicated on the merits of the case, Res Judicata would not operate. *"a decision, pronounced by a judicial tribunal having jurisdiction over the cause and the parties, that disposes once and for all the matter(s) so decided, so that except on appeal it cannot be relitigated between the parties or their privies"* (Res Judicata, 4th edition, (Spencer- Bower & Handley, 2009)

The thrust of the doctrine is to prevent a party from re-litigating an issue or a defence which has already been determined or which could have previously been litigated.

In *Virgin Atlantic Airways Ltd. vs. Zodiac Seats UK Limited* (2013) UKSC 46, a recent judgment on *res judicata*, Lord Sumption (with whom all members of the Supreme Court agreed) identified six principles which make up the doctrine.

1. A party is prevented from bringing subsequent proceedings to challenge an outcome that has already been decided (cause of action estoppel)
2. If a claimant succeeds in the first action and does not appeal the outcome, he may not bring a subsequent action on the same cause of action
3. The doctrine of merger treats a cause of action as having been extinguished once judgment has been provided and accordingly, the claimant's only right is the judgment itself
4. A party may not bring subsequent proceedings on an issue that has already been determined (issue estoppel)
5. A party may not bring subsequent proceedings which should and could have been dealt with in earlier proceedings
6. There is a general procedural rule against abusive proceedings.

In *Stassen Exports Ltd. v. Lipton Ltd. And Another* (2009) 2 SLR 172 at page 186, Dr. Shirani A. Bandaranayake J. (as she was then), stated that;

"The constituent elements of res judicata estoppel is clearly described by Spencer Bower (The Doctrine of Res Judicata, supra, pg. 10), where he has stated thus;

"A party setting up res judicata by way of estoppel as bar to his opponent's claim, or as the foundation of his own, must establish the constituent elements, namely;

- i. the decision was judicial in the relevant sense;*
- ii. it was in fact pronounced;*
- iii. the tribunal had jurisdiction over the parties and the subject matter;*
- iv. the decision was –*
 - a) final and*
 - b) on the merits;*
- v. it determined the same question as that raised in the later litigation; and*
- vi. the parties to the later litigation were either parties to the earlier litigation or their privies or the earlier decision was in rem"*

Therefore, it is clear that the application of doctrine of Res Judicata is to confer finality to a dispute, considering the merits of an action, where in the present case it is evident that the Court has not gone into the merits of the case in order to reach finality to the dispute between the parties. Accordingly, the doctrine of Res Judicata will not apply in the instant case.

The Appellant also question's the authority to institute this action in terms of Section 23(5) of the Act on the basis that the present owner of the premises is her husband and not the Petitioner and therefore, action cannot be maintained against the Appellant.

In terms of Section 28 A (3) (a) of the Act;

“(3) (a) Where any person has failed to comply with any requirement contained in any written notice issued under subsection (1), any building or work is not demolished or altered within the time specified in the notice or within such extended time as may have been granted by the Authority, the Authority may apply to the Magistrate to make a mandatory order authorizing the Authority to discontinue the use of any land or building demolish or alter any building or work, to do all such other acts as such person was required to do by such notice, as the case may be and the Magistrate on serving notice on the person who had failed to comply with the requirement of the Authority under Subsection (1) to demolish or alter the building or work, may, if he is satisfied to the same effect, make order accordingly.”

In terms of Section 28 A (3) (a) of the UDA Act, any person who fails to comply with any requirement contained in any written notice issued under subsection (1) of Section 28A of the Act can be brought before Court. The Respondent submits that the Appellant is the life interest holder of the said property, and the transfer of the property has taken place in 2001. However, the Appellant has failed to raise the said objection even at the time when this

application was pending before the Magistrate's Court of Colombo in 2004. According to letter dated 20/12/2002, at page 211 of the brief, the Appellant as the life interest holder of the property has been aware of the unauthorized construction at the time the ownership of the property was transferred to her husband. Therefore, there is no basis for the Appellant to challenge the application against her at this stage and hence, the objection raised is untenable.

Section 23 (5) of the Urban Development Authority Law as amended by Act No. 4 of 1982 provides as follows;

“(5) The Authority may delegate to any officer of a local authority in consultation with that local authority, any of its powers, duties and functions relating to planning, within any area declared to be a development area under Section 3, and such officer shall exercise, perform or discharge any such power, duty or functions so delegated, under the direction, supervision and control of the Authority.”

The question whether the Mayor had any lawful authority to make an application for a demolition order under the provisions of the Act was looked into by this Court in *CA (PHC) No. 2/97, where, Gamini Amaratunga J.* cited with approval the case of *Piyasena Vs. Wijesooriya CA. Application 119/90- CA. Minutes of 4/11/1994*, where this Court held that “*functions of planning would include the taking of steps to enforce planning procedure*” and was of the view that “*the delegation of the functions of planning would include the taking of steps*

to enforce planning procedure and accordingly the Mayor had the authority to institute proceedings against an owner of an unauthorized building for an order to demolish such building."

In ***M.P. Selvam v. K.H. Perera (SC Appeal No. 123/09)***, the Court held that,

"The "Planning Procedure" is governed by the amending Act No. 4 of 1982. This Amending Act brought into force Section 28A as well which deals with the "procedure to be followed in respect of certain development activities commenced, continued, resumed or completed contrary to any terms or conditions of a permit. The scope of Section 28A is therefore free from obscurity that the legislature intended to secure compliance with the development plan so that proper implementation of the said plan is carried out. The "Planning Procedure" referred to in Part IIA in Section 8B identifies matters pertaining to the

- i. Preparation;*
- ii. Implementation and*
- iii. Enforcement of a development plan.*

Hence, implementation of a development plan falls within the broad caption of "Planning Procedure". While Sections 8A -8H deal with the manner in which a development plan has to be prepared, Section 8J makes it clear that the purpose of issuing a permit is to ensure that all development activities in development areas should conform to the development plan.

The provisions contained in Section 28A (3) fall within the scope of the term "planning" and therefore the powers, duties and functions referred to therein could be delegated by the UDA to any officer of a local authority."

Therefore, the contention of the Appellants that the powers duties and functions of the Urban Development Authority (UDA) could be delegated in relation only to planning and not to the development activity does not hold ground.

Even though the Appellant contends that the order of demolition is related to a development activity, the Appellant has failed to submit a permit issued by the UDA authorizing the construction of the building ordered to be demolished. Part II A of the Act provides that in terms of Section 8(j) of the Act, development activity in any development area can be undertaken only under and in terms of a permit issued by the UDA.

The learned Counsel for the Respondent has submitted the case of ***Urban Development Authority vs. S. W. Kulasiri, CA No. 2226/2003***, where it was held that;

"In a situation where an application under Section 28 A (3) of UDA had been made the relevant question is whether the structure in question has been erected upon a valid permit. The existence of a permit is the only valid answer to the application under Section 28 A (3). The burden of showing that the construction had been on a valid permit is on the person noticed."

The unauthorized building is shown on the sketch marked P1 at page 44 of the brief. However, the Appellant has failed to produce a valid permit issued by the Authority. The Appellant must prove that their construction is according to law. Section 8(j) of the Amending Act has clearly stated that if any person is carrying out or engaged in any development activity in any development area, there must be a valid permit issued by the Authority.

For all the above reasons, the judgment of the learned High Court Judge is upheld and the application is dismissed.

Petition dismissed with costs fixed at Rs. 20,000/-

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL