

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

In the matter of an Appeal against  
the judgment of the Provincial High  
Court of Kegalle in terms of Article  
154(P) of the Constitution of the  
Democratic Socialist Republic of Sri  
Lanka read with Section 4 of the  
High Court of the Provinces (Special  
Provisions) Act No. 19 of 1990.

P.B.M. Herath Banda,  
Kahawaththa,  
Near Sumangala Vidyalaya,  
Ussapitiya.

**Respondent-Petitioner-Appellant**

**C.A.(PHC) No. 169/2012**

**P.H.C. Kegalle No. 4159/Rev**

Vs.

A.R.Sarath Gamini Athapattu,  
(Authorised Officer),  
Chairman,  
Pradesheeya Sabha,  
Mawanella.

**Petitioner-Respondent-Respondent**

BEFORE : JANAK DE SILVA, J. &  
ACHALA WENGAPPULI, J.

COUNSEL : H. Withanachchi for the Respondent-  
Petitioner-Appellant  
Priyantha Gamage for the Petitioner  
-Respondent-Respondent.

WRITTEN SUBMISSIONS

TENDERED ON : 29-06-2018( by the Respondent)  
03-07-2018( by the Appellant)

DECIDED ON : 03<sup>rd</sup> August, 2018

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ACHALA WENGAPPULI, J.

The Respondent-Petitioner-Appellant (hereinafter referred to as the "Appellant") invokes the appellate jurisdiction of this Court to set aside the order of dismissal made by the Provincial High Court holden in Kegalle on 19.11.2012, in respect of his revision application 4159/Rev.

With the filing of the said revision application, the Appellant sought to set aside an order of demolition made by the Magistrate's Court of Mawanella in case No. 24436 on 23.06.2011. The said order of demolition was made by the Magistrate's Court consequent to an application of the Applicant-Respondent-Respondent (hereinafter referred to as the "Respondent") under Section 28A(3) of the Urban Development Authority Law No. 41 of 1978 as emended (hereinafter referred to as the UDA Law)

as the Appellant has failed to "cease development activity" within the time period specified in the said notice, addressed to the Appellant.

The Appellant appeared before the Magistrate's Court on summons and tendered an affidavit by which he claimed that he has transferred ownership of land to one *Jayasinghe Arachchilage Monica Kumari* on 18.05.2010. He admitted that he has commenced construction of a building on the land. He further averred that the land was sold to him by the Chairman of the *Pradesheeya Sabha* with the claim that no building plan is needed for construction, who later changing his stance had instituted the instant action.

Having considered the material placed before the Magistrate's Court, it made order to demolish the unauthorised part of the said construction. Thereafter, the Appellant moved in revision in the Provincial High Court against the said order of demolition.

The Provincial High Court, in dismissing his application by its order, has held that no exceptional circumstances or any illegality was established by the Appellant.

Being aggrieved by the said order, the Appellant seeks to challenge its validity on the following grounds;

- i. The land on which the building to be demolished is not situated in a "Urban Development Area",
- ii. The Respondent is estopped in claiming the said building required approved building plan,

- iii. Breach of rules of natural justice in relation to rights of third parties.

In relation to his first ground of appeal, the Appellant relied upon the Government Gazette No. 38/16 of 01.06.1979 by which the Urban Development Areas were demarcated and identified. The Appellant submits that the village of "Kappagoda" where the building is located, is not included in the said Gazette or the Gazette No. 1070 of 05.03.1999 which was published subsequently.

His second ground of appeal is based on the principle of estoppel. According to the Appellant, the Respondent is the person who sold the property to him with the assertion that no building plan is needed for construction. However, in instituting action he has taken a totally a contrary position by claiming that the Appellant has constructed a building without an approved building plan. Therefore, the Appellant claims that the Respondent is now estopped from claiming that a building plan is needed.

The third ground of appeal is based on the rights of a third party who has bought over the property from the Appellant, even before he appeared in the Magistrate's Court and the order of demolition made without the participation of the new owner clearly violates rules of natural justice.

In the revision application of the Appellant, he sought to revise the said order of demolition on the following grounds pleaded as exceptional;

- a. the building under demolition order was constructed at an enormous cost,
- b. the construction work has commenced about a year ago,
- c. there are other similar buildings in the area,
- d. the Respondent was acting in *mala fide* in respect of this particular building,
- e. even if the new owner was disclosed, no action was taken,
- f. failure to made them a party,
- g. making an order in the absence of the new owner,
- h. failure by the Magistrate's Court to consider these factors.

Upon perusal of the above list of "exceptional circumstances" indicates that except for the third ground of appeal, the other two grounds were not urged before the Provincial High Court by the Appellant.

In an appeal against the order of the Provincial High Court, this Court would only consider what was placed before that Court for determination by the parties. The Appellant is entitled to raise a pure question of law in appeal for the first time. However, the challenge that the village called "*Kappagoda*" is located outside the Urban Development Area is not a pure question of law and therefore, the Appellant cannot raise it before this Court for the first time. The second ground of appeal also belonged to the same category as it is an instance where the Chairman of the *Pradesheeya Sabha*, in his private capacity was involved with the transfer of title and only in his official capacity has instituted action under UDA Law seeking demolition of unauthorised construction.

The Appellant cannot raise any new grounds in appeal, except for the ones involving pure question of law for the first time in the Court of Appeal as per the judgments of *Gunawardene v Deraniyagala and Others* (2010) 1 Sri L.R. 309 and *Simon Fernando v Bernadette Fernando* (2003) 2 Sri L.R. 158.

The third ground of appeal of the Appellant that the Magistrate's Court was in breach of rules of natural justice in relation to rights of third parties was in fact pleaded before the Provincial High Court and therefore could be re-agitated before this Court.

In relation to this ground of appeal, it appears that the Appellant, in raising this issue, is under the notion that the liability in relation to development activity conducted without a permit shifts with the transfer of property rights to the person who succeeds in ownership of the building and the land on which the said building is constructed.

Relevant provisions of the UDA Law do not support such a proposition. Section 28A(1) empowers the Authority to require the "person" who is executing or has executed such development activity to comply with any of the courses of action specified in Section 28A(a) to (c). A person would bring himself under the purview of UDA Law, if he has "... commenced continued, resumed or completed without permit or contrary to any term or condition set out in a permit issued in respect of such development activity...", within an Urban Development Area, without approved building plan or in violation of it.

Section 28A(2) imposes a statutory duty on the "person on whom a notice is issued to comply with any requirement specified in such notice.

Section 28A(3)(a), in turn empowers the Authority to make an application to the relevant Magistrate's Court for an order against such "person" who failed to comply with the notice issued by the Authority to authorise action under Section 28A(3)(a)(a) to (c). It must be noted here that in all these statutory provisions, the "person" is clearly identified as the person on whom a notice was issued by the Authority and has failed to comply with it. This approach is further strengthened by the provisions of Section 28A(6) where it is stated that "*the preceding provisions of this section shall not affect any liability incurred by such person by reason of his failure to comply with such notice.*" The liability of a third person arises if he brings himself under the purview of UDA Law, if he "...continued, resumed or completed without permit or contrary to any term or condition set out in a permit issued in respect of such development activity...".

In relation to the instant appeal, the Authority has issued notice on the Appellant on 06.05.2010. He has transferred the ownership to the property to *Jayasinghe Arachchilage Monica Kumari* on 18.05.2010 presumably with the intention of escaping liability. In fact, she is the daughter-in-law of the Appellant as per her statement to Mawanella Police on 10.05.2011.

However, already the statutory duty, imposed under Section 28A(2) on the Appellant continues and thereby compels him to comply with the notice issued by the Authority. In these circumstances, the absence of any protection to a *bona fide* third-party purchaser of the property or building in the UDA Law could be understood (except for Section 28A(6)), as relevant statutory provisions are clearly focused on the person on whom a notice was issued by the Authority and has failed to

comply with it. In the given set of circumstances, the mere change of ownership has no relevance in relation to proceedings under Section 28A. The Provincial High Court, in its order also has considered this aspect on similar lines.

It is noted by this Court that the Appellant made an attempt to mislead the Provincial High Court with his assertion that it was the present owner of the property (his daughter-in-law) who developed it by constructing a "hotel" and she continued to operate it. This statement is meant to shift liability of construction without a permit to the new owner who is not a party to the case. However, the sketch attached to the Respondent's application clearly indicates that it was the Appellant who commenced construction of this building. It is clearly shown in that sketch that the rectangular building, built on a 10-perch block, which consists of 12 concrete columns in three parallel rows. Therefore, the Appellant is clearly the person who "*... commenced continued, resumed or completed without permit or contrary to any term or condition set out in a permit issued in respect of such development activity...*", within an Urban Development Area, without approved building plan or in violation of it.

This fact alone would have disentitled the Appellant to the discretionary remedy sought from the Provincial High Court.



Accordingly, we hold that the ground of appeal urged before us by the Appellant is devoid of any merit and therefore his appeal ought to be dismissed.

The appeal of the Appellant is dismissed with costs fixed at Rs. 25,000.00.

**JUDGE OF THE COURT OF APPEAL**

**IANAK DE SILVA, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**