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

In the matter of an application for revision under and in terms of Article 138 and Article 154(P)(6) of the Constitution and Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990

Court of Appeal Revision Case No: **CA/PHC/APN/ 09/2019**
H.C. Hambanthota Case No: **HC RA 25/2017**
MC Hambanthota Case No: **28667**

1. Buddi Kalyani Hewa Nadugala,
2. Nimal Kodithuwakku,
   Kodithuwakku Tyre Center,
   Malpethtawa,
   Ambalanthota.

Respondents-Petitioners-Petitioners

-Vs-

1. Urban Development Authority,
   27, D R Wijewardena Mawatha,
   Colombo 10.
   Now
   Sethsiripaya,
   Sri Jayawardenapura Kotte,
   Battaramulla.

Petitioner-Respondent-Respondent

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

2nd Respondent-Respondent

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

&

Dr. Ruwan Fernando J.

Counsel : Prasanna Ekanayake for the Respondents-Petitioners-Petitioners.

Nayomi Kahawita, SSC for the 1st and 2nd Respondent-Respondent-Respondents.

Written Submissions: By the Respondents-Petitioners-Petitioners on 28/06/2019

By the Petitioner-Respondent-Respondent on 28/08/2019

Argued on : 05/02/2020

Judgment on : **06/03/2020**

A.L. Shiran Gooneratne J.

The Petitioner-Respondent-Respondent (hereinafter referred to as the Respondent) filed an application dated 13/06/2016, in the Magistrates Court of Hambantota to enforce a demolition order on an unauthorized structure in terms of Section 28A (5) of the Urban Development Authority Law No. 41 of 1978 (as

amended), (referred to as the UDA law) against the Respondent-Petitioner-Petitioner (hereinafter referred to as the Petitioner). Being aggrieved by the said order of the learned Magistrate, the Petitioner filed a revision application in the Provincial High Court of the Southern Province holden in Hambantota in case bearing No. HCRA-25/2017. The Petitioner is before this Court seeking to set aside the judgment dated 16/01/2019, delivered by the learned Provincial High Court Judge of Hambantota in the said case.

The Respondent's application before the learned Magistrate was made in terms of Section 28A (3) of the UDA law.

Section 28A (3) reads thus: -

"(a) Where any person has failed to comply with any requirement contained in any written notice issued under subsection (1) within the time specified in the notice or within such extended time as may have been granted by the Authority, the Authority may, by way of petition and affidavit, apply to the Magistrate to make an Order authorizing the Authority to –

(a) to discontinue the use of any land or building;

(b) to demolish or alter any building or work;

(c) to do all such other acts as such person was required to do by such notice, as the case may be and the Magistrate shall after serving notice on the person who had failed to comply with the requirements of the Authority

under subsection (1), if he is satisfied to the same effect, make order accordingly.

(b) If such person undertakes to discontinue the use of the land or building or to demolish or alter the building or work, or to do such other acts as are referred to in paragraph (a) of subsection 3 of section 28A, the Magistrate may, if he thinks fit, postpone the operation of the Order for such time not exceeding two months as he thinks sufficient for the purpose of giving such person an opportunity of complying with such requirement."

As required by the UDA law, the Respondent has complied with the statutory requirements by serving a written notice on the Petitioner in terms of Section 28A (1) to be read with Section 8J of the UDA law, in respect of certain development activity commenced contrary to the terms and conditions of the permit. The said notice was served on the basis that such development activity is relevant to the business premises namely 'Kodithuwakku Tyre Centre' situated in the limits of a Urban Development Area, by order of the Minister published in the Gazette notification bearing No. 747/7, dated 29/12/1992, marked "X4".

According to Section 3 of the UDA law;

"(1) Where the Minister is of opinion that any area is suitable for development, the Minister may, by Order published in the Gazette, declare such area to be an Urban Development Area (hereinafter referred to as a "development area").

(2) An Order under subsection (1) declaring an area as a development area shall define that area by setting out the metres and bounds of such area.

(3) The Authority shall develop every development area for the better physical and economic utilization of such area."

The Respondent submits that the alleged development activity is within the urban development area of the Ambalantota Divisional Secretariat by reference to the said Gazette notification bearing No. 747/7 dated 29/12/1992, marked "X4". The position taken by the Petitioner is that the said business premises fall within the Puhulyaya Grama Niladhari Division of the Ambalantota Divisional Secretariat and therefore the said Grama Niladhari Division does not fall within the Gazette Notification No. 747/7, dated 29 /12/1992. Accordingly, the Petitioner submits that the Respondent has no *locus standi* to bring this action against the Petitioner. In this context the Court is called upon to decide as to whether the Respondent has a cause of action against the Petitioner.

The State Counsel in written submissions filed of record has drawn attention to the relevant gazette notification marked "X4", which refers to No. 179, Ihalagama Grama Niladhari Division and No. 159, Baminiyawela Grama Niladhari Division which fails within the Ambalantota Divisional Secretariat. It is submitted that the business premises of the Petitioner is situated at Malpeththawa which is within the boundary description of No. 159, Baminiyawela Grama Niladhari Division.

Section 3 of the UDA law clearly states that, "declaring an area as a development area shall define that area by setting out the metres and bounds of such area". Therefore, a plain reading of Section 3 of the UDA law makes it absolutely clear that the metres and bounds setting out to define No. 159, Baminiyawela Grama Niladhari Division will not apply to the metres and bounds setting out to define Puhulyaya Grama Niladhri Division, which in itself is a separate Grama Niladhari Division. The Counsel for the Petitioner has drawn attention to letter dated 01/03/2017, marked "P7", where the Ambalantota Divisional Secretary has certified that the business premises belonging to the Petitioner is situated within No. 146, Puhulyaya Grama Niladhari Division. The Respondent does not deny the facts contained in the said letter.

In the circumstances, document marked "P7", leaves me with no doubt that the impugned business premises situated at Malpeththawa is within the Puhulyaya Grama Niladhari Division and not within the development area envisaged in the metres and bounds of No. 159, Baminiyawela Grama Niladhari Division. Therefore, I find that the said gazette notification dated 29/12/1992, marked "X4", has no application to the Petitioner's business premises and therefore, the demolition order made by the learned Magistrate is erroneous.

The learned High Court Judge has refused to consider letter marked "P7", on the basis that the said document was introduced for the first time during the

proceedings before the High Court and has justified the findings of the learned Magistrate on the facts disclosed before that Court.

The State Counsel contends that the failure to submit letter marked "P7" at the inquiry before the learned Magistrate should be construed as a breach of the Principle of '*Uberimea Fide*' (the principle of Utmost good faith) and together with want of exceptional circumstances, defeats the cause of the Petitioner.

The learned High Court Judge has refused to consider document marked "P7", on the basis that it was introduced during the proceedings in that Court. It is observed that the document marked "P7" came into existence after the order of demolition was made by the learned Magistrate. In the circumstances, I do not think it is prudent to deprive the Petitioner of a hearing on the said document or be considered being in the breach of coming before this Court with clean hands.

It is well settled law that an aggrieved party will not be deprived the right of revisionary jurisdiction, where his substantial rights have been compromised due to a decision which is manifestly erroneous.

In ***Urban Development Authority Vs. Wejayaluxmi (2006) 3 SLR 62, Wimalachandra, J.*** cited with approval the case of ***Soysa Vs. Silva (2000) 2 SLR 235,*** Where it was held that,

"the power given to a superior Court by way of revision is wide enough to give it the right to revise any order made by an original Court. Its object is the due

administration of justice and the correction of errors sometimes committed by the Court itself in order to avoid miscarriage of justice."

As noted earlier the Gazette notification dated 29/12/1992, marked "X4", has no application to the business premises of the Petitioner since it is not within the metres and bounds of the development area contemplated under the said Gazette notification. In effect, if the Respondent has no cause of action against the Petitioner the action fails on the ground that the Respondent does not have a *locus standi* to institute and maintain this action. ***(The Ceylon Mercantile Union Vs. The Insurance Corporation of Sri Lanka (1980 NLR 309).*** Therefore it is manifestly clear that there exists a failure of justice to be corrected by invoking the revisionary jurisdiction of this Court.

In all the above circumstances, I set aside the judgment of the learned High Court Judge and the order of the learned Magistrate and allow the application.

Application allowed.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL