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

Chairman,
Urban Council
Kegalle.

Court of Appeal Case No:
CA/PHC/0069/2020

Petitioner

Vs.

Kegalle High Court
Case No:5466/19 අභි

W.A. Pushpa Kumara,
No.32/6C,
Kahatapitiya
Kegalle

MC Kegalle Case No:
17061/ඩි /18

Respondent

AND

W.A. Pushpa Kumara,
No.32/6C,
Kahatapitiya
Kegalle

Respondent-Appellant

Vs.

Chairman,
Urban Council
Kegalle.

Petitioner-Respondent

AND NOW BETWEEN

W.A. Pushpa Kumara,
No.32/6C,
Kahatapitiya
Kegalle

Respondent-Appellant-Appellant

Vs.

Chairman,
Urban Council
Kegalle.

Petitioner-Respondent-Respondent

Before	:	**D. THOTAWATTA, J.** **K. M. S. DISSANAYAKE, J.**
Counsel	:	Dr. Sunil Abeyratne with Eshini Perera instructed by Buddika Alagiyawanna for the Respondent-Appellant-Appellant. Akila Aluthwatte with Miss Dilini Rajapakse and Amhar Wassim for the Petitioner-Respondent-Respondent.
Argued on	:	17.07.2025
Written Submissions of the Respondent-Appellant -Appellant tendered on	:	02.10.2024
Written Submissions of the Petitioner-Respondent -Respondent tendered on	:	07.10.2024
Decided on	:	21.11.2025

K. M. S. DISSANAYAKE, J.

The instant appeal arises from an order of the learned High Court Judge of the Sabaragmuwa Province holden at Kegalle dated 11.06.2020 (hereinafter called and referred to as 'the Order') made in case bearing No. 5466/19/අප wherein, the learned High Court Judge of Kegalle had dismissed an application in revision preferred thereto by the Respondent-Appellant-Appellant (hereinafter called and referred to as 'the Appellant') against the order of the learned

Magistrate of Kegalle dated 18.01.2019, wherein the learned Magistrate of Kegalle had made order directing the Petitioner-Respondent-Respondent (hereinafter called and referred to as 'the Respondent') to demolish an unauthorized construction erected by the Appellant on the premises as morefully, described in the petition preferred thereto by the Respondent under and in terms of section 28A(3) of the Urban Development Authority Act No. 41 of 1978 as amended (hereinafter called and referred to as 'the Act') seeking an order for demolition of the same. Being aggrieved by the order, the Respondent has now, preferred to this Court the instant appeal on the grounds of appeal as morefully set out in paragraph 7 (i) to (vi) of the petition of appeal among any other grounds of appeal that may be urged by Counsel at the hearing of this appeal and they may be reproduced as follows;

> "i) The said judgment is contrary to law and not material evidence placed in this case;
>
> ii) The Learned High Court judge failed to take cognizance of the fact that the Respondent has no authority to institute an action as the powers are duly vested with the Urban Development Authority;
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> iii) The Learned High Court judge failed to take cognizance of the fact that the said alleged unlawful construction was outside the city limits of the Respondent council which does not attract the provisions of the Urban Development Authority Act;
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> iv) The Learned High Court judge failed to take cognizance of the fact that the Respondent's notices annexed to the Petition does not states who has authenticated the said notices;
>
> v) The Learned High Court judge erred in law by coming to the conclusion that there were no exceptional circumstance consider the said application in revision and whereas alleged construction does not

come within the purview of the Urban Development Authority Act, where by erred in law;

vi)In the circumstances, the said judgment is void, illegal and bad in law in as much as the learned High court Judge had not analyzed and evaluated the material facts in this case in the correct perspective."

The facts material and relevant to the instant appeal as can be deducible from the petition of appeal, may be briefly, set out as follows;

An application dated 05.06.2018 had been made by the Respondent to the Magistrate Court of Kegalle under and in terms of section 28A(3) of the Urban Development Authority Act No. 41 of 1978 as amended praying for a demolition order of an unauthorized construction erected by the Appellant on the premises as morefully described in the petition preferred thereto by the Respondent along with his application; that the Appellant had then filed his statement of objections wherein he had *inter-alia*, raised a jurisdictional objection to the application on the premise that the Respondent cannot have and maintain the instant action for; alleged unauthorized construction is situated not within an Urban Development Area but, within a Regional Development Area (ප්‍රාදේශීය සංවර්ධන ප්‍රදේශය) as averred by the Respondent himself in his own pleadings, namely; paragraph 3 of his petition preferred to the Magistrate Court of Kegalle along with his application, and as such it should be dismissed *in-limine*; that the learned Magistrate of Kegalle had having inquired into the application and the jurisdictional objection so raised thereto by the Appellant, proceeded in his order dated 18.01.2019 to grant the application of the Respondent directing the unauthorized construction to be demolished thereby totally, rejecting the jurisdictional objection and the several other defences raised by the Appellant thereto; that being aggrieved by the order of the learned Magistrate of Kegalle, the Appellant had preferred an appeal therefrom to the High Court of the Sabaragmuwa Province holden at

Kegalle, and the Respondent had raised a preliminary legal objection to the maintainability of the appeal on the basis that a right of appeal will not lie from an order made by Magistrate in an application made thereto under section 28A(3) of the Urban Development Authority Act No. 41 of 1978 as amended and the learned High Court Judge of Kegalle had nevertheless, proceeded to consider it as an application in revision and having inquired into it, he had proceeded to dismiss the application in revision by holding that Court sees no error in law in the order and therefore, there was no reason to interfere with the order of the learned Magistrate of Kegalle for; he had come to the impugned decision after having considered all the facts and circumstances and the law applicable thereto. It is this order, that the Appellant now, seeks to impugn before us in the instant appeal.

It is to be re-iterated here that the learned High Court Judge of Kegalle had proceeded to consider the appeal preferred to it by the Appellant as an application in revision.

It is true that it was averred in paragraph 3 of his petition by the Respondent that the alleged unauthorized construction is situated within a Regional Development Area (ප්‍රාදේශීය සංවර්ධන ප්‍රදේශය). However, it appears that the Respondent had forthwith, rectified the error so committed by him in paragraph 3 of his petition preferred to the Magistrate Court of Kegalle through paragraph 4 of his counter objections.

Upon a careful scrutiny of the Gazette Notification which was annexed to the petition of the Respondent preferred to the Magistrate Court of Kegalle marked as 'පැ1' which was also, annexed to the statement of objections of the Appellant preferred to the Magistrate Court of Kegalle, marked as 'වී1' together with the letter which was annexed to the petition of the Respondent preferred to the Magistrate Court of Kegalle marked as 'පැ2' and which was also annexed to the statement of objections of the Appellant marked as 'වී2', it clearly, shows

without any doubt and/or without any ambiguity that the whole area coming within the ambit of Kegalle Urban Council had been declared by the Hon. Minister in-charge of the subject of Urban Development, to be an Urban Development Area by virtue of powers vested in him by section 23(5) of the Act as amended.

Besides, upon a careful consideration of the statement of objections of the Appellant in its totality, it becomes manifestly, clear that he too, had clearly, and unequivocally, admitted that it was so.

Hence, it is a common ground that the area in which unauthorized construction is situated is coming within the ambit of the area so declared by the Hon. Minister in-charge of the subject of Urban Development, to be an Urban Development Area by virtue of powers vested in him by section 23(5) of the Act as amended.

However, the principal objection raised to the application by the Appellant being that the area in which unauthorized construction is situated within a Regional Development Area (ප්‍රාදේශීය සංවර්ධන ප්‍රදේශය) and not within an area coming within the ambit of an area so declared by the Hon. Minister in-charge of the subject of Urban Development, to be an Urban Development Area by virtue of powers vested in him by section 23(5) of the Act as amended.

It is however, significant to observe upon a careful reading of his statement of objections, that the Appellant himself had clearly, and unequivocally, admitted that unauthorized construction is situated in an area coming within the ambit of an area so declared by the Hon. Minister in-charge of the subject of Urban Development, to be an Urban Development Area by virtue of powers vested in him by section 23(5) of the Act as amended as manifest from '෭ප2' as well as from 'ඊ2'-his own document.

Hence, the Respondent had established without an iota of doubt before the Magistrate Court of Kegalle that unauthorized construction is situated in an area coming within the ambit of an area so declared by the Hon. Minister in-charge of the subject of Urban Development, to be an Urban Development Area by virtue of powers vested in him by section 23(5) of the Act as amended as manifest from 'ඔඅ2' as well as from 'ඊ2'-Appelant's own document as rightly, held by the learned Magistrate of Kegalle.

In the circumstances, I would hold that the learned High Court Judge of Kegalle had rightly, proceeded to dismiss the application in revision filed before it by the Appellant by holding that the Court sees no error in law in the order and therefore, there was no reason to interfere with the order of the learned Magistrate of Kegalle for; he had come to the impugned decision after having considered all the facts and circumstances and the law applicable thereto.

In the circumstances, it clearly, appears to me that the order complained of, cannot in any manner, be regarded and/or construed as one that is palpably wrong and/or one tainted with illegality and/or one of such a nature that had shocked the conscience of the Court and/or one that had caused positive miscarriage of justice to the Appellant.

Hence, I would hold that the Appellant had not in any manner, shown any exceptional circumstances warranting the exercise of the extra-ordinary revisionary jurisdiction vested in the learned High Court Judge of Kegalle in revision of the order complained of, as rightly, held by the learned High Court Judge of Kegalle.

In the circumstances, I would hold that the application in revision is not entitled to succeed both in fact and law and as such, it ought to have been dismissed *in-limine* as rightly, done by the learned High Court Judge of Kegalle.

Let me now, deal with a further point which is in my view, of vital importance in determining the propriety and/or legal soundness of the two orders sought to be revised and set aside by the Appellant in the instant appeal, namely; the orders of the learned Magistrate of Kegalle and the learned High Court Judge of Kegalle.

It may now, be examined.

As observed by me elsewhere in this judgement that the Appellant himself had clearly, and unequivocally, admitted that unauthorized construction is situated in an area coming within the ambit of an area so declared by the Hon. Minister in-charge of the subject of Urban Development, to be an Urban Development Area by virtue of powers vested in him by section 23(5) of the Act as amended as manifest from 'ඔ2' as well as from 'ඊ2'-his own document.

In a situation where an application has been made to a Magistrate Court under and in terms of the provisions of section 28A(3) of the Act, the pivotal question that would arise before Court for consideration is whether the construction in question has been effected upon a valid permit. The existence of a valid permit is the only valid defence to the application under section 28A(3) of the Act. The burden of showing that the construction in question had been done on a valid permit is on the person noticed.

However, it is significant to observe that although the Appellant had clearly, and unequivocally admitted in paragraph 6, 8 and 10 of his statement of objections in particular, that the construction in question had been effected by him, or else, he had at least been in possession thereof at the time of the application being made to the Magistrate Court of Kegalle under and in terms of the provisions of section 28A(3) of the Act, he had never shown to Court that the construction in question had been effected by him upon a valid permit issued to him under and in terms of the provisions of the Act. Hence, the Appellant had not in any manner, discharged the burden of proof vested in him

by producing a valid permit in respect of the construction in question as rightly, held by the learned Magistrate of Kegalle as well as the learned High Court Judge of Kegalle made acting in revision.

In the circumstances, I would see no error whatsoever, in the orders of the learned Magistrate of Kegalle as well as the learned High Court Judge of Kegalle made acting in revision.

I would therefore, hold that appeal is not entitled to succeed both in fact and law on this ground too, and as such it should be rejected *in-limine* on this ground too.

It is interesting to observe that the Appellant in the course of the argument before us, had made an attempt to contend that the construction in question is situated beyond the limits of the Urban Council of Kegalle. However, it is significant to observe that this is not a matter raised before the learned Magistrate of Kegalle in the first place for his consideration and determination nor was a matter raised in the High Court of Sabaragamuwa Province holden in Kegalle for his consideration and determination. Hence, this is a matter raised by the Appellant for the first time in appeal before this Court. The matter, namely; whether the construction in question is situated beyond the limits of the Urban Council of Kegalle or not; is not a pure question of law but a mixed question of fact and law and therefore, the Appellant is debarred in law, from raising such a matter mixed with fact and law for the first time in appeal before us. Hence, it too, should be rejected as rightly, contended by the learned Counsel for the Respondent.

In view of the foregoing, I would hold that appeal is not entitled to succeed both in fact and law.

In the result I would proceed to dismiss the instant appeal with costs of this Court and the Courts below.

I would thus, affirm both the orders of the learned Magistrate of Kegalle and the Learned High Court Judge of the Sabaragamuwa Province holden at Kegalle.

JUDGE OF THE COURT OF APPEAL

D. THOTAWATTA, J.

I agree.

JUDGE OF THE COURT OF APPEAL