

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

In the matter of an application under and
in terms of Articles 17 and 126 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

D.K. Poornalatha,
No. 99, Sri Gunalankara Road,
Off Saranankara Road,
Kalubowila,
Dehiwala.

Petitioner

SC FR Application No: 37/2016

Vs.

1. Mr. Dhanasiri Amarathunga,
His Worship the Mayor,
- 1A. Stanley Dias,
His Worship the Mayor,
2. Mr. Dhammika Muthugala,
The Municipal Commissioner,
- 2A. Sunil Dalagama,
Acting Municipal Commissioner,
- 2B. Mr. M.M.C.K.K. Mannapperuma,
The Municipal Commissioner,
The Dehiwala Mount Lavinia Municipal
Council,
Dehiwala.

3. Dehiwala Mount Lavinia Municipal Council,
The 1st to 3rd Respondents of;
The Dehiwala Mount Lavinia Municipal Council,
Dehiwala.
4. Urban Development Authority,
3rd Floor, “Sethsiripaya”,
Battaramulla,
Sri Jayawardenepura, Kotte.
5. Hon. Attorney General,
Attorney General’s Department,
Colombo 12.

Respondents

Before: **Justice A.L. Shiran Gooneratne**
 Justice Achala Wengappuli
 Justice Sampath B. Abayakoon

Counsel: Pulasthi Hewamanne with Fadhila Fairoze instructed by
 Thushari Jayawardena for the **Petitioner**.

 Sulari Gamage instructed by Janaki Hapuarachchi for the **1st –**
 3rd Respondents.

 Rajitha Perera, DSG for the **4th and 5th Respondents**.

Argued on: 10/02/2025

Decided on: 30/05/2025

A.L. Shiran Gooneratne J.

- [1] By Petition dated 05/02/2016, the Petitioner has alleged *inter alia*, that the decisions taken to require the Petitioner to demolish a portion of her house by the 1st to 3rd Respondents to this application has violated the Petitioner's Fundamental Rights guaranteed under Articles 11, 12(1), and 14(1)(h) of the Constitution. Having heard the submissions of the respective counsel, the Petitioner was granted leave to proceed for the alleged violation of Articles 12(1) and 14(1)(h) and to quash the letter dated 18/01/2016 [P10(a)] issued by the 2nd Respondent, the Municipal Commissioner.
- [2] In paragraphs 4, 6 and 10, of the Petition, the Petitioner states that due to lack of space, in or around 1995, the Petitioner set up a temporary construction approximately 12 feet by 14 feet in extent, in front of the existing house, situated within the housing complex named the Saranakara Housing Project, consisting of 100 houses. Thereafter, in or around October 2015, the Petitioner set up a permanent structure to the same extent, composed of two floors, with access to the upper floor from a spiral staircase.
- [3] In paragraph 11 of the Petition, the Petitioner states that by letter dated 18/01/2016, the 2nd Respondent informed the Petitioner that the construction was unauthorized and directed the Petitioner to remove such construction by 25/01/2016. The Petitioner alleges that on 29/01/2016, with no prior notice, several officers of the 3rd Respondent arrived at the premises, informed the Petitioner that the new construction was unauthorized, and removed the spiral staircase.
- [4] Apart from the alleged mental trauma, indignity and humiliation caused to the Petitioner and her family by the purported acts carried out by the officers of the 3rd Respondent, the Petitioner's position on the violation of Articles 12(1) and 14(1)(h) is premised on the alleged violations of the following legal provisions;

- Delegation of authority under Sections 23(5) and 28A (1) of the Urban Development Authority Law No. 41 of 1978 [as amended] (hereinafter referred to as the UDA Act), enforced by the 2nd Respondent by letter dated 18/01/2016 [P10(a)], is illegal and ultra vires
- The 2nd Respondent cannot be delegated any authority to demolish or demand the demolition of any unauthorized construction
- Section 28A (3) of the UDA law requires the institution of action in the Magistrates Court to obtain an order for demolition.

[5] When this matter was taken up for hearing, the Petitioner's arguments were based on the above legal position, which is more fully reflected in the written submissions file of record.

[6] Section 23(5) of the UDA Act reads as follows;

“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 function so delegated, under the direction, supervision and control of the Authority.”

[7] In response to the above, the Deputy Solicitor General appearing for the 4th and 5th Respondents drew the attention of Court to document marked ‘4R1’ wherein, the 4th Respondent Authority acting under the above Section 23(5) of the UDA Act, has delegated the required power to the officers of the 1st Respondent, and the 2nd and 3rd Respondents have acted under the delegated authority. The 1st to 3rd Respondents deny demolishing the fences, removing the spiral staircase and further reiterate that at all times material to this application, the Respondents have acted within the limits of power conferred to them by law.

[8] Section 28A, introduced by the amending Act No. 4 of 1982, reads as follows;

“(1) Where in a development area, any development activity is 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, the Authority may, in addition to any other remedy available to the Authority under this Law, by written notice require the person who is executing or has executed such development activity, or has caused it to be executed, on or before such day as shall be specified in such notice, not being less than seven days from the date thereof

(a) to cease such development activity forthwith; or

(b) to restore the land on which such development activity is being executed or has been executed, to its original condition; or

(c) to secure compliance with the permit under the authority of which that development activity is carried out or engaged in, or with any term or condition of such permit,

and for the purposes of compliance with the requirements aforesaid

(i) to discontinue the use of any or building; or

(ii) to demolish or alter any building or work.

(2) It shall be the duty of the person on whom a notice is issued under subsection (1) (2) It shall be the duty of the person on whom a notice is issued under subsection (1) to comply with any requirement specified in such notice within the time specified in such notice or within, such extended time as may be granted by the Authority on application made in that behalf.

(3) (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.

(4) Where a mandatory order has been made under subsection (3), it shall be the duty of the police authorities to render all necessary assistance to the Authority in carrying out the order.

(5) The Authority shall be entitled to recover any reasonable expenses incurred by the Authority in demolishing or altering any building or work in pursuance of an order made by the Magistrate under sub section (3).

(6) 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.”

[9] In *Wimal Withana vs. Paneer Selvam and Hon. Attorney General*¹ the Supreme Court considered whether the powers conferred under Section 28A(3) of the Urban Development Authority Law No. 41 of 1978, as amended, fall within the scope of “planning” as contemplated by Section 23(5) of the same Act. The Court held that every subsection of Section 28A must be interpreted as a whole without omitting any portion of it to give effect to the legislative intent.

It was held that Section 28A, in its entirety, inherently relates to the implementation and enforcement of approved development plans, and therefore the powers, duties, and functions set out in subsection (3), including the institution of proceedings before a Magistrate’s Court for a mandatory order to demolish or alter an unauthorized structure, are planning-related functions capable of being delegated under Section 23(5).

Section 23(5) permits the Urban Development Authority to delegate any of its powers, duties, and functions relating to planning to an officer of a local authority, provided such delegation is made in consultation with the local authority concerned and is subject to the supervision and control of the UDA. The Court, in this case, held that such delegation is valid and binding, and rejected the argument that actions taken under Section 28A(3) lie outside the scope of lawful delegation. This position was reaffirmed in the case of *S.A. Rajalingam vs. D.M. Udaya Ranjith and Others*².

[10] Even though the conclusive findings made in the above case have direct reference to the case at hand to reach its logical conclusion, I wish to pen down the following positions taken in the statement of objections filed by the 1st to 3rd Respondents.

[11] Considering the complaints received by the residents of the area, (R3 to R7) and the notice sent to the Petitioner under Section 23(5) read with Section 28(a) (1)

¹ (2012) 1 SLR 254

² (SC Appeal 60/2017) decided on 18 - 06 - 2020

of the UDA law marked P10 (a), the technical officer had inspected the unauthorized construction and had advised the Petitioner to produce documents and approved plans to substantiate her ownership to the relevant portion of land.

[12] When the Petitioner was awarded the property by Deed No. 770 dated 24/04/2001, there was a proper plan, and the northern boundary of the land was clearly shown as a 10-foot roadway, owned and maintained by the 3rd Respondent. At no time did the Respondents take steps to demolish the garden fence; however, there was an urgent need to clear the area to resurrect the 10-foot-wide common road and the drainage system. The Petitioner constructed the unauthorized structure on top of a drain closing and obstructing the roadway of 50% of the residents in the scheme, thereby obstructing the residents' free movement and preventing the 3rd Respondent from clearing and maintaining the drain system. Due to the Petitioner's disruption of the drain system, at least one occupant has complained to the Human Rights Commission. Photographs marked R8 (a) to R8 (d) are annexed to show the Petitioner's unauthorized construction on top of the drain encroaching on the common roadway and to the triangular-shaped portion to the northern boundary.

[13] There was no garden fence since the construction of the unauthorized two-story building. The spiral staircase was only a temporary fixture. The officers of the Respondents have denied the demolition of the unauthorized construction or any part thereof.

[14] Before any demolition was carried out, in terms of document P10 (a), the Respondents were to obtain a court order in terms of the law.

[15] In their affidavits, the 1st and 2nd Respondents state that they have never taken steps to demolish the garden fence, noting that no fence existed after the construction of the unauthorized two-story building. It is submitted that

clearing the area owned and maintained by the third Respondent had no relevance to the Notice issued under Section 28A (1). The Respondents have vehemently denied taking any steps to demolish the garden fence and the spiral staircase.

[16] According to Section 28A (3)(a) of the UDA Act, subject to subsection (1), the Authority may institute action under the procedure prescribed in the UDA Act. Such an action shall be filed before the Magistrate to make a mandatory order authorizing the Authority to demolish, alter the building, or work within the specified period in the Notice or by such time granted by the Authority. The Petitioner and her son-in-law, a person of direct interest to the subject matter, in their respective affidavits, have pleaded the absence of due process in complying with Section 28A (3)(a) of the UDA Act, prior to the removal of the fence and the spiral staircase. The Petitioner's son-in-law has attached several photographs that are indicative of the presence of the officers of the 3rd Respondent on the date the purported illegal acts were committed (X1 to X3), however, not a single photograph shows the removal of the spiral staircase or the fence by the officers present. As an interested party to the land, the evidence presented to this Court of the alleged acts committed in violation of the statutory provisions does not meet the required standard of proof and falls far short of the degree of establishing an infringement of the Petitioner's legitimate rights and expectations.

[17] This Court further observes that the grant of relief in Fundamental Rights applications is subject to the equitable principle that a party seeking such relief must come before Court with clean hands. While no finding has been made in this case regarding suppression or misrepresentation of facts, every petitioner must demonstrate that they have acted in good faith and by the law. The equitable jurisdiction of this Court under Article 126 is not exercised in a vacuum, and a petitioner's conduct is a relevant consideration in assessing

entitlement to relief. In this case, the Court has taken note of the Petitioner's conduct in proceeding with a construction admittedly lacking prior approval, and encroaching on public utility space, as well as their failure to respond to regulatory directives. While procedural compliance by the authorities is an important consideration, it does not in itself entitle a petitioner to relief where he has not acted in good faith.

[18] The Petitioner admits to the construction of a permanent structure in the place of the temporary shed in or around October 2015. When the said illegal construction was taking place, several residents of the housing scheme petitioned the 2nd Respondent to take appropriate action to demolish the construction to prevent the inconvenience caused to the residents. The photographs attached to the statement of objections filed by the 1st to 3rd Respondents are so compelling and clearly show the extent to which the Petitioner's house protrudes into the roadway, thereby obstructing the free movement of the neighboring residents and the drainage system.

[19] As discussed earlier in this Judgement, the UDA Act makes it abundantly clear that ensuring the due implementation and enforcement of the powers conferred/delegated to the 1st to 3rd Respondents under every subsection of Section 28A is paramount in protecting the rights and liberties of all concerned parties. The Petitioner's act of encroachment into the roadway, restricting the taxpayer residents' movements and the peaceful enjoyment of common facilities, is a clear violation of the law. This high-handed illegal act of the Petitioner is frowned upon by this Court. The Court is equally mindful of the wide and constructive powers vested with the Authority in terms of the law, to be enforced in a purposive and meaningful manner that minimizes delay in furtherance of due process. In all the above circumstances, the Respondents are directed to demolish the unauthorized construction forthwith, in terms of the law and procedure.

[20] The Petitioners have failed to establish any violation of their rights guaranteed under Article 12(1) or 14(1)(h) against any of the Respondents and, therefore, I dismiss this Application. No order for costs.

[21] Application dismissed.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree

Judge of the Supreme Court

Sampath B. Abayakoon, J.

I agree

Judge of the Supreme Court