

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

In the matter of an appeal under Article 154(P) 6 and Article 138 of the Constitution read with Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Court of Appeal Case No.
CA (PHC) 16/2021

H.C. Colombo Case No. HCRA 05/21

M.C. Mount Lavinia Case No.
12790/S/18

A.A.V. Sampath,
Municipal Commissioner,
Prosecution Officer,
Dehiwala – Mount Lavinia Municipal
Council,
Anagarika Dharmapala Mawatha,
Dehiwala.

Substituted Applicant- Petitioner

Vs.

M. G. M. Ismath,
No. 41, Galle Road,
Dehiwala

Respondent

Hayathu Kalanthar Fathima Irzana,
No. 112, Samaria Street,
Crese, ACT 2911
Australia.

Intervient Petitioner

And then Between

M. G. M. Ismath,
No. 41, Galle Road,
Dehiwala

Respondent- Petitioner

Vs.

A.A.V. Sampath,
Municipal Commissioner,

Prosecution Officer,
Dehiwala – Mount Lavinia Municipal
Council,
Anagarika Dharmapala Mawatha,
Dehiwala.

**Substituted Applicant- Petitioner-
Respondent**

Hayathu Kalanthar Fathima Irzana,
No. 112, Samaria Street,
Crese, ACT 2911
Australia.

Intervient Petitioner- Respondent

And now between

M. G. M. Ismath,
No. 41, Galle Road,
Dehiwala

Respondent- Petitioner- Appellant

Vs.

A.A.V. Sampath,
Municipal Commissioner,
Prosecution Officer,
Dehiwala – Mount Lavinia Municipal
Council,
Anagarika Dharmapala Mawatha,
Dehiwala.

**Substituted Applicant- Petitioner –
Respondent- Respondent**

Hayathu Kalanthar Fathima Irzana
No. 112, Samaria Street,
Crese, ACT 2911
Australia.

**Intervient Petitioner- Respondent-
Respondent**

Before: **Damith Thotawatte, J.**
 K.M.S. Dissanayake, J.

Counsels: Jagath Wickramanayake, PC with Keishara Perera for the
 Respondent-Petitioner-Appellant.

 W. Dayaratne, PC with Ranjika Jayawardene for the Substituted
 Applicant-Petitioner-Respondent-Respondent.

 Sumedha Mahawanniarachchi with Nishan Balasooriya for the
 Intervenant Petitioner-Respondent-Respondent.

Argued: 04.05.2026

Written submissions
tendered on: 01.08.2022 by Respondent – Petitioner – Appellant.

Judgement Delivered: 28.07.2026

Thotawatte, J.

The present appeal has been preferred by the Respondent-Petitioner-Appellant (hereinafter sometimes referred to as the "Appellant") against the order dated 24.03.2021 of the learned High Court Judge of the High Court of the Western Province holden in Colombo in H.C. Revision Application No. HCRA/05/21, delivered in the exercise of the revisionary jurisdiction conferred by Article 154P(3)(b) of the Constitution. By the said order, the learned High Court Judge affirmed the order dated 13.11.2020 made by the learned Magistrate of the Magistrate's Court of Mount Lavinia under section 28A (3) of the Urban Development Authority Law, No. 41 of 1978, as amended (hereinafter referred to as the "UDA Act"), allowing the application instituted by the Substituted Applicant-Petitioner-Respondent-Respondent (hereinafter sometimes referred to as the "1st Respondent") seeking an order for the demolition of an unauthorized construction.

The proceedings arise out of a dispute concerning a building situated at No. 41, Galle Road, Dehiwala. Prior to the institution of these proceedings, the Dehiwala-Mount Lavinia Municipal Council had issued Development Permit No. KBB/72/2015 authorizing the

Appellant to carry out development at the said premises. The Appellant has consistently maintained that the construction was undertaken pursuant to that permit and in the bona fide belief that it conformed to its terms. The Municipal Council, however, alleged that the Appellant had carried out construction in contravention of the development permit. The alleged deviations were particularized in the application filed before the Magistrate's Court by a predecessor of the 1st Respondent and were illustrated by the rough sketch marked P3 annexed to the application.

Progression of the Litigation

Upon the Appellant's failure to comply with the statutory requirements prescribed under section 28A of the Urban Development Authority Law, the 1st Respondent instituted proceedings in the Magistrate's Court of Mount Lavinia (Case No. 12790/S/18) on 23.10.2018 under section 28A (3) of the Law, seeking an order authorizing the demolition of the unauthorized development and the recovery of the costs of enforcement under section 28A (5). By order dated 13.11.2020, the learned Magistrate allowed the application and authorized the demolition of the unauthorized construction.

Being dissatisfied with the Magistrate's order, the Appellant invoked the revisionary jurisdiction of the High Court of the Western Province holden in Colombo (H.C. Revision Application No. HCRA/05/21), pleading the existence of exceptional circumstances warranting revision. By order dated 24.03.2021, the learned High Court Judge dismissed the revision application, holding that the Magistrate's order was not illegal.

Being aggrieved by the High Court's order, the Appellant preferred the present appeal before the Court of Appeal challenging the dismissal of the revision application.

Grounds of Appeal

The Appellant, by the Petition of Appeal and the written submissions, impugns the judgment of the learned High Court Judge on several grounds, which may be summarized as follows:

- a) that the learned Magistrate failed to satisfy himself, as required by section 28A (3), that the Appellant had carried out an unauthorized construction in contravention of the development permit.
- b) that the learned Magistrate erred in relying solely upon the rough sketch marked P3, which was admittedly not drawn to scale, and the allegations contained in the

application, without sufficient evidence to establish a breach of the development permit.

- c) that the learned Magistrate erred in ordering demolition in the absence of an approved building plan, survey plan or any technical report prepared by a qualified professional establishing the alleged unauthorized construction.
- d) that the learned Magistrate failed to give due weight to the fact that the Appellant's construction had been undertaken pursuant to a valid development permit issued by the Municipal Council.
- e) that the learned Magistrate failed to consider that the 1st Respondent had acted unfairly and arbitrarily by permitting the construction to proceed without objection and alleging unauthorized development only after its completion.

The statutory scheme governing the removal of unauthorized developments and Scope of the Inquiry before the Magistrate

Before considering the Appellant's contentions, it is necessary to bear in mind the statutory scheme governing proceedings under section 28A of the Urban Development Authority Law. Such proceedings are not ordinary civil proceedings for the determination of proprietary rights but constitute a statutory enforcement mechanism designed to secure compliance with the development plan and the conditions of development permits. In *Palligoda Withanage Keerthi Wimal Withana v. Muniyandy Paneer Selvam*¹, the Supreme Court held that section 28A forms part of the statutory planning procedure established under the Urban Development Authority Law and is intended to secure compliance with the development plan and the conditions of the development permit. Where a person fails to comply with a notice issued under section 28A (1), the Authority may invoke section 28A (3) to obtain a mandatory order authorizing it to give effect to that notice, including by demolishing or altering the unauthorized development.

The statutory procedure is sequential. Before invoking the jurisdiction of the Magistrate under section 28A (3), the Authority must first issue a notice under section 28A (1) requiring the recipient to remedy the unauthorized development, and only upon non-compliance with that notice may it seek a mandatory order authorizing enforcement. The Magistrate is required to determine whether the statutory preconditions prescribed by section 28A have been satisfied before making such an order. This approach is consistent with the construction adopted by this Court in *F. Najimudeen and another v. Jagath*

¹ SC Appeal 123/09 Decided on 18.01.2012

*Chamila Hettiarachchi*², *E. Ranjani v. K.D. Ananda*³, and *Subhasinghe Arachchige Pushpa Chandralatha v. Wanniarachchige Susantha Chandrasiri*⁴.

Scope of the High Court in Revision

The jurisdiction exercised by the Provincial High Court in revision is an extraordinary discretionary jurisdiction and not an appellate jurisdiction. Its function is not to re-evaluate the evidence or substitute its own findings merely because another view is possible, but to determine whether the learned Magistrate acted within jurisdiction and whether the proceedings or the impugned order disclose any illegality, irregularity or impropriety warranting the exercise of the Court's extraordinary revisionary jurisdiction. In exercising that jurisdiction, the High Court must guard against converting a revision into a disguised appeal, particularly where the legislature has withheld a right of appeal. Accordingly, where the learned Magistrate has exercised the special statutory jurisdiction in accordance with law and no jurisdictional error or manifest miscarriage of justice is established, interference is unwarranted. Recent decisions of this Court have consistently reaffirmed that the High Court's revisionary jurisdiction is confined to reviewing the legality, propriety and regularity of the impugned order and is not a substitute for an appeal.

Scope of the Present Appeal

It must be borne in mind that the present appeal is directed not against the order of the learned Magistrate but against the judgment of the learned High Court rendered in the exercise of its revisionary jurisdiction under Article 154P(3)(b) of the Constitution. Accordingly, the function of this Court is not to reconsider the evidence or determine afresh whether the learned Magistrate reached the correct conclusion on the facts, but to examine whether the learned High Court Judge properly exercised the revisionary jurisdiction vested in that Court and whether the impugned judgment discloses any error of law, principle or jurisdiction warranting appellate interference.

The scope of appellate review in such cases is now well settled. In *Nandawathie and Another v. Mahindasena*⁵, this Court observed that an appeal from a revisionary order of the Provincial High Court is not an appeal in the true sense but a proceeding to examine

² CA (PHC) 198/2012 Decided on 24.07.2019

³ CA (PHC) 85/2015 Decided on 23.09.2019

⁴ CA (PHC) 184/2016 Decided on 04.08.2020

⁵ (2009) 02 Sri. L.R 218 at page 238

the correctness, legality or propriety of the manner in which the learned High Court Judge exercised the revisionary jurisdiction. Consequently, the Court of Appeal must refrain from treating such an appeal as one directed against the order of the Magistrate or Primary Court, or from re-hearing or re-evaluating the evidence led before that Court and substituting its own findings on factual matters falling exclusively within its jurisdiction.

Although “**Nandawathie**” arose out of proceedings under Part VII of the Primary Courts' Procedure Act, the principle articulated therein—that an appeal from the High Court exercising revisionary jurisdiction is directed to the legality, correctness and propriety of the High Court's exercise of that jurisdiction rather than the merits of the original order—has subsequently been adopted by the Court of Appeal in other appeals from revisionary orders of the Provincial High Court.

Analysis

Inconsistent positions of the Appellant

A perusal of the Statement of Objections filed by the Appellant before the learned Magistrate (at page 117 of the brief) discloses an unequivocal admission that certain structures had been erected beyond the extent authorized by the Development Permit. The Appellant sought to justify those unauthorized constructions by contending that they were necessary to prevent the accumulation of water on the roof terrace and further maintained that any encroachment upon the prescribed reservations could subsequently be regularized by the approval of an amended building plan.

It is further to be observed that the principal grounds upon which the Appellant sought revision had not been pleaded before the learned Magistrate. Indeed, those grounds appear to depart materially from the position adopted in the Statement of Objections. Before the learned Magistrate, the Appellant acknowledged that certain constructions had been carried out beyond the approved Development Permit and sought to justify those deviations. In contrast, in the revision proceedings and before this Court, the Appellant principally contends that the learned Magistrate failed to establish, on sufficient technical or documentary material, that the impugned construction was in fact in violation of the Development Permit.

The Appellant cannot be permitted to improve his case in revision and appeal by abandoning the position unequivocally adopted before the learned Magistrate.

Failure to monitor and direct the construction

Equally untenable is the Appellant's contention that the 1st Respondent acted unfairly or arbitrarily by failing to intervene during the course of construction and by alleging unauthorized development only upon its completion. The effect of this submission is to attribute to the Dehiwala–Mount Lavinia Municipal Council a continuing obligation to monitor the progress of construction and to advise the Appellant of any departures from the approved Development Permit. The statutory framework imposes no such duty. Responsibility for ensuring that the development conforms to the approved plans rests squarely upon the holder of the Development Permit. The contention must therefore be rejected.

Reliance on P3 sketch

I am unable to accept the contentions advanced under grounds (b), (c) and (e) set out above. The learned Magistrate was not confined to the rough sketch marked P3 or the averments contained in the application but had considered the material placed before Court as a whole, including the Appellant's own admissions regarding deviations from the approved Development Permit. The Urban Development Authority Law does not require, as a condition precedent to the exercise of the Magistrate's jurisdiction under section 28A, the production of an approved building plan, survey plan or technical report prepared by a qualified professional. Equally, the mere existence of a Development Permit does not establish that the construction carried out was authorized. The issue before the learned Magistrate was whether the Appellant had executed the development in conformity with the terms and conditions of the permit, and not whether a permit had been issued in the first place. In the circumstances, I am unable to conclude that the learned Magistrate acted on insufficient material or misdirected himself in law.

Exceptional Circumstances

From both the oral and written submissions advanced on behalf of the Appellant, it is apparent that considerable reliance has been placed upon the contention that the learned High Court Judge failed to consider the matters pleaded as constituting exceptional circumstances in the revision application. However, the Appellant has not demonstrated how those matters, viewed either individually or collectively, transcend ordinary grounds challenging the correctness of the learned Magistrate's findings so as to constitute exceptional circumstances warranting the exercise of revisionary jurisdiction. This

distinction is of considerable importance, for the authorities relied upon by the Appellant make it abundantly clear that it is not sufficient merely to assert the existence of exceptional circumstances; they must be specifically pleaded and established as justifying the invocation of the Court's extraordinary revisionary jurisdiction.

The Appellant's challenge is fundamentally misconceived. Having acknowledged before the learned Magistrate that the development departed from the approved permit and sought to justify those deviations, the Appellant cannot, in revision and on appeal, advance an inconsistent case that the contraventions were never established. Equally, the statutory obligation to ensure compliance with the approved permit rests upon the permit holder and not upon the regulatory authority. Once the material before the Court establishes non-compliance with the permit, the Magistrate's jurisdiction is not defeated by the absence of any particular form of technical or documentary evidence.

Conclusion

For all the foregoing reasons, I am satisfied that the learned High Court Judge properly exercised the revisionary jurisdiction vested in that Court, and that no ground has been established warranting appellate interference. I accordingly affirm the judgment of the learned High Court Judge dated 24.03.2021 and dismiss this appeal with costs fixed at Rs. 50,000/- payable by the Appellant to the court.

Judge of the Court of Appeal

K.M.S. Dissanayake, J.

I agree

Judge of the Court of Appeal