

VEN. KIRAMA SUMANA NANDA THERO
v
RAJAPAKSHE

COURT OF APPEAL
EKANAYAKE, J.
CHANDRA GUNARATNE, J.
CA 136/2004
DC GAMPAHA 43630/M
OCTOBER 15, 2007

Pradeshiya Saba Act 15 of 1987 – Sections 35, 36, 210-214, 214(1) and (2), 215 – Demolition of walls – No prior approval of the Sabawa – Notice in writing to be given to Pradeshiya Saba before action is instituted? – If not – could action be maintained – Sabawa acting outside the scope of Authority? Civil Procedure Code section 461 – Amendment Act 20 of 1967 – compared.

The plaintiff-appellant claimed damages for demolition of walls of 4 rooms in the building which belonged to the plaintiff by the 1st and 2nd respondents (Mahara

Pradeshia Sabawa). The position of the plaintiff-respondent was that demolition took place as the plaintiff failed to obtain prior approval of the Pradeshia Sabawa.

The trial Judge held that, notice under S214 of the Pradeshia Saba Act was not given to the Pradeshia Sabawa and the Pradeshia Sabawa was empowered under Section 35 and Section 36 to demolish the building.

It was contended in appeal by the plaintiff-appellant that (1) the trial Judge failed to consider the Law applicable for demolition under Act 15 of 1987 (2) That the trial Judge failed to consider that under Section 35 of the Act, the respondents could not have demolished a part of the building, without he being heard. (3) that the Court has misdirected itself.

Held:

- (1) In terms of S210-215 – more specially S214 (1) and (2) no action could be instituted against any Pradeshia Sabawa until the expiration of one month, next after notice in writing is given to the Pradeshia Sabawa.

Per Anil Gunaratne, J.

"The above procedural provision is similar to S461 of the Civil Procedure Code involving the State. The earlier view was that if notice was not given action was not maintainable. The introduction of an amendment to S461 by Act 20 of 1977 with S461 A – where no notice has been given, S461A enables Court to stay proceedings for a further month. The section does not contemplate of a dismissal of action on failure to give notice."

Held further

- (2) The position is different in the provisions relating to notice in the Pradeshia Sabawa Act 15 of 1987 which does not contain a similar provision as S461 of the Code. Provisions in S214 seem to be an imperative requirement.
- (3) S35/36 contemplates to safeguard human life from possible dangers by a structure in a collapsible state. If these ingredients are present the Pradeshia Saba of the area could adopt or cause to take such steps to do everything possible to prevent a dangerous state.
- (4) The main items of evidence to support the ingredients in S35/36 are contained in the defendants' documents. The Pradeshia Sabawa has not acted outside its scope of authority. The plaintiff had constructed a building not according to approved specifications. It is an unauthorised construction, the neighbours have expressed fear about the unauthorised construction and the possible danger which may ensue.

APPEAL from the judgment of the District Court of Gampaha.

Cases referred to:

- (1) *Saiboo and others v Attorney-Genera*;— 48 NLR 574.
- (2) *Weerasinghe v De Silva* – 1994 – 2 Sri LR 248.
- (3) *Liyanage v Municipal Council of Galle* – 1994 - 3 Sri LR 217
- (4) *Johannesburg Municipality v African Reality Trust* – 1927 - AD 163.
- (5) *Paramasothy v Veenayagamoorthy* – (1943) 44 NLR 361
- (6) *Perera v Perera* – (1957) 59 NLR 133.

Udaya Gammanpila for plaintiff-respondents.

1st and 2nd defendant-respondents absent and unrepresented.

January 30, 2008

ANIL GOONERATNE, J.

This was delictual action filed in the District Court of Gampaha where the plaintiff-appellant claimed damages for demolition of walls of 4 rooms in the building which belongs to plaintiff, by the 1st and 2nd defendant-respondents in the manner pleaded in paragraphs 5/6 of the plaint. It was the position of the respondents according to the answer filed in the Original Court that demolition took place as the plaintiff failed to obtain prior approval of the Pradeshiya Sabhawa Act, No, 15 of 1987, and in view of a series of complaints about illegal construction by the plaintiff, demolition had to be done, and such act of demolition by the Pradeshiya Sabha was legal. Judgment was delivered by the learned District Judge on or about 14.01.2004 dismissing plaintiff's action.

At the hearing of this appeal only the appellant was represented. This appeal arises from the said judgment and in the Petition of Appeal, appellant plead *inter alia*.

- (a) The learned District Judge has failed to consider the law applicable for demolition under the Pradeshiya Sabha Act, No. 15 of 1987.
- (b) The learned District Judge has failed to consider that under section 35 of the Pradeshiya Sabha Act, the respondents could not have demolished the part of the building as aforesaid, of the said appellant without he being heard and/or after filing an action in the respective Magistrate's Court prior to the said demolition.

- (c) The respondents falsely misdirected the court and the learned District Judge without considering that documents marked V1 and V1 were not proved misdirected her herself and delivered a wrong judgment.

Parties proceeded to trial on 23 issues. This appeal needs to decide whether statutory provisions in Pradeshiya Sabha Act and its applicability to the case in hand justifies demolition as described above, and the question of compliance with procedural requirements.

The learned District Judge *inter alia* refer to the following points and findings arising from evidence led at the trial.

- (a) In the complaint P2, 4 persons and a lady came to the temple in a Double cab on 28.4.99 at about 10.30 a.m. and threatened to demolish the building. Court observes that persons concerned are not identified.
- (b) Evidence of plaintiff in court is to the effect that the Chairman of the Pradeshiya Sabha with others caused damages to the buildings and demolished, same.
- (c) By P3 plaintiff complains to the police that when he arrived at the temple on 29.4.1999 at 4.30 p.m. about 1/3 of the walls in the hall upstairs (Dharma Shalava) had been pulled down. P3 shows that plaintiff was not present at the scene of the building when damage was caused to the building, and in cross-examination stated that when the Chairman of the Pradeshiya Sabha is supposed to have come he was not present.
- (d) In court, the plaintiff claimed damages caused to the building upstairs and the ground floor. But in paragraphs 6 of the plaint damages were claimed only for the damages caused to the building upstairs.
- (e) The main ground urged on behalf of the Chairman Pradeshiya Sabhawa was that the construction was an unauthorized construction and plans had not been approved and the construction had taken place not according to any approved specification. Plaintiff's evidence too confirms this position. Plan had been submitted for approval only after unauthorized construction. Plaintiff admitted that the

foundation of the building was done without authority and construction done by plaintiff priest himself without any guidance by persons involved in building construction which caused danger to those in the vicinity.

- (f) 1st defendant's contention is that the plaintiff had constructed a building not according to approved specification and as a result it is dangerous to other premises in the vicinity.
- (g) Evidence of 1st defendant on D1, a letter addressed to the plaintiff priest and the police. D1 refers to unauthorized construction which had been done without approval or any specification, which building had been inspected by the technical officer. The neighbours have expressed fears about the unauthorised construction and the possible danger which may ensue. A direction to stop construction and removal of building in a dilapidated state. D1 should be dated 12.4.1999 but the District Judge states 12.4.1992.
- (h) D2 of 18.5.1999 is a letter by Divisional Secretary Mahara addressed to Commissioner of Buddhist Affairs and copies to plaintiff and Chairman Pradeshiya Sabha, about the illegal acts mentioned in D1 and requesting that the dangerous building be cleared and a request to inspect the building.
- (i) D3 is a letter addressed to plaintiff by Chairman, Mahara Pradeshiya Sabhawa referring to unauthorized structure, danger to neighbours as a result of structure, previous warnings, inspection by Technical Officer etc. The last paragraph of D3 states that the unauthorized structure should be removed in 7 days and a notice under section 35 of Act, No. 15 of 1987. It further states that failure to comply as above, action will be taken under section 36 to remove same without any warning to remove the obstruction and the unauthorized structure. D3 is copied to Commissioner of Buddhist Affairs, Government Agent and a Minister.
- (j) Plaintiff has admitted receipt of D1 and D2. Plaintiff had been filed when D3 was dispatched to plaintiff.
- (k) District Judge comments on the valuation report on damages marked P4, and rejects P4 and observes.

- (i) P4 contains facts submitted by plaintiff priest and not that of the author of same.
- (ii) Report submitted by the author only the face value.
- (iii) Author unable to testify about the foundation of the building i.e. material, strength etc.

In a case of this nature the primary question for plaintiff to establish is whether by any illegal act of the Defendants (unless protected by statute) the private life of the plaintiff had been interfered with and if so mandatory procedural requirements to bring an action have been complied with by the plaintiff to succeed in damages. Compliance with procedural requirements would be the first precondition to be looked into in a case of a statutory authority. The learned District Judge has answered issue Nos. 3 and 4 in the negative. These issues relate to illegal acts of the defendants. Issue No. 7 relates to the above procedural requirement, which is also answered in the negative in favour of the defendants.

In terms of Pradeshiya Sabha Act procedure and legal proceedings are embodied in section 210 to 215 of the Act. Issue No. 7 refers to section 214 of the said Act. Section 214(1) & (2) reads thus:

- (1) No action shall be instituted against any Pradeshiya Sabha or any member or any officer of the Pradeshiya Sabha or any person acting under the direction of the Pradeshiya Sabha for anything done or intended to be done under the powers conferred by this Act, or any by-law made thereunder, until the expiration of one month next after notice in writing shall have been given to the Pradeshiya Sabha or to the defendant, stating with reasonable certainty the cause of such action and the name and the place of abode of the intended plaintiff and of his Attorney-at-Law or agent, if any, in such action.
- (2) Every action referred to in subsection (1) shall be commenced within ix months after the accrual of the cause of action and not thereafter.

The above procedural provisions are somewhat similar to section 461 of the Civil Procedure Code in cases involving the state and in that regard representation of the Attorney-General, comes into

the picture. Earlier view was that if notice was not given action was not maintainable *Saiboo and others v Attorney-General*⁽¹⁾. Object of section 461 of the Civil Procedure Code is to afford an opportunity to the persons concerned to consider his position with regard to a claim and come to terms of settlement *Weerasinghe v De Silva*⁽²⁾. The introduction of the amendment to section 461, by Act, No.20 of 1977 with section 461A, procedure where no notice has been given is dealt with to enable court stay proceedings for a further month. The said section does not contemplate of a dismissal of action on failure to give notice.

However position is different in the provisions relating to notice in the Pradeshiya Sabha Act, No.15 of 1987 which does not contain a similar provision as section 461A of the Civil Procedure Code.

As such the provisions contained in section 214 of the said Act seems to be an imperative requirement. District Judge in this case had answered issue No. 7 in the negative and held that plaintiff cannot maintain this action. The appellant's counsel argued that there was no necessity to give notice as the respondent's have no power to act in the manner they acted. In *Liyanage v Municipal Council Galle*⁽³⁾.

- (a) Section 307(1) of the Municipal Councils Ordinance requires notice of action in respect of "anything done or intended to be done under the provisions of (the Ordinance)". Clearly it is not in respect of **every** act or omission that notice is required.
- (b) Section 307(1) does not apply to those acts which a Municipal Council has no power to do or which it has power to do (under statute, common law or contract) otherwise than under the Ordinance.
- (c) Notice is also not required in respect of *mala fide* acts or those vitiated by some procedural or other defect.

The next question is whether the defendants had the power to act as above. The learned District Judge has to a great extent considered the factual position to enable the Pradeshiya Sabha to act according to section 35 and 36 of the Pradeshiya Sabha Act.

The learned District Judge as enumerated in (E), (F), (G), (H), (I) and (K) of the above findings, gives an indication that the ingredients referred to in section 35 and 36 of Act, No.15 of 1987 has been considered, in the Original Court Judgment. The said sections reads thus

Section 35 – If any house, building, boundary wall or gateway adjoining any street or thoroughfare in any area or anything affixed thereon, be deemed by the Pradeshiya Sabha of that area to be in a ruinous state; whether dangerous or not, or to be likely to fall, the Pradeshiya Sabha shall immediately if it appears to be necessary, cause a proper hoarding or fence to be put up for the protection of persons using such street or thoroughfare, and shall cause notice in writing to be served on the owner or occupier forthwith to take down, secure, or repair such house, building, boundary wall, gateway or thing affixed thereon, as the case may require.

Section 36 – If any person, on whom a notice is served by or on behalf of a Pradeshiya Sabha under section 35 does not begin to comply with such notice within three days of the service thereof or does not complete the work with due diligence, the Pradeshiya Sabha shall cause all or so much of the work as it may think necessary to be carried out, and all the expenses incurred by the Pradeshiya Sabha shall be paid by such person and shall be recoverable as hereinafter provided.

If one takes a close look at the above sections, any structure in close proximity to a road referred to therein, it is evident that it should be in a ruinous state which could be dangerous and likely to fall on to the road. The section contemplates to safeguard human life from possible dangers by a structure in a collapsible state. If these ingredients are present the Pradeshiya Sabha of the area could adopt or cause to take such steps to do everything possible to prevent a dangerous state.

Statutory Authority – *Principles of Ceylon Law by H.W. Thambiah Q.C.* pg. 403/404.

The defendant may plead that a statute protects his action and, therefore, no action for damages lies, if as a result of some act done under the authority of the statute damage is caused to another. In such cases as Innes J. said (*Johannesburg Municipality v African Reality Trust*⁴¹) "the primary question is whether the statute in question justifies an interference with private lives. If it does not, then there is an end to the matter. Anyone whose private life has been interfered with, (without, of course some justification) has a remedy." Where the defendant has discharged the onus by proving that his act was justified by law, it is still open to the plaintiff

to prove that the defendant is not entitled to the protection of statutory defence because the powers conferred upon him by statute were exercised negligently *Paramasothy v Veenayagamoorthy*⁽⁵⁾. Thus, although The Cattle Trespass Ordinance authorizes an irrigation headman to take charge of trespassing cattle, yet his position is that of a bailee for reward and if he has not exercised due diligence after taking the custody of the cattle he will be liable in damages for the negligence *Perera v Perera*⁽⁶⁾. Public servants are protected by many statutes in Ceylon for any action which they may *bona fide* do under the provisions of statute law (*Fernando, Actions Against Public Servants in Ceylon*).

The main items of evidence to support the ingredients in the above sections are contained in defendant's documents, D1 to D3. Perusal of these documents indicate very clearly that the author of those documents have given his mind to the ruinous state of the structure put up by the plaintiff. I cannot hold that the defendant acted outside their scope of authority, to enable the Original Court to grant relief to the plaintiff. As such it would be a precondition to issue a notice under section 214 of the said Act prior to filing action. The trial court Judge has correctly answered issue No.7, and on this alone action has to be dismissed. In any event issue No.14, 16-21 has been answered correctly by the learned District Judge which issues more or less refer to section 35 and 36 of Act, No.15 of 1987. In the circumstances judgment of the District Court is affirmed. Appeal dismissed with costs.

EKANAYAKE, J. - I agree.

Appeal dismissed.