

BALAKRISHNAN
v.
THE MUNICIPAL ENGINEER, COLOMBO,
AND WICKREMARATNE

COURT OF APPEAL,
W. N. D. PERERA, J.,
C. A. APPLICATION NO. 883/89,
M.C. MALIGAKANDA CASE NO. 1753/M,
September 06, 1990.

Housing and Town Improvement Ordinance. – Demolition order against occupier for erecting unauthorised structure – Status of person obtaining permission to intervene.

The accused petitioner was charged with committing the offence of constructing an unauthorised structure at 377, Ferguson Road, Mattakkuliya under the Housing and Town Improvement Ordinance. He was convicted, his appeal to the Supreme Court was dismissed on 24.05.1978. On 08.03.82 the Magistrate made order directing the demolition of the unauthorised structure. As the Municipal Council had failed to carry out this order of 08.03.82 the owner of the above premises on 25.05.88, intervened and made an application to the Magistrate's Court to execute the order made on 08.03.82. On 01.11.89 after hearing the petitioner the Magistrate made order directing the fiscal to carry out the order made on 08.03.82. The fiscal on 15.11.89 carried out the order and handed possession to the Intervener, the owner of the premises.

The petitioner sought a revision of the Magistrate Court Order dated 01.11.89. The petitioner's submission was that the Intervenant had no status to participation in these proceedings..

Held :

The Intervenant had a status to participate in the proceedings.

Cases referred to :

(1) *Appuhamy v. Weeratunga* 23 NLR 467

APPLICATION for revision of the order of the Magistrate of Maligakanda.

S. Gunasekera for the accused petitioner.

Channa Nilanduwa for the complainant-respondent

J. Joseph for intervenient-respondent.

Cur. adv. vult.

October 10, 1990.

W. N. D. PERERA, J.

The accused-petitioner, K. A. Balakrishnan has made this application to revise the order of the Magistrate, Maligakanda dated 1.11.89 in M. C. Maligakanda Case No. 1753/M whereby he has made a mandatory order to the Fiscal to remove an unauthorised structure.

In his petition the petitioner avers that he was noticed to appear before the Magistrate's Court of Maligakanda on 21.9.88 by a summons in Case No. 1753/M and when he appeared he was asked to enter into a bail bond for Rs. 5000. He was informed after the examination of the record room that the entire record in the above case was lost and an Attorney-at-law had made an application to reconstruct the record. He further states that for filling in the gaps in the said record, the Magistrate had called the petitioner to the witness box and questioned him. He was asked whether he had pleaded guilty in that case and he had denied it. He further states that the Magistrate had adopted a procedure to build up a record by informing him that if he denied the suggestions made to him, he would be remanded. At the end of this questioning, the petitioner states that the Magistrate had made the order complained of.

The intervenient respondent, J. A. Wickremeratne in his statement of objections states that he is the owner of the land bearing No. 377 and that he complained to the Colombo Municipality in 1974 that an unauthorised building had been constructed on it. On behalf of the Colombo Municipal Council, an action bearing No. 1753/M had been filed under Section 13(1) of the Housing and Town Improvement Ordinance against the petitioner who was found guilty, fined Rs. 40 and the unauthorised structure was ordered to be demolished. Against this order the petitioner appealed to the Supreme Court in Appeal No. 2/1977 which was first dismissed on 2.11.77 for non appearance and finally dismissed on 24.5.78.

The intervenient respondent further states that an officer on behalf of the Municipal Council made an application to the Magistrate's Court to execute the said order in case No. 1753/M and the petitioner kept evading the process of court and after warrant was issued against him he appeared in court and undertook to demolish the unauthorised structure at 377, Ferguson Road, Mattakkūliya on 25.6.80. As the structure had not been demolished, the Magistrate had ordered it to be demolished on 8.3.82 as the petitioner had not done so.

As the order of the Magistrate of 8.3.82 had not been carried out by the Municipal Council the intervenient respondent had, through his Attorney-at-law moved the Magistrate's Court on 25.5.88 to execute the said order. As the case record in the said case was not available, the Magistrate had issued notice on the petitioner. The complainant respondent on behalf of the Municipal Council had tendered a photostat copy of the proceedings in the said case and of the order of 8.3.82. The petitioner had appeared in court on 21.9.88 and had been questioned by Court and the petitioner had also moved to show cause against the charge of constructing an unauthorised structure. After hearing the petitioner the Magistrate had made order on 1.11.89 directing the Fiscal to carry out the order made on 8.3.82.

The intervenient respondent states further that the order of the Magistrate dated 8.3.82, directing the demolition of the unauthorised structure was carried out by the fiscal on 15.11.89. This is borne out by document X 3 which is a certified copy of the proceedings in this case.

The petitioner who has filed his objections to the application of the intervenient respondent to have himself added as party to this application on 20.2.90 has not traversed any of the averments of fact in the petition of the intervenient respondent. It was submitted on his behalf that the intervenient respondent had no status to intervene in this application as the proceedings in question had been instituted under the Housing and Town Improvement Ordinance. It was also the submission of the petitioner that as the matter is coming up now in revision in this court, no one except the parties who were in the original court can participate in these proceedings.

On a perusal of the documents X 1 and X 2 (petition of appeal and written submissions filed by the petitioner in S. C. Appeal No. 2/77) it is quite clear that the petitioner was convicted under the provisions of the Housing and Town Improvement Ordinance with the offence of constructing an unauthorised structure at 377, Ferguson Road, Mattakuliya by the Magistrate's Court of Maligakanda on 7.1.76. He had been ordered to demolish the said structure but had failed to do so even after his appeal was dismissed. None of these facts have been controverted or even been referred to by the petitioner.

In respect of the submission made on behalf of the petitioner that the intervenient respondent had no status to participate in these proceedings, counsel for the intervenient respondent cited the case of *Appuhamy v. Weeratunga* (1) where this right has been recognised.

The Magistrate has made the order complained of on 8.3.90 after satisfying himself on the material placed before him by the complainant respondent that the order of 7.1.76 had not been complied with. The petitioner did not, in these proceedings, attempt to show that he was not bound to demolish the unauthorised structure put up in these premises. In fact, the proceedings X 3 show that the structure has already been demolished by the fiscal and possession handed over to the complainant respondent on 15.11.89.

In the circumstances I see no reason to interfere with the order of the Magistrate, Maligakanda made on 8.3.90. The application of the petitioner is accordingly dismissed. The petitioner shall pay Rs. 315 as costs to each of the respondents to this application.

Application dismissed.