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

In the matter of an appeal against the order dated 16/06/2009 of the High Court of the Uva Province situated at Badulla in writ application bearing no. 34/2007 in terms of Rule 11(2) of the Court of Appeal (Procedure for Appeals from High Courts Rules 1988)

1. Dr. S. V. W. T. Ranasinghe,
2. Dr. N. W. Kahandage

   Both of No. 236, Heeloya Road,

   Thanthiriya, Bandarawela.

Case No. C.A. (PHC) 210/2009 **Petitioners-Appellants**

H.C. Badulla Case No. 34/2007 (Writ) **Vs.**

1. Bandarawela Pradeshiya Sabha,

   Office of the Bandarawela Pradeshiya Sabha,

   Bandarawela,

   Bandarawela Municipal Council,

   Bandarawela.

   Substituted 1st Respondent-Respondent
2. Medical Officer of Health,

   Office of the Medical Officer of Health,

   Bandarawela.
3. Public Health Inspector,

   Kingama, Bandarawela.
4. W.A..J. Gunesinghe,

   No. 245, Thanthiriya,

   Bandarawela.

5. T.M.I. Gunesinghe,
   No. 245, Thanthiriya,
   Bandarawela.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Lasith Chaminda for Petitioners-Appellants

W. Dayaratne P.C. with R. Jaywardena for Substituted 1st Respondent-Respondent

Indula Ratnayake State Counsel for 2nd and 3rd Respondents-Respondents

Saliya Pieris P.C. with Varuna De Saram for the 4th and 5th Respondents-Respondents

Written Submissions tendered on:

Substituted 1st Respondent-Respondent on 27th April 2018

4th and 5th Respondents-Respondents on 23rd March 2018

2nd and 3rd Respondents-Respondents on 29th March 2018

Argued on: 19th February 2018

Decided on: 30th May 2018

Janak De Silva J.

This is an appeal against the judgement of the learned High Court Judge of Badulla dated 16th June 2009.

The Petitioners-Appellants (Appellants) and the 4th and 5th Respondents-Respondents (4th and 5th Respondents) are neighbours. The Appellants contend that the 4th and 5th Respondents began constructing a building connecting the walls of the new building to the retention wall of the Appellants without keeping an open space as required by law thereby affecting their well and soakage pit. The Appellants claim that the 1st to 3rd Respondents-Respondents (1st to 3rd Respondents) had granted approval to the 4th and 5th Respondents to construct the said building which was commercial in nature in contravention of the provisions of the Housing and Town Improvement Ordinance (as amended) and the regulations made thereunder.

The Appellants filed the above action in the High Court of the Uva Province holden in Badulla and sought, inter alia, the following reliefs:

(a) A writ of certiorari quashing the approval given by the Pradeshiya Sabha, Bandarawela to the building application of the 4th and 5th Respondents
(b) A writ of mandamus rejecting the building application of the 4th and 5th Respondents and directing them to demolish the unauthorized constructions

The position of the Bandarwaela Pradeshiya Sabha and the 4th and 5th Respondents is that the 4th and 5th Respondents sought permission to construct a commercial building and the approval given thereto does not violate any provision in the Housing and Town Improvement Ordinance (as amended) and the regulations made thereunder.

The learned High Court Judge has accepted this position. He was also of the view that the Appellants had suppressed and/or misrepresented material facts. On that basis the application of the Appellants was dismissed with costs. Hence this appeal by the Appellants.

This application was taken up for argument on 19.02.2018. Parties agreed that the application can be disposed by way of written submissions. All parties except the Appellants have filed written submissions.

The Appellants did not clearly specify in the petition filed before the High Court the specific provisions of law alleged to have been violated when approval was granted to the 4th and 5th Respondents. However, in the written submissions filed in the High Court they advert to proviso 2 to Rule 4 of the Schedule to the Housing and Town Improvement Ordinance (as amended) as the relevant provision.

Rule 3 therein reads as follows:

> "3. Every habitable room in a **residential building** must comply with the following conditions" (emphasis added)

Rule 4 states that:

> "Where a window or door necessary for the purpose of compliance with rule 3 is situated....."

On a plain and literal reading of these provisions it is clear that they apply to "residential buildings". The building for which approval has been granted in the instant case is a commercial building.

The Appellants are relying on proviso 2 to Rule 4 of the Schedule. This is not possible as the main provision is applicable to a residential building and the proviso cannot extend to a commercial building. Bindra states as follows:

> "The proviso cannot possibly deal with an entirely different topic or subject and it is sub-servient to the main provision"[1]

[1] Bindra, *Interpretation of Statutes*, 7th ed. P. 79

In *Senanayake, and another v. Mahindasoma and others*[2] G.P.S. De Silva C.J. stated that:

> "The proviso is an ancient formula. It enables a general statement to be made as a clear proposition, any necessary qualifications being kept out of it and relegated to the proviso. This aids understanding. The formula beginning 'Provided that . . .' is placed at the end of a section or sub-section of an Act, or a paragraph or sub-paragraph of a schedule; and the intention of which is to narrow the effect of the preceding words. (Francis Bennion, Statutory Interpretation, 1984, p. 570). The emphasis is mine. N. S. Bindra, Interpretation of Statutes, 7th Ed., p. 79, explains that a proviso relates to the subject-matter of the principal clause. He states that: The proviso cannot possibly deal with an entirely different topic or subject and it is sub-servant to the main provision. He adds that it is a cardinal rule of interpretation that a proviso to a particular provision of a statute 'only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. Later, Bindra states that although at times it is used to introduce independent legislation, the presumption is that, in accordance with its primary purpose, it refers only to the provisions to which it is attached. Ordinarily, a proviso to a section is intended to take out a part of the main section for special treatment; it is not expected to enlarge the scope of the main section."[3]

Accordingly, I am of the view that proviso 2 to Rule 4 of the Schedule to the Housing and Town Improvement Ordinance (as amended) has no application to the instant case.

The learned High Court Judge further concluded that the Appellants were guilty of suppression and/or misrepresentation of material facts.

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[2] (1998) 2 Sri.L.R. 333
[3] Ibid. page 344

It is trite law that discretionary relief will be refused by Court without going into the merits if there has been suppression and/or misrepresentation of material facts. It is necessary in this context to refer to the following passage from the judgment of Pathirana J in *W. S. Alphonso Appuhamy v. Hettiarachchi*[4]:

> "The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the *King v. The* General Commissioner for the Purpose of the Income Tax Acts for the *District of Kensington-Ex-parte Princess Edmorbd de Poigns* Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application but will dismiss it without further examination".

This principle has been followed consistently in *Hulangamuwa v. Siriwardena, Principal, Visakha Vidyalayaand others* [5], *Collettes Ltd.* v. Commissioner of Labour and another[6], *Laub v. Attorney General and another*[7], *Blanca Diamonds (Pvt) Ltd. v Wilfred Van Elsand two others*[8], *Jaysinghe v The National Institute of Fisheries and Nautical Engineering (NIFNE) and another*[9], *Dahanayake*

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[4] 77 N.L.R. 131 at 135,6
[5] (1986) 1 Sri.L.R.275
[6] (1989) 2 Sri.L.R. 6
[7] (1995) 2 Sri.L.R. 88
[8] (1997) 1 Sri.L.R. 360
[9] (2002) 1 Sri.L.R. 277

and Others v. Sri Lanka Insurance Corporation Ltd. and Others[10] and *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene & Others*[11].

The following facts and documents have been suppressed and/or misrepresented by the Appellants:

(a) The fact that the building is a commercial building
(b) The fact that District Court of Bandarawela Case No. SP/273 was filed and subsequently withdrawn
(c) The fact that another case bearing District Court of Bandarawela Case No. 1848/L was filed prior to the institution of the writ application

I am of the view that the above are material facts to the instant case and the application of the Appellants was liable to be dismissed in limine for these reasons. The learned High Court judge was correct in concluding that the Appellants have suppressed and/or misrepresented material facts.

For the foregoing reasons, I see no reason to interfere with the judgement of the learned High Court Judge of Badulla dated 16th June 2009.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal

[10](2005) 1 Sri.L.R. 67
[11](2007) 1 Sri.L.R. 24