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

Hasitha Hinguruduwa
No.57/2, Old Road,
Piliyandala.
Respondent-Petitioner-Appellant

C.A.(PHC)Appeal No. 220/2006
P.H.C. Colombo Case No. HCRA 10/2006
M.C. Mt. Lavinia CaseNo. 1976/S/5

Vs.

W.A. Gunawardena
Dehiwala-Mt. Lavinia Municipal Council,
Anagarika Dharmapala Mawatha,
Dehiwala
Petitioner -Respondent-Respondent

S.P.Ratnayake
Director General,
Urban Development Authority,
"Sethsiripaya",
Battaramulla
Substituted-Respondent

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BEFORE	:	**JANAK DE SILVA, J. &** **ACHALA WENGAPPULI, J.**
COUNSEL	:	Malaka Herath with Indunil Bandara for the Respondent-Petitioner-Appellant Sulari Gamage with W.T.N. Nishanthi for the Petitioner – Respondent-Respondent. M. Amarasinghe SC for the Substituted-Respondent
WRITTEN SUBMISSIONS TENDERED ON	:	03-10-2018(by the Appellant) 04-10-2018 (by the Respondent)
DECICED ON	:	16th October, 2018

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ACHALA WENGAPPULI, J.

This is an appeal by the Respondent-Petitioner-Appellant (hereinafter referred to as the "Appellant") against an order of dismissal of his revision application filed before the Provincial High Court of the Western Province holden in Colombo bearing No. HCRA 10/06. In the said application, the Appellant sought to revise an order made by the Magistrate's Court of Mt. Lavinia upon an application of the Applicant-Respondent-Respondent (hereinafter referred to as the "Respondent") under Section 28A(3) of the Urban Development Act No. 41 of 1978 as amended (hereinafter referred to as the said "Act").

The Respondent, in making the said application sought an order under Section 28A(3) in respect of a development activity effected by the Appellant in constructing buildings of 12 x 10 feet and 10 x 10 feet at the premises bearing assessment Nos. 5 and 5A of Templers Road, Mt Lavinia.

At the inquiry before the Magistrate's Court, the Appellant only contended that the Respondent has no *Locus Standi* to initiate such proceedings as Dehiwala Mt Lavinia Municipal Council instead of Urban Development Authority. This objection was overruled by the Magistrate's Court and it had thereafter made order under Section 28A(3).

The Appellant, in his petition addressed to the Provincial High Court, had reiterated his contention that the Respondent had no *Locus Standi.* He had then, in paragraph 6, referred to a plan marked as "X11" and stated that it was tendered to the Magistrate's Court by way of a motion dated 12.12.2005.

However, the Appellant only in his submissions before the Provincial High Court, raised a new ground that the Magistrate's Court had failed to consider the approved plan for the development activity tendered before it, marked as "X11".

The Provincial High Court, in its order had dealt with the issue raised by the Appellant in relation to standing of the Respondent against him and proceeded to dismiss his application.

In his submissions addressed to this Court, the Appellant now concedes that the Respondent had standing to institute action against him before the Magistrate's Court. The only ground of appeal he now raises against the order of dismissal by the Provincial High Court and the order of the Magistrate's Court is that it had failed to consider the document marked "X11".

It must be noted that whether the development activity which gave rise to the application under Section 28A(3), had already been approved by the Respondent as the relevant municipal authority and whether the Appellant constructed his building in conformity with the said approved plan are questions of fact or at the most, mixed questions of fact and law. It is also noted by this Court that the Appellant raises this question of having prior approval to the development activity for the first time before the Provincial High Court in his written submissions. This is not a ground raised in his petition tendered before the Provincial High Court. He contended in his written submissions tendered to that Court that " *X11 also shows that the relevant building is a pre-existing building and that the building application had been approved by none other than the mayor of Dehiwala Mt Lavinia Municipal Council.*"

The Supreme Court, having considered the judicial precedents of ***Talagala v. Gangodawila Co-operative Stores Society Ltd.*** (1947) 48 N.L.R. 472, ***Setha v. Weerakoon*** (1948) 49 N.L.R. 225, ***The Tasmania*** (1980) 15 A.C. 223, ***Appuhamy v. Nona*** (1912) 15 N.L.R. 311, ***Manian v. Sanmugam*** (1920) 22 N.L.R. 249 and ***Arulampikai v. Thambu*** (1944) 45 N.L.R. 457 in its judgment of ***Gunawardena v Deraniyagala and Others*** (2010) 1 Sri L.R. 309 concluded that;

> *"On an examination of all these decisions, it is abundantly clear that according to our procedure, it is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. The appellate Courts may consider a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material that is required to decide the question."*

In view of this clear determination by the apex Court, the Appellant's contention that he had an already approved building plan for the development activity complained of by the Respondent should not be considered by the Provincial High Court or by this Court since he had raised it for the first time in appeal.

Even if the document X11 is considered by the Magistrate's Court, it had no effect on its order. The said building plan was approved on 20th August 1991. The proposed building for which approval was granted is 12

x 5 feet in its dimensions. The Respondent's sketch of the unauthorised development activity shows that the dimensions of two buildings are 12 x 10 feet. This sketch is dated 18th February 2005. There was no Certificate of Conformity in relation to X11 is obtained by the Appellant for 14 years. Therefore, X11 has no direct relevance to the development activity complained before the Magistrate's Court by the Respondent.

In addition, this Court notes with concern the manner in which the document marked X11 had found its way into the case record of the Magistrate's Court. The motion is dated 12th December 2005. The previous date on which the case was called is indicated as 9th December 2005 and the next date is indicated as 6th January 2006, the day on which the impugned order was pronounced. In the hand-written part of the objections/submissions of the Appellant to the Magistrate's Court, he only referred to document marked X8. The motion merely requested Court to accept documents X9 to X11 and to file them of record. No request has been made to Court for it to be treated as supporting documents to his submissions. The Appellant did not produce the journal entry of 12th December 2005. Therefore, it is not clear whether there was any application made by the Appellant to tender additional documents on that day or whether the Court had allowed the Appellant to tender such additional documents. In these circumstances, it is reasonable to infer that the Appellant merely filed those documents in the case record without obtaining prior permission from Court and had tendered them after the Court had fixed the matter for order. Having adopted such an irregular procedure to introduce documents without even giving notice to the

opposing party or to Court, the Appellant complained to the Provincial High Court, and that too only in his written submissions, the Magistrate's Court had failed to consider X11.

In view of the forgoing, we are of the view that the appeal of the Appellant is devoid of any merit. The Respondent sought to dismiss the appeal of the Appellant with costs.

Accordingly, the appeal of the Appellant is dismissed with costs fixed at Rs. 10,000.00.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL