

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

In the matter of an application for Special Leave to Appeal under and in terms of the provisions of Article 128(2) of the Constitution against the judgment of the Court of Appeal in C.A. Ap. No. 2022/2003 dated 15.5.2007.

Saranguhewage Garvin De Silva,
36/1, Old Kesbewa Road,
Nugegoda.

SC APPEAL 10/2009

C.A. Ap. No. 2022/2003

PETITIONER-APPELLANT

-Vs-

1. Lankapura Pradeshiya Sabha,
Talpotha.
2. Chairman,
Lankapura Pradeshiya Sabha,
Talpotha.
3. W.A.J.C. Fernando,
BOP 398 (near Patunugama Junction),
Abeyapura,
Pulasthigama.
4. Rev. Fr. Ranjith de Mel,
Our Lady of Rosary Church,
Palugasdamana,
Polonnaruwa.

RESPONDENTS-RESPONDENTS

BEFORE : Hon. Saleem Marsoof P.C., J,
Hon. Chandra Ekanayake J, and
Hon. Priyasath Dep P.C., J.

COUNSEL : Manohara de Silva, P.C. for Appellant.
M.A. Sumanthiran with Viran Corea for 3rd Respondent.
Shammil Perera, P.C. with Ms. Vijula Arulanandan and
Duthika Perera for 4th Respondent.

Argued On : 10.10.2013

Written Submissions On : 31.10.2013

Decided On : 15.12.2014

SALEEM MARSOOF, P.C. J,

This is an appeal from the judgment of the Court of Appeal dated 15th May 2007, which dismissed the application of the Petitioner-Appellant (hereinafter referred to as “the Appellant”) for a writ of *mandamus* to compel the 1st and 2nd Respondent-Respondents to cause the demolition of a building constructed on land belonging to the 3rd Respondent-Respondent on the basis that it is unauthorised. The Appellant is the honorary joint secretary of the Society for the Upliftment and Conservation of Cultural, Economic and Social Standards (‘SUCCESS’), which, it is claimed, is a voluntary social services organisation established for the attainment of the cherished objective of the advancement and protection of cultural, economic and social standards of the Sri Lankan Buddhists.

The Appellant alleged in his Petition filed in the Court of Appeal *inter alia* that a building has been constructed on a land described as B.O.P 398 Abeyapura, Pulasthigama, belonging to the 3rd Respondent-Respondent (hereinafter referred to as “the 3rd Respondent”) and within the local limits of the 1st Respondent-Respondent which is the Lankapura Pradeshiya Sabha without obtaining the approval of the 2nd Respondent-Respondent, the Chairman of the said Lankapura Pradeshiya Sabha, in contravention of Section 5 and Section 15(1) and (2) of the Housing and Town Improvement Ordinance No. 19 of 1915 (as amended), read with Section 221 of the Pradeshiya Sabha Act No. 15 of 1987 (as amended), thereby rendering the construction and occupation of the said building as a church, both unauthorised and illegal.

When granting special leave to appeal, this Court restricted the appeal to the following substantial question of law:-

“Whether the provisions of the Housing and Town Improvement Ordinance (as amended) apply to the entirety of a Pradeshiya Sabha area, without exception.”

The substantive issue is whether the Housing and Town Improvement Ordinance (as amended) is applicable to the said property, and if so, whether the approval of the 2nd Respondent-Respondent is necessary for any construction, alteration or change of use of any building within the local authority area of the 1st Respondent-Respondent.

The applicability of the Housing and Town Improvement Ordinance

Section 2 of the Housing and Town Improvement Ordinance defines “local authority” as the following:-

"Local authority" means;

- (a) within any Municipal limits, the Municipal Council;
- (b) within the limits of any Urban Council or Town Council, the Urban Council or Town Council;
- (c) within the administrative limits of any Village Council, the Assistant Commissioner of Local Government for the administrative region within which such limits are situated, or if the Minister by Order published in the Gazette so directs, the Village Council; and
- (d) in any place outside any of the limits aforesaid, the Assistant Commissioner of Local Government for the administrative region within which such place is situated.

Section 3 of the Housing and Town Improvement Ordinance relates to the scope of applicability of the said Ordinance and reads as follows:-

“This Ordinance shall apply:

- (a) within the administrative limits of any Municipal Council, Urban Council or Town Council;
- (b) within any other limits in which it shall be declared to be in force by resolution of Parliament.”

Section 3 of the Ordinance limits the application of the Ordinance to the administrative limits of any Municipal Council, Urban Council or Town Council or any other limits in which it shall be declared to be in force by resolution of Parliament. There is no reference to Pradeshiya Sabhas in the Act, since at the time of its enactment, Pradeshiya Sabhas did not exist.

It is evident that the applicability of the Ordinance is limited to Municipal Councils, Urban Councils and Town Councils. It specifically excludes Village Councils, unless the Ordinance has been declared to be in force within the limits of a Village Council or part thereof, by resolution of Parliament.

Interpretation of Article 221 of the Pradeshiya Sabhas Act

Section 221 of the Pradeshiya Sabhas Act No.15 of 1987 provides as follows:-

“A reference in any written law in operation on the date appointed under section 1 of this Act;

- a) To a Town Council or a Village Council shall be deemed to be a reference to a Pradeshiya Sabha; and
- b) to a local authority, shall unless the context otherwise requires, be deemed to include a Pradeshiya Sabha.”

Based on the above provision wherein a reference to a Town Council or a Village Council is deemed to be a reference to a Pradeshiya Sabha, the gravamen of the Appellant’s submission is that all written laws applicable within Town Council or Village Council areas shall be applicable to all Pradeshiya Sabhas, and accordingly, that the Housing and Town Planning Ordinance would be applicable in all Pradeshiya Sabhas. The Respondents have argued that on a plain reading of the Pradeshiya Sabhas Act, it is very clear that the Legislature has opted to use the words “Town Council or a Village Council” instead of the words “Town Council and a Village Council”, to specifically maintain Town Councils and Village Councils as mutually exclusive alternatives.

Bindra, in *Interpretation of Statutes* (8th Edition, page 1011) has stated as follows:-

“When the word ‘or’ is used in relation to two or more alternatives it is not necessarily the case that the alternatives are mutually exclusive. The question as to whether they are mutually exclusive or not must be determined by applying the general rule that words should be construed to ascertain the intention of the provision in question to be collected from the whole of its terms (Horsey v. Caldwell, 73 CLR 304,314). It may, in an appropriate context mean ‘and’. But such a construction is not warranted unless it would reduce the provision to absurdity or prevent the manifest intention of the Legislature from being carried out.....”

In the present case, the Legislature has opted to use the wording “Town Council or Village Council” and thereby, has maintained a clear distinction between Village Councils and Town Councils. This clear distinction is consistently observable in the Ordinance. Similar language is used in Section 225(2) of the Pradeshiya Sabha Act which provides as follows:-

“Section 225(2): All by-laws made by a Town Council constituted for a town or by a Village Council constituted for a village area, and deemed, under section 18 (2) (e) of the Development Councils Act, No. 35 of 1980 to be by-laws made by a Development Council shall, with effect from the date appointed under section 1 of this Act, be deemed to be by-laws made by the Pradeshiya Sabha constituted for the Pradeshiya Sabha area within which such town or village area was situated.”

Before the enactment of the Pradeshiya Sabha Act, Town Councils and Village Councils were local authorities with separate jurisdiction. In 1987, Pradeshiya Sabhas were introduced in place of Town Councils and Village Councils and thus, as a matter of necessity, the transitional provisions in the said Act provide that any reference to a Town Council or a Village Council shall be deemed to be a reference to a Pradeshiya Sabha. However, this provision does not result in a situation wherein laws which were applicable in Town Councils (which were deemed to be Pradeshiya Sabhas) would apply in Village Councils (which were also deemed to be Pradeshiya Sabhas). To interpret the provision in this way would result in Village Councils being deemed to be Town Councils.

The clear intention of the legislature to consider as distinct the separate regimes of law applicable to Town Councils and Village Councils is also evident in Section 225(2) of the Pradeshiya Sabha Act, wherein by-laws made by a Town Council continue in force only in respect of Town Councils deemed to be Pradeshiya Sabhas, and by-laws made by a Village Council continue in force only in respect of Village Councils deemed to be Pradeshiya Sabhas.

The judgment of the Court of Appeal dated 15th May 2007 contains adopts similar reasoning wherein Srisankarajah J states at page 8 as follows:-

“...By the above provision, the applicability of the said Act is limited to the Municipal Council, Urban Council and Town Council areas. In other words it specifically excludes Village council areas. The said law has specifically provided that if this law has to be extended to other areas other than those are covered by Municipal Council, Urban Council or Town Council it has to be by a resolution of Parliament.

Even though the Pradeshiya Sabhas are established under the Pradeshiya Sabhas Act, each Pradeshiya Sabha is assigned a name (Section 2(1)). If a Pradeshiya Sabha is constituted comprising of a Town Council area the Housing and Town Improvement Ordinance will be applicable to that Pradeshiya Sabha area. But if a Pradeshiya Sabha is constituted comprising of a Village Council area the Housing and Town Improvement Ordinance will not be applicable to that Pradeshiya Sabha area unless by resolution of Parliament it is declared that the said Act is in force in that Pradeshiya Sabha area.”

I am of the opinion that the Court of Appeal has properly analyzed the applicable law. Hence, I am unable to agree with the Appellant’s argument that the Housing and Town Improvements Ordinance applies to all

Pradeshiya Sabhas, without exception. Section 3 of the Ordinance makes it clear that the Ordinance does not apply within Village Councils, and there is no evidence that Parliament has passed a resolution declaring that the Housing and Town Improvement Ordinance is applicable within the area in which the building is situated. Further, the deeming provision in section 221 of the Pradeshiya Sabhas Act does not result in a situation wherein laws which were applicable within formerly Town Council areas apply within formerly Village Council areas.

Evidence available to show that the particular area in which the construction was built was formerly a Village Council area

No substantive evidence has been adduced by either side to prove that the area of Abeypura, Pulasthigama was located within a former Village Council area before the Pradeshiya Sabhas Act came into operation.

However, Sriskandarajah J, at page 6 of the judgment of the Court of Appeal dated 17th May 2007 states that:-

“...It is admitted fact that the said property, which is in Abeypura, Pulasthigama, falls within the Village Council area before the Pradeshiya Sabhas Act, No. 15 of 1987, came into operation....”

Learned President’s Counsel for the Appellant did not at the hearing of this appeal deny the accuracy of the above quoted statement found in the judgment of the Court of Appeal, or attempt to controvert the finding of the Court of Appeal at page 9 of the said judgment that Abeypura, Pulasthigama was within a formerly Village Council area and that the said Village Council is by operation of law deemed to be the Lankapura Pradeshiya Sabha, which is the 1st Respondent Pradeshiya Sabha.

Further, the 1st and 2nd Respondents have specifically stated at paragraph 5 of their Statement of Objections in the Court of Appeal that no prior approval needed to be obtained from the 1st and 2nd Respondents for the building which forms the subject matter of the present application.

Section 101 of the Evidence Ordinance reads thus:-

“Whoever desires any court to give judgment as to any legal right to liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

The Appellant’s case is contingent on the application of the Housing and Town Improvement Ordinance to the area in which the property under consideration is situated. The burden of proof in any application for prerogative writ including *mandamus* is on the person who seeks such relief, to prove the facts on which he relies, which in this instance, would be to establish either that the Housing and Town Improvement Ordinance applied to formerly Village Council Areas or that Parliament has by resolution declared that the said Ordinance is applicable within the area in which the building in dispute is situated. Alternatively, the Appellant has to prove that the property in which the building is situated came within a formerly Town Council area, and accordingly that the Housing and Town Improvement Ordinance applied to such area. The Appellant has not persuaded me on either of these grounds.

Accordingly, I answer the substantive question on which special leave to appeal was granted by this Court, in the negative, and hold that the Housing and Town Improvement Ordinance does not apply to the building in relation to which the application for writ of *mandamus* was filed by the Appellant in the Court of Appeal.

The appeal is dismissed, but in all the circumstances of this case, without costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake, J.

I agree.

JUDGE OF THE SUPREME COURT

Priyasath Dep, P.C. J.

I agree.

JUDGE OF THE SUPREME COURT