THE
Sri Lanka Law Reports

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FERNANDO
VS
SILVA

COURT OF APPEAL,
AMARATUNGA, J.,
WIMALACHANDRA, J.
CALA 260/2003 (LG)
D. C. COLOMBO 19452/L
OCTOBER 14, 2004

Civil Procedure Code - Section 31(1), Section 75(d)-Averments in Plaint not specifically denied - Sinhala word "ප්‍රතික්ෂේප කර සිටී" is not the only word which can convey in Sinhala what is meant by the English word "Deny" - Substance more important than form?-Courts to have realistic approach.

As the Defendant had not denied the contents of paragraphs 4, 8, 9 and 13 of the Plaint, the trial Court recorded the aforesaid paragraphs as admissions. The Defendant had while answering the said paragraphs had stated that he - ඔප්පු කරන දෙස අභියෝග කර සිටී.

HELD:

Per Amaratunga J.,

The Civil Procedure Code was enacted in English. Upto date there is no official translation of the Code although there is a translation issued by the Official Languages Department. At the time the language of the Courts was English the pleadings were in English. Therefore it was easy to use the word "Deny" in an answer. Now the pleadings are in Sinhala or in Tamil, however in the absence of a specific Sinhala word, officially recognised for the purpose of Section 75(d) Court cannot insist that only a particular Sinhala word shall be used when a Defendant means to 'deny' any averment.

(i) Substance is more important than the form. Whatever is the Sinhala word used to convey the meaning similar to the meaning of the word 'Deny' if it clearly conveys the idea that the Defendant does not accept the correctness of the averments, there is a valid denial for the purposes of Section 75(d) ;

(ii) When pleadings are prepared in Sinhala in accordance with rules laid down in English, Courts must have a realistic approach and shall not tie down the litigants with technical forms, forgetting importance of substance.

APPLICATION for leave to appeal from the Order of the District Court of Colombo, with leave being granted.

Cases referred to :

1. *Re. Chenwell* - 8 Ch. D 506
2. *Wickramatilaka* vs *Marikkar - (1895) 2 NLR 9 at 12*

Rohana Jayawardena with *Nimal Muttukumarana* for petitioner.

Kuvera de Zoysa with *Sumedha Mahawanniarachchi* for Respondents

Cur adv vult

January 11, 2005

GAMINI AMARATUNGA J.

This is an appeal with leave granted by this Court. The subject matter of the appeal is the order of the learned trial Judge recording paragraphs 4, 8, 9 and 13 of the plaint as admissions. That order had been made on the basis that the defendant had not denied the contents of those paragraphs.

It is pertinent to set out the facts relevant to the case. The plaintiff filed action against the defendant to get a declaration of her title to the land and the buildings described in the schedule to the plaint and to get an order ejecting the defendant therefrom. She also sought a declaration that a Deed of Declaration executed by the defendant was null and void. In paragraph 2 and 3 of the plaint the plaintiff set out the manner in which she got title to the property. The Defendant in his answer denied (ප්‍රතික්ෂේප කර සිටී) the averments in those paragraphs. In paragraph 4 of the plaint the plaintiff averred that in view of what have been stated in paragraphs 2 and 3 she became the owner of the property in suit. Answering the said averment No. 4, the defendant has stated that he challenged the plaintiff to prove it (ඔප්පු කරන ලෙස අභියෝග කර සිටී). In his answer the defendant denied paragraphs 5, 6 and 7 of the plaint (ප්‍රතික්ෂේප කර සිටී). In paragraph 8 of the plaint the plaintiff averred that when the defendant forcibly entered her property she made a complaint to the police. In paragraph 9 the plaintiff alleged that the defendant had fraudulently executed a Deed of Declaration in respect of the land in suit. Answering the paragraphs 8 and 9 of the plaint together, the defendant

has merely stated that the plaintiff should prove those matters. Further the defendant had denied the contents of paragraphs 10, 11 and 12 of the plaint. In paragraph 13 the plaintiff has stated that under section 35 (1) of the Civil Procedure Code she has a legal right to seek permission to declare the defendants Deed of Declaration null and void. The defendant has challenged the plaintiff to prove that.

When the trial was taken up the plaintiff moved to have averments in paragraphs 4, 8, 9 and 13 recorded as admissions on the basis that the defendant has not denied the contents of those paragraphs. The contention of the learned counsel for the plaintiff was that the defendant in answering paragraphs 2, 3, 5, 6, 10, 11 and 12 has used the words (ප්‍රතික්ෂේප කර සිටී) but in answering paragraphs 4, 8, 9 and 13 he has not used those words and accordingly the defendant has admitted those paragraphs. The learned trial Judge having referred to the provisions of section 75(d) of the Civil Procedure Code has ordered to record the averments in paragraphs 4, 8, 9 and 13 of the plaint as admissions.

The relevant portion of section 75(d) of the Civil Procedure Code is as follows. Every answer shall contain the following particulars - "a statement admitting or denying the several averments in the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence".

The Civil Procedure Code was enacted in English. Upto date there is no official translation of the Code although there is a translation issued by the Official Languages Department. At the time language of Courts was English, the pleadings were in English. Therefore it was easy to use the word 'deny' in an answer. Now the pleadings are in Sinhala or in Tamil. So in Sinhala pleadings what is the exact Sinhala word to be used to signify denial?

Blacks Law Dictionary defines the English word 'deny' as follows. "To traverse. To give negative answer or reply to. To refuse to grant or accept." The new Hamlyn Encyclopedic World Dictionary gives the following meanings to the word 'deny'. To assert the negative of; declare not to be true; to refuse to believe; reject as false or erroneous; to refuse to recognize or acknowledge; disavow; repudiate; to refuse to accept. (1988 Edition)

The Sinhala word 'ප්‍රතික්ෂේප කරමි' is not the only word which can convey in Sinhala what is meant by the English word 'deny'. In the absence of a specific Sinhala word, officially recognized for the purpose of section 75 (d) of the Civil Procedure Code, the Courts cannot insist that only a particular Sinhala word shall be used when a defendant means to deny any averment in a plaint. Substance is more important than the meaning of the word 'deny' if it clearly conveys the idea that the defendant does not accept the correctness of the averments set out in the plaint, there is valid denial for the purposes of section 75(d) of the Code. When pleadings are prepared in Sinhala in accordance with rules laid down in English, the Courts must have a realistic approach and shall not tie down litigants with technical forms, forgetting the importance of substance.

In this case, when the answer of the defendant is read as a whole, it is manifestly clear that the defendant has refused to admit the entire case of the defendant. The plaintiff's action is a rei vindicatio action where the burden is on the plaintiff to establish his case. If the defendant does not accept the plaintiff's title, he can without setting up any other defence, challenge the plaintiff to prove his case and remain silent. In the present case the defendant has not set up any defence. He has merely refused to accept the truth of the averments set out in the plaint. The defendant' s prayer is a simple prayer to dismiss the plaintiff's action.

As Jessel M. R. in *Re Chenwell*[1] said It is not the duty of a Judge to throw technical difficulties in the way of the administration of Justice Quoted by Bonser C. J. in *Wickramatilaka vs. Marikar*[2] at 12.

In this case, the defendant by his answer has sufficiently denied the truth of the whole case presented by the plaintiff. Therefore the learned Judge was not justified in recording paragraphs 4, 8, 9 and 13 of the plaint as admissions. Accordingly I allow the appeal and make order deleting those admissions recorded at the trial. The defendant is entitled to costs in a sum of Rs. 5000/-

WIMALACHANDRA J. – I Agree

Appeal allowed

RANATUNGA
VS
TIKIRI BANDA

COURT OF APPEAL,
WIJAYARATNE J.,
SRIPAVAN J,
C A NO. 1342/2001
AUGUST 30, 2004
OCTOBER 7, 2004

Debt Conciliation Board Ordinance No. 39 of 1941 - Sections 14, 15 - Amended by Act 20 of 1983 - Section 19A (1) Difference between date of application and date application is entertained?-Should a certified copy of the Deed be tendered along with the application?

The 1st Respondent made an application on 30.08.1996 to the Debt Conciliation Board in terms of Section 14 of the Debt Conciliation Board Ordinance (DCB) for the settlement of his debt to the 2nd Respondent secured by a conditional transfer.

Board entertained the application on 10. 09. 96 and ordered the issue of Notice which was despatched on 14. 09. 96 and received by the 2nd Respondent on 17. 09. 96 . The 2nd Respondent appeared before the Board and intimated that the property had been sold, thereafter the purchaser had been made a party.

The added party objected to the application on the ground that

(i) The application is time barred as the original application was entertained on 10. 09. 96

(ii) That a certified copy of the Deed was not submitted with the application

The Board overruled the preliminary objection and fixed the matter for inquiry. The Petitioner sought to quash the said Order.

HELD:

(i) Upon a reading of Section 19A it is very clear that the Board cannot entertain any application unless it is made within time and the validity of the application is not determined by the entertainment of same (10. 09. 96) within time but the application being made in time (30. 08. 96)

(ii) The time taken before the order of entertaining the application is made is a lapse of time due to administrative delay which is totally beyond the control of the respondent applicant.

(iii) There is no requirement of law that a certified copy of the deed should be tendered along with the application. The Board was satisfied that the application made together with affidavit to furnish prima facie proof of material facts was sufficient compliance with Section 15.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *Nachichaduwa Vs Mansoor* - 1995 2 Sri LR 273

2. *W. M. Mendis & co., Vs Excise Commissioner - 1999 1 Sri LR 351*

Rohana Jayawardena for petitioner.

David Weeraratne for 1st Respondent

Cur adv vult

November 24, 2004

Wijayaratne, J.

The petitioner preferred this application invoking the writ jurisdiction of this Court seeking the grant of a mandate in the nature of Writ of Certiorari quashing the order of the Debt Conciliation Board marked X 39 dated 19. 07. 2001 and also seeking a Writ of Prohibition against the several members of the Debt Conciliation Board restraining or prohibiting them from proceedings with the application of the 1st respondent marked X14.

The 1st respondent made application on 30. 08. 1996 to the Debt Conciliation Board in terms of section 14 of the Debt Conciliation Ordinance, No. 39 of 1941 as amended, for the settlement of his debt to the 2nd respondent secured by a Conditional Transfer X2. The Board entertained the said application on 10. 09. 1996 and ordered the issue of notice which was dispatched on 14. 09. 96 and said to have been received by the 2nd respondent on 17. 09. 96. The second respondent appearing before the

Board intimated that the property had been sold and conveyed to the petitioner on 11. 09. 96 by deed marked X4. Having considered the matters of fact elicited by the the parties, the Debt Conciliation Board (referred to as the Board) made order on 06. 11. 1997 directing the 1st respondent to amend application X 14 dated 15. 12. 197 in terms of the order. The Board caused notice to be issued on the petitioner who is the added party who appeared before the Board and objected to the application of the 1st respondent being entertained on grounds that

(a) The original application of the 1st respondent was entertained on 10. 09. 1996 after the expiry of the period within which the property may be redeemed by the debtor the 1st respondent by virtue of the agreement contained in the said deed of Conditional Transfer.

(b) The petitioner is a bona fide purchaser of the property for valuable consideration in the absence of any Caveat or other information of such application of the 1st respondent to redeem the property.

The Board on several dates postponed the matter with the view to settlement and finally on 19. 07. 2001 made order that the application of the 1st respondent dated 30. 08. 1996 has been made within the prescribed time and the Board is entitled to proceed with the application and fixed the same for inquiry. The petitioner thereupon preferred this application invoking the writ jurisdiction of this Court seeking to quash the decision of the Board and restrain them from proceeding to inquiry. The application is made on several grounds stipulated in paragraphs 15 A to 15 E. The first respondent resisted the application of the petitioner and insisted that the decision of the Board is lawful and the Board has the power and authority of the law to proceed to inquiry into the matter.

The main thrust of the argument for the petitioner was that the application entertained by the Board on 10. 09. 1996 was out of time prescribed by section 19A of the Debt Conciliation Ordinance. Section 19A (1) of the Debt Conciliation Ordinance as amended by section 2 of Act No. 20 of 1983 states;

"(1) The Board shall not entertain any application by a debtor or creditor in respect of debt purporting to be secured by any such conditional transfer of immovable property as is a mortgage within the

meaning of this ordinance unless that application is made before the expiry of the period within which that property may be redeemed by the debtor by virtue of any legally enforceable agreement between him and his creditor."

Upon a reading of the section it is very clear that the Board cannot entertain any application unless it is made within time and the validity of the application is not determined by the entertainment of the same within time but the application being made within time. The section states

"The board shall not entertain any application by a debtor ..... in respect of ..... Conditional Transfer of immovable property ..... unless that application is made before the expiry of the period within which that property may be redeemed ....."

The deciding factor, in terms of the provision of section 19A (1) is "the date on which the application is made" and not the date on which the application is entertained. The petitioner concede the application upon which the impugned order was first made on 30.08.1996 a date at least 10 days anterior in time to the date on which the redeemable period of time expired.

The time taken before the order of entertaining the application is made, is a lapse of time due to administrative delay in the office of the Board which is totally beyond the control of the 1st respondent applicant. In the case of *Nachichaduwa Vs Mansoor*[1] it was held

"(4) The act of filing the petition and that of forwarding the record to the Court of Appeal are official acts of the District Court. Any delay in filing a petition in the record cannot be attributed to the appellant."

Applying the rule set up in that case by analogy to the facts of the present application, the act of entertaining the application made by debtor within time is an official act. Any delay in making the order entertaining the application cannot be attributed to the applicant 1st respondent.

The debtor applicant the 1st respondent made his application within the period of redeemable time, i.e. on 30. 08. 1996. The delay in making

orders of entertaining the application on 10. 09. 1996 is no mistake, negligence or inadvertence on the part of the applicant 1st respondent. Even if it were so the rule of procedure cannot punish him or deny him just relief. Vide the decision of *W. M. Mendis and co. Vs Excise Commissioner*[2].

The Petitioner also referred to the fact of a certified copy of the deed of Conditional Transfer not being tendered along with the application. There is no requirement of law that such a copy should be tendered along with the application. The petitioner does not refer to any such provisions requiring the tender of a certified copy of the deed. However the document is subsequently tendered and following the rule set up in the case of *W. M. Mendis & Co. (supra)* that is no reason to refuse him just relief. The Board was satisfied that the application made together with affidavit to furnish prima facie proof of material fact was sufficient compliance with the requirements of section 15 and the condition of redeem is one conceded by the petitioner. The fact that a certified copy of the deed was not tendered could not have caused any prejudice to the petition in these circumstances.

The order of the Board is lawful and within the spirit of the Debt Conciliation Ordinance. There is no reason to interfere with same. The petitioner has failed to establish any grounds on which the writ jurisdiction of this court could be exercised.

The application is dismissed with costs fixed at Rs. 5000/-

Sripavan, J. – I agree,

Application dismissed

SOMATILAKA BANDARA
VS
PEOPLES BANK

COURT OF APPEAL
AMARATUNGA, J.,
WIMALACHANDRA, J.,
CALA 8/2004
D.C. MAHO 5700/M
AUGUST 25, 2004 AND
OCTOBER 7, 2004

Civil Procedure Code - Sections 754, 754(1), 754(5) 757 - Debt Recovery Act, No. 2 of 1990 - Amended by Act, 9 of 1994 - Decree Nisi entered - Objections filed - Decree Nisi made absolute - Is it an Interlocutory Order or a Final Order ?

The Court entered Decree *Nisi* in the first instance and after Objections were filed by the Defendant, the Court made the Decree *Nisi* absolute. The Defendant sought leave to appeal from the said Order.

HELD -

(i) The Order has the effect of finally disposing of the rights of the parties, it has the effect of a final Judgment - only the execution of the decree remains.

(ii) The impugned order is a final Judgment in terms of Section 754(5). Leave to appeal does not lie against the said Order.

APPLICATION for Leave Appeal from an Order of the District Court of Maho.

Cases referred to :

1. Siriwardana vs *Air Ceylon Ltd.,* - 1984 1 Sri LR 286.

S. B. Dissanayake for Defendant Appellant.

Ronald Perera for Plaintiff Respondent

Cur. adv. vult.

November 17, 2004
WIMALACHANDRA, J:

It was agreed between the parties that this judgment should apply to the C. A.L. A. No. : 07/2004.

The plaintiff-respondent (hereinafter referred to as the plaintiff) instituted the two actions No. 5700/M and No. 5701/M in the District Court of Maho against the 1st defendant-petitioner (hereinafter referred to as the 1st defendant) and against the 2nd and 3rd respondents (hereinafter referred to as the 2nd and 3rd defendants) in terms of the provisions of the Debt Recovery Act, No. 2 of 1990 as amended by Act, No. 9 of 1994 for the recovery of sums of Rs. 169,887.74 and Rs. 166,600 respectively.

In both cases the plaintiff sought order *nisi* in the first instance. The learned District Judge entered order *nisi* to be made absolute in the event of the defendants not showing cause on a day appointed for that purpose. Thereafter the defendants filed objections and the matter was taken up for inquiry on 19.12. 2003, and after the inquiry, the learned Judge made the decree *nisi* absolute, in both cases. It is against this order the defendants have filed these two applications.

When these two applications were taken up in this Court for inquiry, the plaintiff raised a preliminary objection that leave to appeal does not lie and as such the defendants ought to have filed a final appeal and an application in revision if they so desired.

Section 6(3) of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 as amended by Act, No. 9 of 1994, states thus ;

"Where the defendant either fails to appear and show cause or having appeared, his application to show cause is refused, the Court shall make the decree nisi absolute ..... "

Section 13 (1) states as follows :

"Subject to orders of court, where a decree nisi entered in an action instituted under this Act is made absolute, it shall be deemed a writ of

execution duly issued to the fiscal in terms of 225(3) of the Civil Procedure Code, and notwithstanding anything to the contrary in any other written law, the execution of the same shall not be stayed."

Therefore, upon a plain reading of the aforesaid sections it appears that once the decree absolute is entered, it will have the effect of a final judgment in this case.

The defendant has filed a leave to appeal application from the order dated 19.12.2003 in terms of Section 757 of the Civil Procedure Code.

Section 754 speaks of mode of preferring an appeal. Section 754(5) states that ;

"Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter -

'Judgment' means any judgment or order having the effect of a final judgment made by any Civil Court ; and

'Order' means the final expression of any decision in any Civil action proceeding or matter, which is not a judgment."

It appears that the word "judgment" given in the section, encompasses not only judgment which finally disposes of the rights of the parties but also all those orders made in the course of civil proceedings which have the effect of a final judgment.

In the case of *Siriwardena* Vs. *Air Ceylon* [1]. Sharvananda, J. (as then he was) after analysing several English authorities, laid down the following tests to be applied to determine whether an order has the effect of a final judgment and so qualifies as a judgment under section 754 (5) of the Civil Procedure Code :

(i) It must be an order finally disposing of the rights of the parties.

(ii) The order cannot be treated as a final order, if the suit or the action is still left a live for the purpose of determining the rights of the parties in the ordinary way.

(iii) The finality of the order must be determined in relation to the suit.

(iv) The mere fact that cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order a final order.

Accordingly, if the order has the effect of finally disposing of the rights of the parties, it has the effect of a final judgment. In the instant case the impugned order dated 17.12.2003 finally disposes of the rights of the parties and only the execution of the decree remains.

In the circumstances, I am of the view that the order dated 19.12.2003 is a final judgment in terms of section 754(5) of the Civil Procedure Code and hence the defendant is not entitled to file a leave to appeal application against this order in terms of Section 754(2) of the Civil Procedure Code. Therefore, leave to appeal does not lie against the said order of the learned District Judge.

For these reasons the preliminary objection raised by the plaintiff is upheld and the two applications, namely, C. A. L. A. No. : 7/2004 and C.A. L. A. No. : 8/ 2004, are dismissed with costs.

Amaratunga, J., – I agree,

Application dismissed

JINADASA
VS
CEYLON ELECTRICITY BOARD AND OTHERS

COURT OF APPEAL
SRIPAVAN, J.
SRISKANDARAJAH, J.
CA 2080/03
SEPTEMBER 7, 14, 2004
OCTOBER 26, 2004
NOVEMBER 5,2004

Writ of Certiorari - Electricity Act - Sections 12, 13, 15 - Drawing of electricity lines - No Inquiry held - No procedural fairness - proper procedures not followed- consequences.?

The 1st Respondent - Ceylon Electricity Board was carrying out a Project, to draw a power line from Matara to Tangalle. As the line was to be drawn over a portion of the land belonging to him, the Petitioner lodged his written objections with the 3rd Respondent. An inquiry was held in 1999 and at the Inquiry it was assured that the power line would not affect the foundation already laid in his land for a house. In 2002, the 3rd Respondent began to excavate 15ft. behind the house already built in order to erect a tower, contrary to the previous undertaking given to the Petitioner. The power line according to the Petitioner, if drawn would go over his house for which he did not consent. The Petitioner sought to quash the said decision as no Inquiry was held, before the impugned decision was taken.

HELD

(i) Electricity Act provides the procedure to be adopted with regard to installing electricity lines. Section 13 makes it mandatory that specifications, plans, drawings of the area of supply of electricity must show the route of each such electric line. These documents were not produced to Court by the Respondents.

(ii) Where proper procedures are not followed, the Court will not hesitate to strike down the impugned order as being ultra vires. Had the 1st Respondent followed the procedure spelt out in Section 15, this Court would have been in a position to ascertain whether in fact there was a deviation of the power line which was approved by the Chief Electrical Inspector and produced before the 2nd Respondent (Divisional Secretary) at the Inquiry.

(iii) The procedure followed by the 1st and 2nd Respondents is flawed.

APPLICATION for a Writ of Certiorari

Mohan Pieris P. C., with *Ms. Nuwanthi Dias* for the Petitioner.

Ms. B.Thilakaratne, D. S.G., for Respondents.

cur.adv. vult.

January 10, 2005

SRIPAVAN, J.

The first respondent Board was carrying out a project to draw a power line from Matara to Tangalle. The petitioner came to know that the said line was to be drawn over a portion of the land belonging to him. Hence,

the petitioner lodged his written objections with the third respondent. The petitioner alleges that thereafter an inquiry was held by the second respondent in the year 1999 and states that at the inquiry it was assured that the power line would not affect the foundation already laid in his land for a house. However, in the year 2001 the third respondent entered the petitioner's land, demarcated a corridor for the said line and requested him to clear the said portion of the land which the petitioner did without any protest. Accordingly 20 coconut trees, 4 jak tress and 12 other trees in the said demarcated portion of the land were felled and the first respondent paid compensation to the petitioner in a sum of Rs.46,250. It is to the petitioner's surprise that on 5th November 2002, the third respondent began to excavate 15 feet behind the house already built by the petitioner in order to erect a tower which the petitioner alleges contrary to the previous undertaking given to him. The power line, according to the petitioner if drawn would go over his house for which he did not consent. The petitioner states that he was not summoned for the purported site inspection nor was given any hearing before a decision to draw the power line over his house was taken. Accordingly, the petitioner seeks to quash the decision contained in the letter dated 9th July, 1999 marked P7 which the respondents claim to be the decision to draw the power line over the petitioner's house.

The learned Deputy Solicitor General submitted that as averred in paragraph 21 of the affidavit of the second respondent dated 28th April 2004, the construction of the tower and the drawing of lines were done in accordance with the route approved by his predecessor based on a *rough sketch* produced by the first respondent. In this context, it may be relevant to consider, inter alia, the nature and scope of Sec. 15 of the Electricity Act which can be summarised as follows :-

(1) The first respondent or a person authorised by it is entitled to enter upon any land after giving one weeks notice in order to carryout the works referred to in Sec. 12.;

(2) Prior to the carrying out the works referred to in Sec. 12, the first respondent shall give thirty days notice in terms of Sec. 15 (3) as fully and accurately as possible the nature and extent of the acts intended to be done.;

(3) Any person affected by such notice may within fourteen days is entitled to lodge a written objection with the Government Agent to any of the intended acts of the first respondent.;

(4) The Government Agent shall in writing notify such objection to the first respondent and fix date for hearing ;

(5) The objector shall be informed of the date of hearing.

Thus, the Electricity Act provides the procedure to be adopted with regard to installing electricity lines Sec. 12(3) of the said Act specifically states that the first respondent shall not execute any of the works enumerated in Column 1 (which includes laying of electric lines) of Subsection 1 except in accordance with specifications, plans and drawings approved by the Chief Electrical Inspector. Column 2 in Sec. 13 of the said Act makes it mandatory that specifications, plans and drawings of the area of supply of electricity must show the route of each such electric line.

Though the second respondent in Paragraph 8 of his affidavit concedes that an inquiry was held in terms of Sec. 15 of the said Act, neither the specifications nor the plans and drawings of the area of supply showing the route of the electric line were produced before court. On the other hand, the petitioner in Paragraphs 8 and 9 of his affidavit dated 28th November, 2003 alleges that he lodged written objections with the third respondent as he was made to understand that the line would be drawn over a portion of his land. This allegation was accepted by the third respondent in his affidavit dated 29th April, 2004.

No procedure had been laid down in the Electricity Act to lodge objections with the third respondent. Since the petitioner on his own volition lodged objections with the third respondent, the only inference that could be drawn was that the first respondent failed to give the petitioner thirty days notice in terms of Sec. 15(3) specifying accurately the nature and extent of the acts intended to be done together with plans and drawings of the area of electricity supply showing the route of such line. It is only after such a notice is given the petitioner is legally entitled to lodge his objections with the Government Agent. It is imperative that the procedure laid down in the Electricity Act should be properly observed. The provisions of the statue in this respect are supposed to provide safeguards to the petitioner. It is

only by procedural fairness administrative powers are rendered tolerable. When an administrative act is challenged by way of judicial review, the court is concerned with the legality of the order made. Where proper procedures are not followed, the court will not hesitate to strike down the impugned order as being *ultra vires*. Had the first respondent followed the procedure spelt out in Sec. 15, this court would have been in a position to ascertain whether in fact there was a deviation of the route of the power line which was approved by the Chief Electrical Inspector and produced before the second respondent at the inquiry.

The learned Deputy Solicitor General urged that in October, 2001 the trees were marked and felled from the petitioner's land in order to maintain a corridor of sixty feet for the purposes of drawing electricity lines. The first respondent accordingly paid compensation to the petitioner in a sum of Rs. 46,250 on 25th January, 2002 as evidenced by P5. This fact is accepted by the third respondent in Paragraph 12(e) of his affidavit dated 29th April, 2004. Notwithstanding the payment of compensation to the petitioner to the portion of the land already cleared, the first respondent by an undated letter marked P10 requested the petitioner to cut down further 29 trees on or before 17th December, 2003 for which, compensation has been estimated as Rs.38,600. This raises a doubt as to whether the first respondent was trying to deviate from the original route and demanded the petitioner to cut down further trees contrary to the proviso Sec. 17 of the said Act which reads as follows:

> "Provided that where compensation has been paid under any of those sections, no further compensation shall be payable for the felling or lopping of any tree or the removal of vegetation which has grown or been allowed to grow or for the removal of any wire which has been fixed after that payment in such a manner as to obstruct or interfere with the electric line or apparatus.".

Though counsel for the respondents on 7th September, 2004 moved for time to get instructions with regard to the basis upon which the document marked P10 was sent to the petitioner, no satisfying explanation was tendered to court.

The respondents in their written submissions stated that as long as the power line is in the construction phase and if the officers of the first

respondent Board are of the opinion that additional trees, outside the 60 feet perimeter should be cleared then they could issue vouchers providing compensation as permitted by law. However, the learned Deputy Solicitor General did not refer to any statutory provision which empowers the first respondent to do so. In view of the foregoing, I conclude that the procedure followed by the first and/or second respondents are flawed. No electric lines could be drawn on a *rough sketch* provided by the first respondent as stated by the second respondent in Paragraph 21 of his affidavit. Accordingly, a writ of certiorari is issued quashing the decision contained in the letter dated 9th July, 1999 marked P7. The petitioner is entitled for costs in a sum of Rs.5,000 payable by the first and the second respondents in equal shares.

Sriskandarajah, J. — I agree

Application Allowed.

GUNASEKERA AND OTHERS
VS
RAVI KARUNANAYAKE

COURT OF APPEAL
MARSOOF P. C. J(P/CA),
SRISKANDARAJAH J.
CA (MC REV) 05/2004,
M.C. FORT 60956
NOVEMBER 2, 10, 17,24, 2004
DECEMBER 6, 2004

Public Property Act,12 of 1982 - Section 3(2)- as amended by Act, 28 of 1999- Section 8 - Bail Act, No. 30 of 1997- Sections 3, 3(1), 21, Code of Criminal Procedure Act 15 of 1979 - Anticipatory Bail - Offences against Public Property Act-Applicability of the Bail Act?- ejusdem generis rule - Evidence Ordinance S 57(4)-Written Law - Prevention of Terrorism (Temporary Provisions) Act, 48 of 1979 - Could reference be made to the Parliamentary Debate ? - Official Secrets Act. 1920.

The Respondent was suspected to have committed an offence under the Offences against Public Property Act. The respondent sought and was granted anticipatory Bail under the provisions of the Bail Act. The petitioner (officer in charge of the Anti Corruption Unit of the Crime Division) sought to revise the said Order on the sole ground that, as the Respondent was suspected to have committed an offence defined under the Offences against Public Property Act, Bail Act has no application -

HELD -

(i) To exclude a written law from the application of the Bail Act as provided under Section 3 of the Bail Act that written Law should provide express provision in respect of the release on bail of persons accused or suspected of having committed or convicted of offences under that written law.

(ii) The Bail Act provided for the procedure, forum and the conditions for the release of a person at the time of investigation, at the time of trial after conviction. Bail Act was enacted to have a clear policy and to lay guidelines to Bail.

(iii) The offences against Public Property Act does not provide for the procedure or forum but provides a condition for the release of persons at the time of investigation, at the time of trial and after conviction. The condition is in relation to the serious nature of the offence.

(iv) The release of persons on bail for an offence committed or suspected to have committed under the offences against Public Property Act in view of the provisions in Section 3(2) of the Bail Act has to be read with the Bail Act. The Court that releases a person on Bail is considering the condition laid down in offences against Public Property Act cannot act in isolation of the Bail Act as it provides not only the procedure but also other restrictions under Section 14 for the release of a person on Bail.

(v) The Bail Act is a general Act, the Offences against the Public Property Act is a special Act in relation to specific offences.

(vi) The proposition that the Bail Act is not applicable to the Offences against Public Property Act cannot be accepted.

(vii) It is legitimate to make reference to the debate that preceded the passage of the Bail Act in Parliament in order to clarify the ambuguities in Section 3 of the Act.

APPLICATION in Revision from an Order of the Magistrate's Court of Fort.

Cases referred to :

1. *Thilanga Sumathipala* vs *I. G. P. and* three others 2004 1 Sri LR 210
2. *Davis* vs *Johnson* - 1978 1 All ER 132
3. *Escoigne Properties* Ltd., Vs I.R.C. 1958 AC 549 at 566
4. *Sirisena* and others vs *Kobbekaduwa*, Minister of Agriculture and Lands - 80 NLR 1
5. *Manawadu* vs *Attorney General* - 1987 2 Sri LR 30
6. *J. B. Textiles* Ltd vs *Minister of Finance* - 1981 1 Sri LR 156
7. *Jeyaraj Fernandopulle* vs *De Silva and others* - 1996 1 Sri LR 22 at 34
8. *Pepper* vs *Hart* - 1993 1 All ER 42
9. *Anuruddha Ratwatte and 4 others* vs *Attorney General* - 2003 2 Sri LR 39

W. P. G. Dep, P. C., Addl. Solicitor General with *B. P. Aluvihare* S. S. C., for Respondent Petitioners

K. N. Choksy P. C., with *Kalinga Indatissa*, *Ms. Krishan Wijetunge*, V. *K. Choksy*, *Ranil Samarasooriya* and *Jayantha Jayaweera* for Petitioner Respondent

cur adv vult

January 1, 2005.

Sriskandarajah J.

This is an application filed by the 1st and 2nd Respondents - Petitioners (hereinafter referred to as the Petitioners) to revise an order of the learned Magistrate, Colombo Fort dated 06.07.2004 granting anticipatory bail to the petitioner - Respondent (hereinafter referred to as the Respondent) under Section 21 of the Bail Act, No. 30 of 1997.

Petitioners urged several grounds in their petition to revise the said order of the learned Magistrate but learned Additional Solicitor General relied only on two grounds at the time of arguing this application. Firstly ; that the Magistrate should not have issued notice in the first instance as the offence disclosed in the application for anticipatory bail is not a non-bailable offence. Secondly ; the Respondent is suspected to have committed an offence under the Offences against Public Property Act, No.12 of 1982 as amended and therefore he is not entitled to obtain anticipatory bail.

The learned Additional Solicitor General in his written submissions restricted his submissions to the second of the aforesaid grounds to revise the order of the learned Magistrate and did not pursue the first ground. He submitted that the Respondent was suspected to have committed an offence defined under the Offences against Public Property Act. As this Act makes express provision in respect of the release on bail of persons accused or suspected of having committed an offence, the Bail Act has no application to the offences under this Act. Therefore he submitted that the Magistrate had erred in resorting to the provisions of the Bail Act to grant anticipatory bail to the respondent.

Section 3(1) of the Bail Act No. 30 of 1997 reads as follows :

> "Nothing in this Act shall apply to any person accused or suspected of having committed, or convicted of, an offence under, the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, Regulations made under the Public Security Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed or convicted of, offences under such other written law."

Learned Additional Solicitor General submitted that 'any other written law' which is specified in Section 3 (1) of the Bail Act means any written law which has express provisions pertaining to the release on bail of persons accused or suspected of having committed or convicted of offences under such written law. Petitioners also submitted that the *ejusdm generis* rule has no application to 'any other written law' for the reason that in this section after referring to Prevention of Terrorism Act, Regulations made under Public Security Act and any other written law the sentence did not come to an end but it continued by describing the necessary requirements

of "any other written law". The necessary requirements or qualifications that are mentioned in the sentence are namely : "Which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of , offences under such other written law". He submitted that the criteria spelt out in this sentence should be applied to ascertain whether a particular Act falls within 'any other written law'.

Learned Additional Solicitor General submitted that the Bail Act deals with persons accused or suspected of having committed or convicted of offences. That is, the Act contemplates three categories of persons namely : suspects, accused and convicted persons. He further submitted that the Prevention of Terrorism Act, Emergency Regulations and Offences against Public Property Act have express provisions pertaining to granting of bail to all the said three categories of persons. Therefore the Offences against Public Property Act is a written law that is contemplated in Section 3 of the Bail Act and as provided by this section it is excluded from the application of the Bail Act. The petitioners also contended that as the applicability of the Bail Act is excluded for Offences against Public Property Act, Section 3 (2) of the Bail Act also has no application to this Act. For these reasons the petitioners submitted that the Magistrate could not grant anticipatory bail under Section 21 of the Bail Act to the respondent against whom there is an allegation that he is suspected to have committed an offence under the Offences against Public Property Act.

Learned President's Counsel for the Respondents relied on the judgement of Justice Gamini A. L. Abeyratne in *Uduwatuwage Janathpriya Thilanga Sumathipala vs the Inspector General of Police and three others*[1] when interpreting Section 3 of the Sinhala text of the Bail Act which prevails over the English text of the Bail Act, His Lordship had held that "any other written law" in section 3 of the Bail Act refers to the Prevention of Terrorism Act and the Public Security Ordinance and no other written law is contemplated by that Section."

The learned Additional Solicitor General submitted that it appears that there is a discrepancy between the Sinhala text and the English text and the Sinhala text should prevail over the English text. But this difference is mainly due to the grammatical variations and the different method of

constructing sentences in the Sinhala and English languages. This ambiguity could be resolved by interpreting the section in a manner that will manifest the intention of the legislature. He urged that the court could resort to exceptional construction method to resolve this problem. He relied on the passage in Rupert Cross in his book on Statutory Interpretation (1976 pp 84-98) which states thus :

> "The judge may read in words which he considers to be necessarily implied by words which are already in the statute, and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible or absurd or totally unreasonable, unworkable or totally irreconcilable with the rest of the statute"

The learned Additional Solicitor General further submitted that the court in an appropriate case could add words or substitute words to give effect to the purpose of the statute. Section 3 of the Official Secrets Act 1920 prohibit persons "In the vicinity of" any, prohibited place from impeding sentries. The accused pleaded that although he was within the perimeter of a Royal Air force Station, he had not literally been in the vicinity or neighbourhood. However, Court added the word "in or" in the vicinity of to give effect to the object of the statute. In the same way Court had corrected statutes by substituting 'and' for 'or' or *vice versa*. Therefore the petitioners submitted in the same way the word "or" (in Sinhala හෝ) which causes the ambiguity could be resolved and the proper construction of that section would be that in addition to Prevention of Terrorism Act and the Regulations under Public Security Ordinance other written laws such as the Offences against Public Property Act are also contemplated.

In this context the question arises as to whether it is legitimate to have regard to the proceedings in Parliament which preceded the enactment of the legislation in question in order to understand the intention of Parliament. The traditional view that prevailed in the United Kingdom was that a court of law will not generally look at the proceedings in Parliament to ascertain the meaning of enacted legislation. In accordance with this view, in *Davis v. Johnson*[2] Viscount Dilhorne referred to the well established and well known rule that "Counsel cannot refer to Hansard as an aid to the construction of the Statute". In Escoigne Properties Ltd. v. I. R. C.[3] at 586 Lord Denning said :

".....In this country we do not refer to the legislative history of an enactment as they do in the United States of America. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of Hansard. All that the courts can do is to take judicial notice of the previous state of the law and of the other matters known to well - informed people.".

Consistently with this approach, our courts too have shown considerable reluctance to use speeches made in parliament for the determination of the intention of Parliament. In *Sirisena and Others V. Kobbekaduwa, Minister of Agriculture and Lands*[4] the Supreme Court was invited to look at the Hansard Particularly at the Minister's speech and ascertain the intention of Parliament. Vytilingam J in what may be considered the majority judgement in that case, showed some reluctance to do so, and observed at page 71 that -

"For my part I am of the view that we ought not to do so unless there is such great ambiguity in the words that looking at the Hansard alone would be decisive."

In *Manawadu v. Attorney - General*[5] when a similar invitation was made, Sharvananda C. J. preferred to apply accepted canons of interpretation of statutes to ascertain the intention of Parliament, although Seneviratne J in his dissenting judgement relied on the views expressed by the Minister in Parliament to interpret the legislation in question.

However, it is noteworthy that in *J. B. Textiles Ltd.* v. *Minister of Finance*[6] Samarakoon, CJ expressed the view that Hansards are admissible to prove the course of proceedings in the Legislature in terms of Section 57(4) of the Evidence Ordinance, and that they constitute evidence of what was stated by any speaker in the Legislature. His Lordship observed at 164 that-

"The Hansard is the official publication of Parliament. It is published to keep, the public informed of what takes place in Parliament. It is neither sacrosanct nor untouchable."

The above *dictum* of Samarakoon CJ was quoted with approval by Mark Fernando J in the Majority judgement in *Jeyaraj Fernandopulle v De Silva*

and others[7]. In *Pepper v Hart*[8] the House of Lords shifted from the traditional approach and permitted the use of the Hansard to ascertain the intention of the legislature where the very issue of interpretation which the Court was called upon to resolve had been addressed in the Parliamentary debate and the promoter of the legislation had made a clear statement on the very issue. Lord Browne-Wilkinson observed at 69 that-

> "I therefore reach the conclusion, subject to any question of parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where: (a) the legislation is ambiguous or obscure or lead to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect ; (c) the statements relied on are clear."

It is therefore legitimate to make reference to the debate that preceded the passage of the Bail Act in Parliament in order to clarify the ambiguity in Section 3 of the Act.

Hon. Prof. G. L. Peris, Minister of Justice (as he then was) when presenting the Bail Bill in Parliament on 2nd October, 1997 at the second reading (reported in Parliamentary Debates (Hansard) Volume 113 No. 5 Tuesday, 7th October, 1997) stated :

> "Mr Speaker, there have been various judicial decisions on this subject, but I think the time has come for Parliament to lay down clearly the principles that should govern the grant of bail. It is not a matter which can be left any longer entirely in the hands of the courts. This is because there are conflicting stands of decision and there is a great deal of confusion which has to be rectified by the intervention of Parliament. Parliament laying down very clear guidelines which will be binding on the courts in the future; Now that, Mr. Speaker, is exactly what we have done by means of this legislation."

At the close of his speech he said :

> "Those, Mr. Speaker, are the main provisions of this law. It has been necessary to exclude certain statutory regimes from the ambit of application of this law. The bill which I have the honour to present does

not apply to the *Prevention of Terrorism Act.* Offences under the Prevention of Terrorism Act are not caught up within the ambit of this law because there are special considerations applicable to the safety of the State.

Salus Civitatis Suprema Lex has always been an axiom of the law. The security of the State is of the highest possible legal value. In recognition of that reality we have refrained, for the moment, from bringing the Prevention of Terrorism Act within the applicability of this particular law. That is a matter to be considered in the future. I am not foreclosing that for all time. These matters are required to be assessed from time to time with changing circumstances. But right now we think that the right balance to be struck does not allow us to bring offences under that particular statutory regime within the four corners of this particular law. For the same reasons Mr. Speaker, Regulations under the Public Security Ordinance will also not be regulated by the provisions contained in this new piece of legislation Nor will this legislation apply to other written laws which contain express provisions in respect of bail for persons accused of offences under such laws."

Mr. Tyronne Fernando, Member of Parliament in his speech said :

"I very much welcome your clause on anticipatory bail. I think India is the only place where anticipatory bail has been in force since 1970. Sir, I would like to quote from Mr. P. V. Ramakrishna's "Law of Bails". There they give the reason for this anticipatory bail. This anticipatory bail, Sir, was made use of by even Mr. Narasinha Rao, the former Prime Minister, when the guns were turned on him. He did not want to be embarrassed by being suddenly picked up by the police. So, he went and got this anticipatory bail. That is precisely the reason why the anticipatory bail has been allowed, why there is provision. May I quote, Sir?

"the provision for anticipatory bail has been incorporated mainly in order to relieve a person from being disgraced by trumped up charges".

These trumped up charges are very common features in our part of the world, Sir. It is very salutary that this anticipatory bail has been brought in the case of non-bailable offences. One word of caution I want to address to the Hon. Minister. He Spoke about bailable and non-bailable offences and the machinations of the police and the local powers.

A bailable offence can easily be turned into a non-bailable offence by sleight of hand. I have a very good example for you. One of our youth candidates at the local government elections was remanded, just before nomination, for eight days on a trumped up charge. Soon after the local bodies were dissolved he had removed some files from the municipal council. He was then remanded on the basis of a "B" report which said, "පොදු දේපල පනත යටතේ රු. 5000 කට අධික දේපල සොරා ගැනීමක් නිසා යැයි කියා එයාව රිමාන්ඩ් කළා." Ten days later, Sir, I got a young lawyer called Weerasuriya to go into the case. The lawyer got the Magistrate to examine what these files are, whether they were of some million dollar affairs or some petty files important to this person. We still have files we have brought from our Ministries pertaining to various personal things of ours. Ultimately, after ten days this young man was remanded, just before the local government elections campaign, and the Magistrate held :

"අධිකරණය විසින් මෙම ලිපිගොනුවල ලේඛන පරීක්ෂා කරන ලදී. මෙම ලේඛනවල කිසිදු වටිනාකමක් ඇතැයි සැළකීමට නොහැක. ඒ අනුව මෙම දේපලවල වටිනාකම රු. 5,000 කට වැඩිය යන්න තක්සේරු කළ නොහැක. ඇප දෙමි."

So for ten days, purely by the police filing a 'B' report saying some files worth over Rs.5,000 are missing, this young man was in remand. We welcome your new law because this is a non-bailable offence on the 'B' report. He could have gone to court and got anticipatory bail".

In the Minister's speech he has clearly stated that Section 3 of the Bail Act excludes the applicability of the Bail Act to the Prevention of Terrorism Act, Regulation under the Public Security Ordinance nor will this legislation apply to other written laws which contain express provision in respect of bail for persons accused or suspected of having committed or convicted of offences under such law. Therefore the said ambiguity Sinhala text of the Baid Act could be resolved by considering the intention of the legislature which contemplates other written laws in addition to Prevention of Terrorism Act and Regulation made under Public Security Ordinance.

It is also manifest from the Minister's speech that the intention of the legislature is to exclude certain statutory regimes which have special consideration applicable to the safety of the State from the ambit of the application of the Bail Act. Therefore any other written law mentioned in

Section 3 of the Bail Act has to be read in *ejusdem generis* to the Acts mentioned in that section. The Offences against Public Property Act cannot be considered as an act which has concerns applicable to the safety of the State. Therefore this act cannot be considered as an Act which was intended by the Legislature to exclude from the applicability of the Bail Act. Mr. Tyronne Fernando, Member of Parliament in his speech has specifically referred to a situation under the offences against Public Property Act and welcomed the new law (Bail act) because the provision for anticipatory bail could be resort to in the future for non bailable offences under the offences against Public Property Act. It is clear from the speeches of the Minister of Justice and Mr. Tyronne Fernando, Member of Parliament mentioned above that the intention of the legislature is not to exclude the applicability of the Bail Act to the Offences against Public Property Act.

In my view to exclude a written law from the application of the Bail Act as provided under Section 3 of that act that written law should provide express provision in respect of the release on bail of persons accused or suspected of having commited, or convicted of, offences under that written law. This is similar to the long title of the Bail Act which reads as "An act to provide for release on bail of persons suspected or accused of being concerned in committing or having committed an offence." Chief justice Sarath N Silva in Anuruddha Ratwatte and 4 others vs Attorney General[9] observed.

> "The Bail Act No. 30 of 1997 was passed by Parliament as stated in the long title to "provide for release on bail of persons suspected or accused of being concerned in committing or of having committed an offence".... A person is considered as being suspected of having committed an offence" at the stage of investigation and he would be considered as an accused after he is brought before a court on the basis of a specific charge that he committed a particular offence. He would remain an accused until the trial is concluded and a verdict of guilty or not guilty is entered or he is discharged from the proceedings. Thus the provisions of the Bail Act would apply in respect of all stages of the criminal investigation and the trial."

The stages in which a person could be released on bail enumerated in the long title of the Bail Act and the stages provided in section 3 of the Bail Act are similar. The Bail Act, the Prevention of Terrorism Act and the

Emergency Regulation (which was in force) provided for the procedure, forum and the conditions for the release of a person at the time of investigation, at the time of trial and after conviction. Therefore by necessary implication the written law mentioned in Section 3 of the Bail Act should also provide for the **procedure, forum and the conditions** for the release of a person at the time of investigation, at the time of trial and after conviction.

The offences against Public property Act No.12 of 1982 as amended by Act No. 28 of 1999 under section 8(1) does not provide for the **procedure or forum** but provides a condition for the release of person at the time of investigation, at the time of trial and after conviction. The condition is in relation to the serious nature of the offence namely, if the value of the subject matter in respect of which the offence committed exceeds Rs.25,000 then that person should be released on bail only on exceptional circumstances. The provisions in this Act clearly show that these provisions are not self-contained to release a suspect or accused on bail and it categorically states that in relation to bail Code or Criminal Procedure Act shall apply.

Section 8(1) of the offences against Public property Act as amended provides :

> "The provisions of the Code of Criminal Procedure Act, No.15 of 1979, in relation to bail shall apply where any person surrenders himself or is produced on arrest on an allegation that he has committed or has been concerned in committing or is suspected to have committed or to have been concerned in committing an offence under this Act :
>
> Provided, however, that where a Gazetted officer not below the rank of Assistant Superintendent of Police certifies that the value of the subject-matter in respect of which the offence was committed, exceeds twenty five thousand rupees such person shall be kept on remand until the conclusion of the trial. It shall be competent for the court in exceptional circumstances to release such persons on bail after recording reasons therefore."

The Provisions laying conditions to release a suspect or accused on bail embodied in the above section was enacted before the enactment of Bail Act. The Bail Act was enacted to have a clear policy and to lay guide lines to bail. Section 3(2) of the Bail Act provides :

3(2) Where there is a reference in any written Law to a provision of the Criminal Procedure Code Act, No.15 of 1979 relating to bail, such reference shall be deem, with effect from the date of commencement of this Act, to be a reference to the corresponding provision of this Act.

Therefore, the release of persons on bail for an offence committed or suspected to have committed under offences against Public property Act in view of the provisions in Section 3 (2) of the Bail Act has to be read with the Bail Act. The court that releases a person on bail in considering the condition laid down in offences against Public Property Act cannot act in isolation of the Bail Act as it provides not only the procedure but also other restrictions under Section 14 for the release of a person on bail.

The Bail Act is a general Act in relation to Bail which provides for the procedure, the conditions and the court by which a person could be released on bail but offences against Public Property Act is a special Act in relation to specific offences. Therefore, the condition that suspect or an accused could be released on bail only on exceptional circumstances shall prevail. This condition in the said Act is not in conflict with the provisions of the Bail Act. Even though, the guiding principle of the Bail Act is that the granting Bail shall be regarded as the rule and the refusal to grant bail as the exception. The specific circumstances of exceptions to refuse bail are given in Section 14 of the Bail Act. Section 15 of the Bail Act has also laid down provisions empowering Court to refuse bail after giving reasons for the refusal. One of the reasons for which a bail could be refused to a person who is suspected or accused of having committed an offence under the offences against Public Property Act is the absence of exceptional circumstances.

Under these circumstances the submission of the Petitioners that the Bail Act is not applicable to the offences against Public Property Act cannot be accepted. The petitioners did not pursue any other grounds to challenge the order of the learned Magistrate in granting anticipatory bail. This court after careful consideration of the Judgment of the Magistrate has decided not to interfere with the order of the Magistrate as there is no illegality in the order. Therefore, this Court dismisses the application of the petitioners without costs.

MARSOOF J, (P/CA) - I agree

Application dismissed.

PIYASENA
VS
OFFICER IN CHARGE, POLICE STATION, MAWARALA AND ANOTHER

COURT OF APPEAL
WIJAYARATNE J
SISIRA DE ABREW J
CA 77/2005
H.C. MATARA 75/2004
M. C. MORAWAKA - 67009

Penal Code - Section 315 - Primary Court Procedure Act - Section 25(1) - Assumption of jurisdiction of the Primary Court by Magistrate - Trial of accused without plea being recorded - Validity? - Applicability of the Mediation Boards Act -

HELD

(i) The Magistrate had proceeded to the trial of the accused without him being charged and without his plea being recorded - which is a material irregularity which nullifies the legal effect of all the proceedings thereafter.

(ii) As regard Section 315 Penal Code, in terms of the Mediation Boards Act, Court is not permitted to take cognizance of such offences without a Certificate from the Mediation Board.

(iii) Magistrates in certain circumstances are empowered to take cognizance of matters falling within the jurisdiction of the Primary Court - this is by way of assumption of jurisdiction of the Primary Court and not by way of exercising the jurisdiction of the Magistrate.

AN APPLICATION in Revision from the Order of the High Court of Matara.

Razik Zarook with Rohana Deshapriya for Petitioner.

Anoopa de Silva, S. C., for the Attorney General.

Cur. ad. vult

August 26, 2005

WIJAYARATNE, J.

This is an application to revise the order of the learned High Court Judge dated 03.02.2005 refusing an application to revise the order of the Magistrate of Morawaka convicting the petitioner of an offence under section

315 of the Penal Code reported to the Magistrate of Morawaka under the provisions of section 25(1) of the Primary Court's Procedure Act. Learned High Court Judge has held that this is a mere technicality and the offence punishable under s. 315 is one cognizable by the Magistrate and therefore he did not proceed with this application. Further it appears from the proceedings before the learned Magistrate of Morawaka that the Accused who was present in court on summons was put on trial without his plea being recorded. There is no minute what so ever of his being charged or what his plea was. Accordingly we presume that the learned Magistrate had proceeded to the trial of the accused without him being charged and without his plea being recorded, which is a material irregularity which nullifies the legal effect of all the proceedings thereafter. The learned State Counsel also concedes this fact. In such an event the court is obliged to quash the proceedings and direct a re-trail of the accused on the charges preferred against him.

More over, we find that the procedure of charging the accused is also not accord with the laws. A charge under section 315 of the Penal Code reported to the learned Magistrate of the area in terms of the provisions of section 25(1) of the Primary Court's Procedure Act. The Magistrate in certain circumstances is empowered to take cognizance of matters falling within the jurisdiction of the Primary Court. However, it is by way of assumption of jurisdiction of the Primary Court and not by way of exercising the jurisdiction of the Magistrate. It is also further revealed that the accused was charged with an offence punishable under section 315 of the Penal Code and convicted of same. In terms of the provisions of Mediation Board Act, Court is not permitted to take cognizance of such offences without a certificate from the Mediation Board. For all these reasons, we are unable to refer this matter to a fresh trial by the learned Magistrate. Accordingly, all the proceedings and the conviction and sentence imposed by the learned Magistrate of Morawaka and the order dated 03.02.2005 made by the learned High Court Judge of Matara are all quashed and set aside. However, this order will not operate as a bar in the event of fresh proceedings being instituted under the relevant provisions of law if the prosecution so wishes. Application for revision is allowed.

SISIRA DE ABREW, J. I agree

Application allowed.

CEYLINCO INSURANCE COMPANY LTD
VS
RATNAYAKE

COURT OF APPEAL
AMARATUNGA, J.
WIMALACHANDRA J.
C. A 14/2004 (LG),
D. C. TANGALLA 9507/M
JULY 14, 2004

Prescription Ordinance -Section 9 - Is it Contrary to the provisions of the Prescription Ordinance for parties to agree to limit the period of prescription to a shorter time ?

The Plaintiff - Respondent filed action on 30.08.2000, seeking to enforce a fire insurance contract he had entered with the Defendant, Appellant on 19.10.1998. The Plaintiff Respondent's business was destroyed by fire. He contended that the Defendant Petitioner had on 16.02.1999 rejected his claim. The Defendant in its answer took up the position that the action is prescribed in Law. It was the Defendants position that in terms of clause 20 of the Insurance Policy the Defendants's liability ceases at the expiry of 12 months from the date of the loss and damage, unless, the claim is the subject of a pending case or arbitration and in terms of Clause 18, if the claim is rejected and if no action or arbitration is commenced within 3 months from the date of rejection.

The trial Judge over-ruled the application of the Defendant to try as a preliminary issues, regarding the maintainability of the action, on the basis that Section 9 of the Prescription Ordinance prevails over the terms of the insurance policy. The Defendant sought leave to appeal from the said Order and was granted same.

HELD -

(i) The parties to a contract have the right to agree with regard to the limitation period and the time period agreed upon by the parties will prevail over the Prescription Ordinance.

(ii) The Prescription Ordinance will not apply as the parties had agreed on a time period within which action has to be instituted.

(iii) The plaintiff has not filed this action within 12 months from the date of the fire, more over, he has not filed this action within 3 months from the date of rejection of his claim. The action therefore is time barred.

Application for leave to appeal.

From an order of the District Court of Tangalle, with leave being granted.

I. S. de Silva for the Defendant Petitioner.

Plaintiff-Respondent absent and unrepresented.

cur.adv.vult.

January 13, 2005
WIMALACHANDRA, J.

Leave was granted of consent on 11.02.2004. This is an appeal to set aside the order made by the learned District Judge dated 29.12.2003 overruling the preliminary objections of the defendant- appellant (defendant) and answering the issues numbering 38 to 41 in favour of the plaintiff-respondent (plaintiff).

Briefly, the facts as set out in the petition are as follows :

The plaintiff filed action against the defendant in the District Court of Tangalle seeking to enforce a fire insurance contract he had entered into with the defendant. Admittedly, the plaintiff insured his business premises at No. 181, Tissa Road, Tangalle against fire under a policy of insurance bearing No. AM/TC/593 obtained from the defendant company. The plaintiff states that on or about 19.10.1998 his business premises was destroyed by a fire. The plaintiff filed the District Court action on the basis that the defendant had failed to honour its obligations under the said insurance policy and thus a cause of action had accrued to him to seek the intervention of Court for compensation and damages in terms of the said contract of insurance. The defendant filed answer and took up the position that the plaintiff's action is prescribed and the Court has no jurisdiction to hear and determine the action. The defendant's position was that in terms of clause 20 of the said insurance policy, the defendant's liability ceases at the expiry of 12 months from the date of the loss and damage unless the claim is the subject of a pending case or arbitration and in terms of clause

18 if the claim is rejected for the reasons set out therein and if no action or arbitration is commenced within three months from the date of rejection.

At the trial the following issues were tried as preliminary Issues :

(38) Does the Court have jurisdiction to hear and determine this action ?

(39) As set out in paragraph 2(a) of the answer, has the plaintiff failed to institute action within 12 months from the happening of the loss and damages as required by clause 20 of the Insurance Policy?

(40) As set out in paragraph 2(b) of the answer has the plaintiff failed to institute action within 3 months from the date of rejection of the claim as required by clause 18 of the Insurance Policy?

(41) If issues 38, 39 and 40 or any one of them are answered in favour of the defendant, is the plaintiff's action liable to be dismissed?

Thereafter the Court directed the parties to tender written submissions. The Court made the order on 29.12.2003 overruling the preliminary objections and answered the aforesaid issues in favour of the plaintiff in the following manner.

Issue No. : 38	-	Yes
39	-	Yes, but it is not a reason to dismiss the action.
40	-	Yes, but it is not a reason to dismiss the action.
41	-	No.

In his order the learned Judge has observed that the plaintiff has failed to institute the action within twelve months from the date of the fire as required by clause 20 of the Insurance Policy and has also not filed the action within three months from the date of rejection of his claim in terms of clause 18 of the Insurance Policy. However, the learned Judge held that the provisions of section 9 of the Prescription Ordinance prevails over the terms of the said insurance policy.

Admittedly, the fire took place on 19.10.1998. The Plaintiff submitted his claim on the insurance policy on 07.12.1998 and the defendant by its letter dated 16.02.1999 rejected the claim of the plaintiff. Thereafter the plaintiff instituted this action against the defendant on 30.08.2000.

The insurance policy Am/TC/593 has clauses 18 and 20 which read as follows :-

Clause 18 - FRAUD :

> If the claim be in any respect fraudulent, or if any false declaration be made, or used in support thereof if any fraudulent means or devices are used by the insured, or one acting on his behalf to obtain any benefits under this policy or if the loss or damages be occasioned by the wilful act, or with the connivance of the insured or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection or (In case of an arbitration taking place in pursuance of the 19th condition of this policy) within three months after the arbitrator, arbitrators or umpire shall have made their award all benefit under this policy shall be forfeited.

Clause 20 - **TIME LIMIT FOR COMPANY'S LIABILITY**

> In no case whatever shall the Company be liable to any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

It will be seen that in terms of clause 18 if the claim is rejected on the ground of fraud and if no action is filed or arbitration is commenced within three months from the date of rejection of the claim, all benefits under the said policy is forfeited. In terms of clause 20 the defendant will not be liable for any loss and damage after the expiry of 12 months from the happening of loss and damage unless the claim is the subject of pending action or arbitration. In the instant case it is to be noted that there is no other pending case or arbitration proceedings under the said Insurance Policy with regard to the loss or damage sustained by the plaintiff as a result of the said fire to the said premises.

Is it contrary to the provisions of the Prescription Ordinance for parties to enter into an agreement to limit the period of prescription to a shorter time period or curtail the period of prescription that is provided in the Prescription Ordinance? On such an occasion does the time period agreed upon by the parties prevail over the provisions of the Prescription Ordinance?

In this regard C. G. Weeramantry in his book "The Law of Contracts" volume II at page 797 states thus :

> **"It is not contrary to public policy for parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable in English Law if supported by consideration, whether it be made before or after the limitation period has expired. The same observation holds good for our law, except that such an agreement need not be supported by consideration."**

The learned Counsel for the defendant also cited Chitty on "Law of Contract" 27th edition at 1366, on the question of whether it is open to parties to an agreement to stipulate in the agreement that legal proceedings be commenced within a shorter period of time than provided in the Limitation Act.

Chitty on Contract, 27th edition at page 1366 in paragraph 28-084 states as follows:-

> **"Agreement of the parties- It is open to the parties to a contract to stipulate in the contract that legal or arbitral proceedings shall be commenced within a shorter period of time than that provided in the Limitation Act 1980. Such stipulations are not uncommon in commercial agreements and their effect may be (depending on the precise wording of the stipulation) to bar or extinguish any right of action, or to deprive a party of his right to have recourse to particular proceedings, e.g. arbitration, after the expiration of the agreed time limit. It is also open to the parties to agree that one party shall be released from liability or the other party's claim shall be extinguished or become barred unless a claim has been presented within a stipulated period of time."**

It appears that the parties to a contract have the right to agree with regard to the limitation period and the time period agreed upon by the parties will prevail over the Prescription Ordinance. In the circumstances both parties to the contract of insurance are bound by the terms set out in the Policy of Insurance with regard to the period of limitation. Therefore in this case the Prescription Ordinance will not apply as the parties had agreed on a time period within which the action had to be instituted.

In this case the plaintiff is suing on the fire insurance policy. Accordingly, the cause of action accrues to the plaintiff on the occurrence of fire causing loss and damage to the plaintiff and not on the rejection of the claim. In any event he has failed to file action within three months from the rejection of his claim by the defendant. Admittedly, the fire took place on 19.10.1998. The defendant by letter dated 16.02.1999 rejected the plaintiff's claim. The plaintiff filed this action on 30.08.2000. Accordingly the plaintiff has not filed this action within twelve months from the date of the fire. Moreover, he has not filed this action within three months from the date of rejection of his claim by the defendant which was 16.02.1999. Since the plaintiff has failed to file the plaint within the stipulated period of time the plaintiff's action is time barred.

I therefore allow the appeal and set aside the order of the learned District Judge dated 29.12.2003, but without costs.

AMARATUNGA, J.— I agree.

Appeal Allowed.

JAYASINGHE
VS
RAMANAYAKE AND OTHERS

COURT OF APPEAL
SOMAWANSA. J, (P/CA),
BASNAYAKE. J,
CA APPLICATION 1396/2004 (REV)
D.C. MT LAVINIA 1001/98/L
MARCH 1, 2005

Civil Procedure Code - Section 86(2) and , S 839 - Party not a Defendant - Is he bound by the Decree? - Can the decree be vacated by the successor in office? Audi alteram partem Rule-Pradesheeya Saba Act, 15 of 1987, Section 214 - Urban Councils Act - Section 220

The Plaintiff - Petitioner Instituted action against one 'R' and the Maharagama Pradesheeya Sabhawa. Judgement and decree were entered exparte. The decree was not served on the Pradesheeya Sabawa as it was not in existence then. The Maharagama Urban Council, which succeeded the Pradesheeya Sabha accepted the decree and filed papers to have the Judgment and decree vacated.

The Plaintiff Petitioner objected to the application as the papers were filed after the 14 day period stipulated in Section 86(2). The trial Court overruled the objection and vacated the decree and permitted the Urban Council to file answer.

HELD:

(i) It was the duty of the Plaintiff to make the Urban Council a party to the case. The decree issued on the Pradesheeya Saba without making the Urban Council a party, has no effect on the Urban Council.

Per Basnayake J.

> "I am of the view that, the learned Additional District Judge has rightly exercised the inherent powers in this case, in a situation where no other provision is available and at the same time to have the principle of audi alteram partem Rule observed."

An application in Revision from an Order of the District Court of Mt. Lavania.

Case referred to :

1. *Fonseka* vs *Dharmawardena* - 1994 3 Sri LR 49.

Ranjan Suwandaratne with *Mahinda Nandasekera* for Plaintiff Petitioner.
Harsha Gamlath with *S. M. S. Jayawardena* for 2A Defendant Respondent.

cur.adv. vult.

March 7, 2005
Eric Basnayake J.

This is a revision application filed by the plaintiff - petitioner (plaintiff) to have the order of the learned Additional District Judge, Mt Lavinia, dated 30.04.2004, set aside. This case was filed in the District Court of Mt. Lavinia against Namaratne Ramanayake and the Maharagama Pradeshiya Sabha as 1st and 2nd defendants. The Pradeshiya Sabha was succeeded by the Maharagama Urban Council (2A respondent) in 2001. The plaintiff anyhow did not take steps to have the caption amended and to make the Urban Council a party to the case. The case was fixed for trial against the original defendants and on the date of the trial as both defendants were absent, the case was fixed exparte. Exparte evidence was led on 10.06.2003 against the original defendants namely Namaratne Ramanayake and the Maharagama Pradeshiya Sabha. The judgment and the decree were entered against the same parties and the decree was ordered to be served on them. The decree was not served on the Pradeshiya Sabha as the Pradeshiya Sabha was not in existence then. Instead the Maharagama Urban Council the 2A respondent, who succeeded the Pradeshiya Sabha, accepted the decree on 8.10.2003. On 23.10.2003 the 2A respondent filed papers in court to have the said decree vacated.

At the inquiry the plaintiff took a preliminary objection with regard to the delay in filing papers as these papers were admittedly filed out side the stipulated 14 day period. The court after inviting written submissions from both parties, the learned Additional District Judge made an order vacating the decree and allowing the 2A respondent to file answer.

The plaintiff complains that the 2A respondent filed papers to vacate the exparte decree in terms of section 86(2) of the Civil Procedure Code

having taken the responsibility on behalf of Maharagama Pradeshiya Sabha. He states that the 2A respondent succeeded to the rights and liabilities of the original 2nd defendant and the learned Judge erred by not considering section 86(2) of the C. P. C.

Section 86(2) of the C. P. C. is as follows :

> Where within fourteen days of the service of the decree entered against him for default, the **defendant** with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the **defendant** to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper (emphasis is mine).

This section undoubtedly applies to the defendants. The 2A respondent states that neither on the date of the exparte judgment nor at the time of the service of the decree was he a defendant in this case. This action was filed against Maharagama Pradeshiya Sabha. At the time of the judgment and the service of the decree the Pradeshiya Sabha was not in existence. The 2A respondent further complained that the plaintiff had not complied with the mandatory provisions contained in section 214 of the Pradeshiya Sabha Act No. 15 of 1987 nor section 220 of the Urban Council Act.

He further informs this court that in pursuance of the order of the learned Additional District Judge, the plaintiff has now taken steps to have the caption amended and also move to file a replication and thereby complied with the order which he is seeking to revise. The relevant journal entry had been marked 2R1.

The learned Additional District Judge relying on the judgment of Fonseka vs. Dharmawardena[1] *said that although the 2A respondent accepted the decree that was issued to Maharagama Pradeshiya Sabha, it was not regular and hence by invoking the inherent powers vested in the courts by virtue of section 839 of the C. P. C. the learned Additional District judge set aside the decree and allowed the 2A respondent to file answer.*

In the case of *De Fonseka vs. Dharmawardena* (*Supra*) His Lordship S. N. Silva, the President of the Court of Appeal (as he then was) held as

follows. "An inquiry that is held upon an application made by a defendant to set aside an ex parte decree, in terms of section 86(2), is not regulated by any specific provision of the Civil procedure Code. Therefore the inquiry should be conducted by the Judge in a manner that is consistent with the principles of natural justice and fairness".

I am of the view that it was the duty of the plaintiff to make the 2A respondent a party to this case. The decree issued on the Pradeshiya Sabha without making him a party, had no effect on the 2A respondent. Therefore I am of the view that the learned Additional District Judge has rightly exercised the inherent powers in this case, in a situation where no other provision is available and at the same time to have the principle of *audi alteram partem* rule observed. Hence I am of the view that the plaintiff's application is without merit and is therefore dismissed. I make no order for costs.

ANDREW SOMAWANSA. J, (P/CA) —I agree

Application dismissed.

SEEMITHA ATHUGALPURA PUDGALIKA BUS SANGAMAYA AND ANOTHER
VS
NORTH WESTERN PROVINCIAL COUNCIL ROAD PASSENGER TRANSPORT AUTHORITY AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
C. A. WRIT APP 249/2003,
JULY 15, 22, 2004

Writ of Quo Warranto - Lacks basic qualifications De facto holder of a public Office–should it be a substantive office - Availability in what circumstances – Can a writ be issued if the post is non existent? - locus standii - Public Office.– Road Passenger Carriage Services Statute – 4 of 1995 North-Western Provincial Council.

The 2nd Respondent claims to hold the office of Assistant Director (Operations) in the 1st Respondent Authority. The Petitioner sought a writ of quo warranto on

the 2nd Respondent- Assistant Director (Operations) as he lacks the basic qualifications necessary to lawfully hold the said office.

It was also contended by the Petitioners that the post of Assistant Director (Operations) is non - existence in the 1st Respondent Authority : The Respondent - contended that the office of the 2nd Respondent is not an office which is amenable to the relief claimed and that the Petitioner lacks locus standi.

HELD:

(i) To succeed in this application for a writ of quo warranto the Petitioner must first establish that there is an office of a public nature and the 2nd Respondent is functioning in that office without proper qualifications or Authority.

(ii) As the position of the Petitioner is that the post of Assistant Director (Operations) does not exist, the question whether the post is of a public nature does not arise.

(iii) As the post of Assistant Director (Operations) is non existent in the 1st Respondent Authority, there cannot be a usurpation of the office of Assistant Director (Operations)

"The test to be applied whether a writ of Quo Warranto is available -is whether there has been a usurpation of an office of a public *nature and* an office of substantive character, that is an office independent in title and not merely the function or employment of a deputy or a servant held at the will and pleasure of others"

Application for a Writ of Quo Warranto.

Cases referred to :

1. *Deen* vs *Rajakulendram* - 40 NLR 25
2. *Siriwardana* vs *Fernando* - 77 NLR 469

Sunil Cooray with *G. Rodrigo* for Petitioner

Navin Marapana for Respondents.

cur. adv. vult.

March 21, 2005
SRISKANDARAJAH J.

The 1st Petitioner is a limited liability company limited by guarantee, and incorporated under the Companies Act No. 17 of 1982 having perpetual succession and common seal, and operating under the name and style of "(Apayen) Seemitha Athugalpura Paudgalika Bus Samagama". The 2nd Petitioner is the Chairman of the said company. The 1st Respondent is the Authority established under the Road Passenger Carriage Services Statute No.: 4 of 1995 of the North Western Provincial Council. The Petitioners submitted that the 2nd Respondent at present claims to hold the office of Assistant Director (Operations) of the above authority, and he has accepted and commenced to exercise the powers and functions of the said office. The Petitioner further submits that the 2nd Respondent lacks the basic qualification necessary to lawfully hold the office of the Assistant Director of the 1st Respondent Authority and has sought a writ of *quo warranto.*

When this case was taken up for argument on 28.05.2004, the Respondents raised preliminary objections and the parties agreed to file written submission. The Respondents raised the following preliminary objection to this application.

1. The Petitioners are not entitled to the relief prayed for in their petition as what has been prayed for are certain declarations and directory relief which can only be granted by the District Court and there is no prayer for a mandate in the nature of the Writ of Quo Warranto as set out in the caption to the petition.

2. The office of the 2nd Respondent is not an office which is amenable to the remedy of Quo Warranto as it is not a public office.

3. The Petitioner has no *locus standi* to pursue this application.

4. The Petitioner's application is belated and therefore the Petitioner is not entitled to the relief claimed.

The Respondents and the Petitioners have filed their written submission to these preliminary objections.

Firstly, I will deal with the merits of the second objection. The Respondents submitted that it is established law that the remedy of Quo Warranto lies only with regard to the de facto holder of a public office. In the instant case the 2nd Respondent has been appointed to office as the Regional Director of the 1st Respondent Authority. The 2nd Respondent's letter of appointment marked 'H' and annexed to the petition clearly shows that the 2nd Respondent's office is one clearly held at the will and pleasure of the 1st Respondent and this letter of appointment includes a probationary period of three months therefore the respondents submitted that these facts clearly bring to light that the 2nd Respondent is a mere contracted employee of the 1st Respondent Authority, and the office he is holding is not a public office for the purpose of being amenable to a writ of Quo Warranto. In support of his contention the Respondents relied on *Deen V. Rajakulendaram*[1] where His Lordship Poyser J, observed :

> *"Under Section 47 of Ordinance No.11 of 1920 an Urban Council possesses large powers to appoint all its necessary officers, to remove any such officers so appointed to fix their salaries etc, subject to certain restrictions. Assuming such a writ is granted, then it must necessarily be available even against a coolly working under and* Urban District Council. No doubt, such officers and servants are not holding public offices."
>
> " the writ is limited or restricted and therefore cannot be applied universally such a writ lies for usurping any office of a public nature. It must be a substantive office and not one, which is held at the will and pleasure of others"

The Respondents submitted that in the light of the above, it is clear from documents marked G and H produced with the petition that the office of the second respondent is clearly not one that falls within the definition of a public office for the purpose of the writ of Quo Warranto.

In reply to this objection, the Petitioners submitted that a broader view has been taken in the case of *Siriwardana vs. Fernando*[2]. The Court laid down certain guidelines to identity the "office of a public nature" : where the office is one which was created by statute and (a) the public have an interest and that, (b) Exercise of them materially affects a great body of them, (c) execution of the officers secures a proper distribution of funds which the body of the public have an interest.

The Petitioner submitted that in the present case the 1st Respondent is created by statute and the public have a great interest in the same and are greatly affected by the acts and deeds of the same and that the second respondent is not just another employee of the first respondent but a responsible top officer, having a decision making capacity which effect the public at large, and as such it would no doubt necessary to move for writ of Quo Warranto to declare that the 2nd Respondent is not in law entitled to hold this office on the basis of not having the minimum qualifications for this office as required by the statute.

The Petitioner's position according to their petition is that the 2nd Respondent was originally appointed to the post of Regional Director in the service of the 1st Respondent authority on 13.10.1998. The Petitioner states that according to the recruitment procedure of the 1st Respondent Authority certain basic qualifications for the eligibility for appointment to the post of Regional Director are stipulated. The recruitment procedure and the letter of appointment are marked as 'G' and 'H'.

The Petitioners also have pleaded in their petition that the 2nd Respondent was promoted to the present post as Assistant Director (Operations) and he holds this post at present. According to the prayer, the Petitioners have sought declarations that the 2nd Respondent lacks necessary qualifications to lawfully hold the office of Assistant Director of the 1st Respondent. In the written submissions of the Petitioners, it was stated that their application before this court is in fact a writ of Quo Warranto as very clearly stated in the caption of the application. The caption of the application reads as follows "In the matter of application for a writ of Quo Warranto against the Assistant Director (Operations) of the North Western Provincial Council Road Passenger Transport Authority". The availability of the writ of Quo Warranto is discussed by Pathirana J in *Siriwardena* v *Fernando* (supra) at 473 that :

> "The test therefore to be applied whether a writ is available is whether there has been a usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title and not merely the function or employment of a deputy or a servant held at the will and pleasure of others."

The Petitioners contention in the petition and in their written submission is that the post of Assistant Director (Operations) is non - existent in the

first Respondent Authority. In other words, that there is no post called as Assistant Director (Operations) in the 1st Respondent Authority. To succeed in this application for a writ of Quo Warranto the Petitioner should first establish that there is an office of a public nature and the 2nd Respondent is functioning in that office without proper qualifications or authority. The position of the Petitioners is that the post of Assistant Director (Operations) does not exist; therefore, the question whether that post is of a public nature does not arise. In these circumstances there cannot be an usurpation of the office of Assistant Director (Operations) which is non existent. For this reason, alone the Petitioners cannot have and maintain this applications. Therefore the Court has not considered the other preliminary objections raised by the respondents. The Petitioners application is dismissed without cost.

Application dismissed.

SUMANAWATHIE KARUNARATNE AND OTHERS
VS
ARIYARATNE

COURT OF APPEAL
SOMAWANSA. J,
MS. EKANAYAKE. J.
CALA 380/2000
D. C. AVISSAWELLA 20258/L,
DECEMBER 3, 2004.

Civil Procedure Code - Section 146 - Section 146(2)- Amendment 9 of 1991- Section 93(2) - Must Issues be restricted to Pleadings?- Discretion of Court to permit fresh Issues after case has commenced? - Raising of Issues on a fresh cause of action that had not been pleaded - Is it permissible?

HELD -

(i) The framing of Issues is not necessary restricted to the pleadings.

Per Somawansa J.,

"No doubt it is a matter with the discretion of a Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such cause appears to be in the interest of Justice and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings.

(ii) The grievance of the Plaintiff Petitioner was that the Defendant Respondent had encroached upon his land and prayed for ejectment of the Defendant Respondent therefrom, but the superimposition establishes that the Defendant- Respondent had not encroached but it is the Plaintiff Petitioner who had encroached upon a portion of land owned by the Defendant Respondent.

(iii) The Plaintiff by the fresh issues, is seeking to claim title to another portion of the land owned by the Defendant Respondent- in such an instance the Issues if allowed would cause material prejudice to the defendant Respondent.

(iv) No party can be allowed to make at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet.

Application for Leave to Appeal from an order of the District Court of Avissawella.

Cases referred to :

1. *Aymil Kareeza* vs *Jayasinghe* - 1986 1 CALR 109
2. *Liyanage* vs *Seneviratne* - 1986 1 CALR 306
3. *Bank of Ceylon* vs *Chelliahpillai* - 64 NLR 25
4. Silva vs Obeysekara 24 NLR 97
5. *Duraya* vs *Siripina* - 1908 4 ACR 125
6. *Fernando* vs *Soysa* - (1899) 2 NLR 40
7. *Attorney General* vs *Smith* (1906) 8 NLR 229
8. *Seneviratne* vs *Kandappa* (1917) 20 NLR 60
9. *Jayawickrema* vs *Amarasuriya* - 1918 - NLR 289
10. *Velupillai* vs The Chairman, Urban District Council 39 NLR 464 at 465

11. *Wickrematilake* vs *Marikkar* et al - 2 NLR 9 at 12.

12. In Re Chenwell CH. D. 9506

13. Colombo Shipping Co. Ltd., vs Chirau Clothing (Pvt) Ltd., 1995 2 Sri LR 9

14. *W. M. R. Candappa* vs *Madirampillai Ponnambelampillai* - SC 32/89 CAM 19.03.1993 - DC 13964/L

P. A. D. Samarasekera, P. C., with *Upali de Almeida* for Plaintiff Respondents *Gamini Marapona* P. C., with *Navin Marapona* and *Ms. Nishanthi Mendis* for Defendant Respondents.

cur.adv.vult.

December 3, 2004,

Andrew Somawansa, J.

This application has been filed by the plaintiff - petitioner seeking to canvas an order of the learned Additional District Judge of Avissawella dated 24.11.2000 marked X10 wherein the learned Additional District Judge rejected issue Nos. 2, 3, 4, 5, 7, 8, 10, 11 and 12 raised by the plaintiff-petitioner.

The main objection taken by the defendant - respondent to these issues was that the plaintiff - petitioner was seeking to raise issues on a fresh cause of action that had not been pleaded in the plaint and that he was in effect trying to circumvent the effect of an earlier order of the learned Additional District Judge dated 20.06.2000 marked X6 wherein he had rejected a replication filed by the petitioner. The plaintiff - petitioner being aggrieved by the aforesaid order dated 24.11.2000 sought to have it set aside by his application dated 11.12.2000 made to the Court of Appeal. His application for leave to appeal was entertained and was taken up for inquiry on 12.02.2002. After oral submissions were concluded both counsel tendered written submissions. The order was finally delivered on 12.11.2002 wherein the Court observed that the application filed on behalf of the deceased plaintiff- appellant did not include a specific prayer for the grant of leave to appeal from the order of the District Court and that the failure to comply with this fundamental requirement precluded the Court of Appeal

from considering the validity of the impugned order and therefore the application was dismissed in limine with costs.

The appellants were granted special leave to appeal from the order of the Court of Appeal on a question of law. The Supreme Court by its decision dated 25.11.2003 allowed the appeal and the judgment of the Court of Appeal was set aside. Directions were also given for another Bench to hear the application on its merits after permitting the appellant to amend the prayer by adding the form of the relief claimed.

Accordingly when this application was taken up for hearing both parties informed Court that they have already tendered written submissions on this matter and moved that order be made on the written submissions already tendered.

The relevant facts are the original plaintiff instituted the instant action in the District Court of Avissawella seeking a declaration of title in respect of land and premises depicted as lot 5C in Plan No. 1148/5 dated 26.12.1885 prepared by Loganathan, Licensed Surveyor morefully described in the second schedule to the plaint containing an extent of 7.5 perches, ejectment of the defendant- respondent and those under him therefrom. He also prayed for an enjoining order, interim and permanent injunction preventing the defendant- respondent from carrying on any activity on the land. The original plaint averred that the defendant - respondent who is said to be the reputed owner of the land adjacent to the aforesaid land in suit and acting in violation of his rights and has encroached upon his land.

The defendant - respondent while denying the aforesaid averments denied having encroached upon the plaintiff - petitioner's land and claimed title to lot 06 in the aforesaid Plan No. 1148 in extent 5.25 Perches. In paragraph 8 of the plaint the original plaintiff has admitted this fact.

The defendant - respondent upon a commission obtained from Court had spa Plan No .151 dated 16.09.1997 prepared by M. D. P. Jayalath Kumara, Licensed Surveyor marked X4. On this plan lot 5C claimed by the plaintiff - petitioner and lot 06 belonging to the defendant - respondent in Plan No. 1148 were superimposed. The superimposition shows that lot 5C in *plan* no. 1148 consist only of lot 1 in Plan no. 151 marked X and that lots 2, 3, 4, 5, 6, and 7 in the said plan no. 151 fell within lot 06 in plan no.

1148. Thus the superimposition establishes the fact that the defendant - respondent had not encroached on the land claimed by the plaintiff petitioner but that it was the plaintiff - petitioner who had in fact encroached on the land claimed by the defendant - respondent viz : lots 2, 3 and 4 of Plan No. 151 marked X.

The defendant - respondent filed an amended answer seeking for an interim injunction restraining the plaintiff - petitioner from building on the aforesaid encroached portions depicted as lots 2, 3 and 4 in Plan No. 151 marked X4 and after due inquiry the said injunction was granted against the plaintiff petitioner on 03.04.1998. Thereafter on 09.03.2000 the plaintiff - petitioner filed a replication but the defendant - respondent objected to the same and the learned District Judge by his order dated 14.06.2000 rejected the replication of the plaintiff- petitioner.

When issues were framed on 25.07.2000 on behalf of the plaintiff petitioner issues based on Plan No. 151 marked X4 were raised both in relation to the land described in the second schedule to the plaint and also upon prescriptive possession. These issues were objected to on the basis that they do not arise upon the plaint and that the said issues are based upon the rejected replication. After submissions by both parties the learned District Judge by his order dated 24.11.2000 rejected issues 2, 3, 4, 5, 7, 8, 10, 11 and 12 objected to on behalf of the defendant - respondent. It is this order that the plaintiff - petitioner is seeking to canvas now.

It is submitted by the President's Counsel appearing for the plaintiff - petitioner that although the original plaintiff claimed rights into and upon the allotment of land and premises morefully described in the second schedule to the plaint yet the fact remains as shown in plan 151 marked X4 that he is in possession of lots 1 to 4 in the said Plan No. 151 until the date of the plaint without any objection from any person whomsoever and more particularly from the defendant - respondent. In the circumstances he submits that it is apt to consider Section 146 of the Civil Procedure Code which deals with the framing of issues which reads as follows :

146. (1) "On the day fixed for the hearing of the action, or on any other day to which the hearing is adjourned, if the parties are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue and the court shall proceed to determine the same."

(2) "If the parties, however, are not so agreed, the court shall, upon the allegations made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to record the issues on which the right decision of the case appears to the court to depend".

He further submits that it is manifest that :

"In the instant case Plan No. 151 and the Report annexed thereto would reveal, Lots 1-4 are in possession of the original plaintiff. The main question for consideration by the Original court was whether the original plaintiff is entitled to claim Lots 1-4 in the said Plan. A perusal of the issues proposed on behalf of the original plaintiff shows that they were framed with a view to ascertaining this position."

In this respect he has cited a number of decisions to which I would refer briefly :

In the case of *Aymil Kareeza* vs. *Jayasinghe*[1] it was held :

"The framing of issues is not necessarily restricted by the pleadings. Again in the case of *Liyanage* vs. *Seneviratne* [2] was held that issues are not confined to matters specifically pleaded.

In the case of *Bank of Ceylon* Vs. *Chelliahpillai* [3] the rules was to the effect that a case must be tried upon the issues on which the right decision appears to the Court to depend and it is well settled that the framing of such issues is not restricted by pleadings.

No express provision is made in our Code for salutary machinery of "summons for directions" as in England or for pre-trail proceedings as in America. Nevertheless, and indeed for this very reason, Section 146 imposes a special duty on the Judge himself to eliminate the element of surprise which could arise when precise nature of the dispute is not clarified before *the evidence is recorded.* The defendant's pleadings were defective, and the plaintiff (let it be conceded) has not been as vigilant as she should have been to protect herself against surprise. But it was still the Judge's

duty to control the trial. He should have ordered the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge has ascertained for himself "The proposition of fact or of law" upon which the parties were at variance. This was especially necessary where the administratix of an estate was confronted with serious allegations against a person who had never had an opportunity, when alive, to answer personally to the charges.

The discretion of the judge to permit fresh issues to be formulated after the case has commenced was judicially recognized in the case of *Silva vs. Obeysekera*[4] at 107.

Counsel for the plaintiff raised the objections that these issues did not arise on the pleadings, and that defendant should have got his answer amended so as to raise these issues. On this objection being taken the learned District Judge disallowed the issues. Here the learned Judge was certainly led into a mistake. No doubt it is a matter with the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interest of justice, and it is certainly not a valid objection to such course being taken that they do not arise on the pleadings. See *Duraya vs. Siripina*[5], *Fernando* vs. *Soyza,* Attorney General v. *Smith*[6] *Seneviratne* vs. *Kandappa*[7] see also *Jayawickrama* vs. *Amarasuriya*[9]. It would undoubtedly have been better had the learned judge added these issues in such terms as he thought just.

The case of *Velupillai vs. The Chairman, Urban District Council* [10]. A reference which has been used extensively to drive home the necessity to take a liberal rather than a narrow and constricted view of the role of Courts. "It would appear as if the shortcomings of his legal adviser, the peculiarities of law and procedure, and the congestion in the Courts have all combined to deprive him of his cause of action and I for one refuse to be a party to such an outrage upon justice. This is a Court of Justice, it is not an Academy of Law"

Finally in the case of *Wickrematileke vs. Marikar* et al [11] at 12.

"I commend to his attention, as to that of all other Judges of first instance, the observation of Jessel, M. R. in re *Chenwell*[12], "It is not the duty of the Judge to throw technical difficulties in the way of the

administration of justice, but when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise".

I have no reason to disagree with the Presidents Counsel that the judgments quoted above and the passages referred to therein no doubt establish in full measure that the District Court was not only empowered but also duty bound to raise issues that arose for consideration. However, I am unable to agree with the learned President's Counsel that the judgments quoted above or the passages referred to would have any bearing on the issue at hand. For as submitted by the learned President's Counsel for the defendant - respondent that there are other provisions of the Civil Procedure Code also relevant and applicable to the issue at hand.

The main objection taken by the learned President's Counsel for the defendant- respondent was that the plaintiff - petitioner was trying to raise issues on a fresh cause of action that had not been pleaded in the plaint and that the plaintiff - appellant was in effect trying to circumvent the effect of an earlier order of the learned District Judge rejecting a replication filed by the plaintiff- petitioner. I think there is force in this argument. It is to be noted that the plaintiff - petitioner came to Court claiming a declaration of title and ejectment of the defendant - respondent from the land depicted as lot 5C in plan No. 1148 in extent 7.5 perches. The defendant - respondent having denied that he encroached upon the plaintiff - petitioner's land claimed title to lot 06 depicted in the aforesaid plan 1148 in extent 5.25 perches. It is admitted in the plaint that the defendant respondent was in fact the owner of the said lot 06. On a commissions issued by Court plan No. 151 marked X4 was prepared and on that plan lot 5C claimed by the plaintiff - petitioner and lot 06 belonging to the defendant - respondent as depicted in plan no. 1148 was superimposed. As stated above the superimposition shows very clearly that lot 5C in plan 1148 consists only of lot 01 in plan no. 151 marked X4 and that lots 2, 3, 4, 5, 6 in plan no. 151 clearly fell within lot 06 in plan no. 1148. In short, superimposition establishes the fact that the defendant - respondent had not encroached on the land claimed by the plaintiff- petitioner but that the plaintiff - petitioner has in fact encroached upon a portion of the defendant- respondent's land viz. lots 2, 3 and 4 in plan no. 151 marked X4. On a perusal of the record, it is to be see the defendant-respondent filed his amended answer wherein

he moved Court for the issue of an interim injunction against the plaintiff-petitioner restraining him from building on the encroached portion depicted as lots 2, 3 and 4 in plan no. 151 marked X. After due inquiry by order dated 03.04.1998 the Court granted an interim injunction as prayed for by the defendant - respondent. Thereafter, no steps were taken by the plaintiff - petitioner to amend his pleadings so as to claim any portion of the encroachment depicted as lots 2, 3 and 4, in plan no. 151 which clearly fell outside the land described in the schedule to the plaint. However, in a replication filed by the plaintiff - petitioner on 09.03.2000 sought to claim the aforesaid lots 2, 3, and 4 in plan no. 151 marked X which was 1.24 Perches in extent not claimed in the plaint. The defendant - respondent objected to the said replication being accepted and the learned Additional District Judge by his order dated 14.06.2000 upheld the objections and rejected the replication filed by the plaintiff- petitioner. The plaintiff - petitioner did not seek to canvas the aforesaid order of the learned Additional District Judge.

At the trial, the plaintiff- petitioner once again attempted to make a claim to the aforesaid lots 2, 3 and 4 in plan no. 151 marked X4 by raising issues 2, 3, 4, 5, 7, 8, 10, 11 and 12. The defendant - respondent objected to the aforesaid issues on the basis that if these issues were permitted to stand it would permit the plaintiff - petitioner to set up a claim outside the scope of his original action in as much as the schedule to the plaint confined itself to lot 5C in plan no. 1148 in extent 7.5 perches only. It appears to me that the Additional District Judge by his order dated 24.11.2000 quite correctly rejected the aforesaid issues for if the plaintiff - petitioner was allowed to raise the aforesaid issue, it would be allowing him to raise issues on an unpleaded cause of action.

It is contended by the counsel for the defendant - respondent that prior to Act No. 09 of 1991 which repealed the original Section 93 of the Civil Procedure Code, Courts were very willing in most cases to allow issues that did not arise from the pleadings, for the reason that they had a very wide discretion to allow parties to subsequently amend the pleadings to incorporate those matters referred to in the issues and that all these changed in the light of the amendment of Section 93 of the Civil Procedure Code. In support of this submission counsel has cited the case of *Colombo Shipping Co. Ltd., vs. Chirayu Clothing (pvt) Ltd.*,[13] where it was held that "Amendments on or before the first date of trial can now be allowed only in

a very limited circumstances, namely when the Court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party is not guilty of laches". I would say this is sound reasoning.

As stated above, it was submitted by counsel for the plaintiff - petitioner that it is manifest from Section 146(2) quoted above that the Court is entitled to determine issues not only upon the allegations in the plaint or in answer to interrogatories delivered in the action but also upon the contents of documents produced by either party and after such examination of the parties as may appear necessary. The purpose of this section evidently is to ascertain upon what material propositions of fact or of law the parties are at variance. The intention of the legislature was to empower the Court to proceed to record the issues on which the right decision of the case appears to the Court to depend. He further submits that in the instant case as plan no. 151 and the report annexed thereto would reveal lots 1 to 4 are in the possession of the original plaintiff. The main question for consideration by the original Court was whether the original plaintiff is entitled to claim Lots 1 to 4 in the said plan A perusal of the issues proposed on behalf of the original plaintiff shows that they were framed with a view to ascertain this position. I am unable to agree with this submission for the reason that the case enunciated by a party must reasonably accord with its pleadings. No party can be allowed to make at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet as was held in *W. M. R. Candappa vs. Madirampillai Ponnambalampillai* [14]. I have no hesitation to agree with the above principle laid down in that case by G. P. S. de Silva, C. J. and in any event, I am bound to follow the aforesaid principle.

Applying the aforesaid principle to the instant action, it is to be seen the plaint confined itself to lot 5C in plan no. 1148 in extent 7.5 Perches only as described in the schedule to the plaint. The prayer for the plaint reads as follows. :

එහෙයින් පැමිණිලිකරු ගරු අධිකරණයෙන් ඉල්ලා සිටිනුයේ,

(අ) මෙහි පහත දෙවන උපලේඛනයෙහි සවිස්තරව දැක්වෙන දේපල තමනට හිමි බවට ප්‍රකාශයක් ද,

(ආ) මෙහි අධිකරණයෙන් ලබාගත් කොමිසමින් පෙන්නුම් නොකරන අයුතු ඇදා ගැනීම් වලින් විත්තිකරු සහ ඔහු යටතේ සිටින සේවකයින්, නියෝජිතයින්, සහ අනෙකුත්

සියළුම අය නෙරපා එකී කොටස්වල කැනීම් සහ ඉදිකිරීම් ඉවත් කරන නියෝගයක් දානය කරන ලෙසද,

(ඇ) මෙහි පහත දෙවන උපලේඛනයෙහි දැක්වෙන දේපළෙහි කැනීම්, ඉදිකිරීම්, කැඩීම් සහ ඉවත් කිරීම් වලක්වාලන ස්ථිර තහනම් නියෝගයක් ද,

(ඈ) ඉහත (ඇ) හි සඳහන් ස්ථිර තහනම් නියෝගය නිකුත් කරන තෙක් මෙහි පහත දෙවන උපලේඛනයෙහි සවිස්තරව දැක්වෙන දේපලෙහි කැනීම්, ඉදිකිරීම්, කැඩීම් සහ ඉවත් කිරීම් වලක්වාලන අතුරු තහනම් නියෝගයක් ද,

(ඉ) ඉහත (ඇ) හි සඳහන් අතුරු තහනම් නියෝගය නිකුත් කරන තෙක් මෙහි පහත දෙවන උපලේඛනයෙහි සවිස්තරව දැක්වෙන දේපලෙහි කැනීම්, ඉදි කිරීම්, කැඩීම්, සහ ඉවත් කිරීම් වලක්වාලන වාරන නියෝගයක් නිකුත් කරන ලෙස ද

(උ) නඩු ගාස්තු, සහ

(ඌ) ගරු අධිකරණයට අනෙකුත් අතිරේක සහනයක් ද සඳහා විත්තිකරුට විරුද්ධව නඩු තීන්දුවක් වේ."

The Second schedule to the plaint reads as follows :

දෙවන උපලේඛනය

ඉහත කී අවිස්සාවේල්ලේ, අවිස්සාවේල්ල පළාත් ආණ්ඩු සහා සීමාව තුළ කොළඹ පාරේ, පිහිටි වරිපනම් අංක 3 දරන තොටගාව වත්ත නැමැති ඉඩමේ එස්. ලෝකනාදන් මිනින්දෝරු මහතා සැදූ අංක 1148/5 හා 26.12.1963 දින දරන සැලැස්මේ ප්‍රකාර බෙදා වෙන් කළ අංක *6 බී* දරන කැබැල්ලට මායිම් : උතුරු නැගෙනහිරට : කොළඹ පාර ද, දකුණු නැගෙනහිරට : *ලොට් 6, 6 බී සහ 5ඊ* දරන කැබැලි ද දකුණු බස්නාහිරට : පාරද, උතුරු බස්නාහිරට : ලොට් *6බී* ද, යන මායිම් තුල පිහිටි පර්චස් හතයි දශම පහ (අක්. 0, රූ. 0, පර්. 7.5) විශාල ඉඩමේ බිම් සහ එම අයිති සියළු දේද වේ.

Having prayed for the aforesaid relief can he also set up a claim in respect of portion of the land owned by the defendant - respondent depicted as lot 06 in plan no. 1148 in respect of which there was no claim whatsoever in the pleadings of the plaintiff - petitioner. In fact grievance of the plaintiff-petitioner was that the defendant - respondent had encroached upon his land depicted as lot 5C in extent 7.5 perches and prayed for ejectment of the defendant - respondent therefrom, but the superimposition established otherwise that the defendant-respondent had not encroached on the plaintiff-petitioner's land but it is the plaintiff-petitioner who had encroached upon a portion of the land owned by the defendant-respondent. It appears that now in addition to lot 5C in extent 7.5 perches the plaintiff respondent is seeking to claim title to 1.24 perches and of the Land owned by the defendant respondent by means of raising the aforesaid issues 2, 3, 4, 5,

7, 8, 10, 11 and 12 which claim is a new cause of action not pleaded in the plaint. In other words, having come to Court on the basis that the defendant-respondent has encroached on his land the plaintiff-petitioner now claims that he has encroached on the defendant-respondent's land and thus is attempting to set up a claim in respect of portions of the defendant - respondent's land which if allowed I would say would cause material prejudice to the defendant- respondent.

For the above reasons, I am of the view that the plaintiff -petitioner cannot succeed in his application and accordingly this application will stand dismissed with costs fixed at Rs.10,000.

MS. EKANAYAKE, J.—I agree.

Application dismissed.

AMARASEKERA

VS.

KARUNASENA KODITHUWAKKU, MINISTER OF HUMAN RESOURCE DEVELOPMENT, EDUCATION AND CULTURAL AFFAIRS AND OTHERS

COURT OF APPEAL
SALEEM MARSOOF P.C., J.(P/CA),
SRISKANDARAJAH, J.,
CA APPLI.362/2004
SEPTEMBER, 30, 2004 WRIT
OCTOBER 18, 2004
NOVEMBER 15TH, 25TH, 2004

Writ of Mandamus - Pension - Intentionally delayed - Minutes on Pensions - Section 12 (1) - Applicability - Constitution - 17th Amendment - Article 61A - Ouster of jurisdiction - Interpretation Ordinance 2 of 1947 - Section 2.

The Petitioner sought a Writ of Mandamus directing the Respondents to forward the necessary documents to the 14th Respondent - Director of Pensions, to enable him to take steps for the award of the pension. The complaint of the Petitioner was that, the Respondents were intentionally delaying the forwarding

of the relevant documents to the Director of Pensions, with a view of applying the provisions of Section 12 (1) of the Minutes on Pensions (MOP) to the Petitioner with retrospective effect and that Section 12 (2) of the MOP cannot be applied to withhold the pension of an officer who has already retired ; and that in order to make an Order under Section 12 (1) of the MOP disciplinary action against a Public Officer should have been pending or contemplated at the time of retirement.

The Respondent contended that after a Preliminary Investigation the Petitioner was found responsible for certain irregularities and disciplinary action was recommended.

The Respondent further contended that the Public Service Commission (PSC) was intimated that the Petitioner is due to retire on 15.02.2003, and to consider the possibility of retiring the Petitioner in terms of Section 12 (1) of the MOP in view of the findings against him. On 23.06.2003, the PSC has intimated that the payment of the Petitioner's pension should be withheld in terms of Section 12 (1) and further directed that disciplinary action be commenced against the Petitioner.

HELD -

(i) It is quite fortuitous that the retirement of the Petitioner had intervened into the disciplinary and other proceedings which were contemplated not only against the Petitioner but also against other officials - this is a case in relation to which Section 12 (1) of the MOP may be legitimately applied, so long as disciplinary proceedings were contemplated against the retiring public officer at the time of his retirement the relevant disciplinary authority may permit his retirement, subject to Section 12 of the MOP.

(ii) The fact that the PSC may have made its determination (23.06.2003) after his actual retirement (15.02.2003) will not affect the validity of the said Order.

(iii) The Petitioner cannot maintain this application if he is not challenging the determination of the PSC.

APPLICATION for a writ of Mandamus.

Cases referred to :

1. *Wilbert Godawela vs S. D. Chandradasa and Others* - 1995 2 Sri LR 338 (Distinguished)

2. *Peiris vs Wijesooriya, Director, Irrigation and others* - 1999 1 Sri LR 295.

D. S. Wijesinghe P. C., with *Ms Faisza Musthapha - Marikkar* and *Ms Tushani Machado* for Petitioner.

Ms Uresha de Silva, State Counsel for the Respondent

December 16, 2004

SALEEM MARSOOF, P. C. P(C/A)

The Petitioner has sought a mandate in the nature of a writ of *mandamus* directing the 2nd Respondent and/or the 3rd to the 13th Respondents to forward the necessary documents to the 14th Respondent Director of Pensions to enable him to take steps for the award of pension to the Petitioner. The Petitioner complaints that the 2nd Respondent and/or the 3rd to the 13th Respondents are intentionally delaying the forwarding of the relevant documents to the 14th Respondent with a view of applying the provisions of Section 12 (1) of the Minutes on Pensions to the Petitioner with retrospective effect. It is submitted on behalf of the Petitioner that this course of action is contrary to law and to established procedure. It is further submitted that the non-payment of the Petitioner's pension, despite the lapse of over one year after retirement, is illegal, null and void and a gross violation of the Petitioner's rights to receive the same in terms of the Minutes on Pensions which is a part of the written law of this country in terms of Section 2 of Interpretation (Amendment) Ordinance No. 2 of 1947.

According to the petition filed in this case, the Petitioner counts an unblemished record of 35 years of service in the public service. Having being released from the public service by the Ministry of Rehabilitation, the Petitioner was appointed as Project Accountant of the Emergency School Rehabilitation Project funded by the Asian Development Bank under the Ministry of Education from 23rd November 1992. With effect from 24th January 1994, the petitioner was appointed as Project Accountant of the Secondary Education Project also funded by the Asian Development Bank under the Ministry of Education on a contract basis initially for a period of 3 years. As the period of release granted to the petitioner was due to expire on 2nd January 1997 in terms of Public Administration Circular No. 52/91 dated 10th January 1991, the then Minister of Education had sought and obtained Cabinet approval to retain the services of the Petitioner until the completion of the said project and accordingly the Petitioner continued to serve until the completion of the Project in 2000.

The Petitioner states that he was then appointed as Project Accountant of a new project, namely the Asian Development Bank funded Secondary Education Modernization Project with effect from 1st January, 2001 upon Cabinet approval obtained for the purpose. Subsequently, in addition to the duties of his substantive post as Project Accountant, the petitioner was appointed to act as the Project Director following the removal of the then Director. The Petitioner states that he had to decline the said appointment as it was improper for him as a single individual to perform two of the four financial functions, namely, authorization, approval, certification and payment, as each such function has to be performed by different officers to ensure internal check as envisaged by the Government Financial Regulations. Accordingly, the post of Project Director was filled and the Petitioner continued in his position as Project Accountant. The Petitioner claims that thereafter he was called upon by the 2nd Respondent by his letter dated 20th December, 2002 (P10) to explain certain accounts maintained in respect of the Project for the period 21st to 29th October 2002. The Petitioner claims that he duly tendered his explanation which he considers as having been accepted as he did not received any intimation to the contrary.

The Petitioner held the substantive post of Accountant Class II Grade I of the Sri Lanka Accountants' Service at the time he reached the age of compulsory retirement (60 years) on 15th February, 2003. In response to a request made by the Petitioner from the 2nd Respondent by his letter dated 6th September 2002 (P-12) that steps be taken to retire him from service with effect from 15th February, 2003 on which date he was due to complete his age of compulsory retirement, he received a letter dated 14th February, 2003 (P-13) from the 2nd Respondent that his services as the Project Accountant would be terminated from 15th February, 2003. However, as there was no confirmation that the Petitioner was retired from public service with effect from 15th February, 2003, the Petitioner wrote the letters dated 25th February, 2003 (P14), 8th April, 2003 (P15) and 6th May 2003 (P16) to the 2nd Respondent and the Petitioner received the letter dated 7th May, 2003 (P-17) from the Additional Secretary of the 2nd Respondent informing him that his pension papers had been forwarded to the Secretary of the Accountants' Services Board.

The Petitioner claims that as he did not receive any pension, he sought the assistance of the Human Rights Commission by his letter dated 19th

May, 2003 (P 18a) addressed to the Secretary of that Commission. The Petitioner states that to his utmost surprise, he received a letter dated 15th October, 2003 (P-21) from B. A. W. Abeywardena - Preliminary Investigation Officer, captioned "Special Investigation into the Activities of the Secondary Education Modernization Project", calling upon the Petitioner to call over at the Ministry of Education on 7th November 2003. As the Petitioner was no more a public officer, and as his services as Project Accountant was purportedly terminated upon his reaching the age of compulsory retirement (60 years) on 15th February 2003, he replied the said letter with his letter dated 31st October 2003 (P-22) stating that he was at a loss to comprehend as to why he was being called up to clarify any irregularities after the lapse of nine months from his retirement. The Petitioner states that he received the letter dated 3rd December, 2003 (P-23) from the Human Rights Commission forwarding for his response a copy of a letter dated 29th October 2003 sent to the said Commission by the office of the 2nd Respondent from which it transpired that -

(a) a preliminary investigation was in progress relating to certain financial irregularities in the said Project involving, *inter alia* the Petitioner ;

(b) the Public Service Commission had directed that the Petitioner be retired under Section 12 (1) of the Minutes on Pensions ; and

(c) a decision with regard to the payment of pension to the Petitioner would be taken only on receipt of the report of the said preliminary investigation.

The Petitioner states that he replied the said letter with his letter dated 23rd December 2003 (P-24) addressed to the Legal Officer of the Human Rights Commission stating *inter alia* that the Petitioner could not be retired under Section 12 (1) unless there was disciplinary action pending or contemplated against him at the time of his retirement. The Petitioner has also invited the attention of Court to the letter dated 12th January, 2004 (P-25) addressed by the Secretary to the Public Service Commission to the 3rd Respondent as a reminder to an earlier letter dated 17th December, 2003 requesting the latter to forward his observations and recommendations together with draft charges against the Petitioner. It is submitted on behalf of the Petitioner that he has not been informed in terms of Section 26 : 8

of the Establishments Code, of any decision either by the Public Service Commission or by any other duly appointed authority that he had been retired under Section 12 (1) of the Minutes on Pensions, and as there was no disciplinary action contemplated against the Petitioner at the time he retired upon reaching the age of compulsory retirement on 15th February, 2003, the Petitioner is entitled to a writ of *mandamus* directing the 2nd Respondent and/ or the 3rd to the 13th Respondents to forward the necessary documents to the 14th Respondent Director of Pensions to enable him to take steps for the award of the pension to the Petitioner. It is contended on behalf of the Petitioner that the non-payment of his pension despite the lapse of nearly one year after he became entitled to retire, is illegal, null and void and a gross violation of the petitioner's right to receive same in terms of the Minutes on Pensions which is a part of the written law in terms of Section 2 of the Interpretation (Amendment) Ordinance No. 2 of 1947. It is further submitted that the Petitioner had a legitimate expectation of receiving his pension on retirement in terms of Rule 1 of the Rules framed under Section 2 of the Public and Judicial Officers' Retirement Ordinance No. 11 of 1910 as subsequently amended, and the denial of the Petitioner's pension offends the principle of reasonableness, proportionality and fairness.

The case of the Respondents as set out in the Statement of Objections of the Respondents is that by his letter dated 20th December 2002 (P10) the 2nd Respondent called upon the Petitioner to explain certain irregularities relating to certain financial transactions involving the Secondary Education Modernization Project that took place during the period 21st to 29th October 2002, and the Petitioner tendered his explanations by his letter dated 31st December 2002 (P11). Thereafter, a preliminary investigation was held and the Interim Report dated 29th January 2003 (15R3) revealed that the Petitioner was, along with certain other officers, responsible for certain financial irregularities. The Investigation Officer has recommended that disciplinary proceedings be commenced against the officers responsible for the said financial irregularities, and that the responsible officers be interdicted, sent on compulsory leave or retired under Section 12 of the Minutes on Pensions, as may be appropriate, pending the disciplinary proceedings. He has also recommended that the matter be also referred to the Commission to Investigate Bribery and Corruption. The Public Service Commission was informed of the findings of the aforementioned preliminary investigation by the letter dated 13th

February 2003 (15R1). A copy of the Interim Report marked 15R3 was also submitted to the Public Service Commission. The Public Service Commission was further intimated that the Petitioner is due to retire on 15th February 2003 upon reaching the age of retirement and to consider the possibility of retiring the Petitioner in terms of Section 12 (1) of the Minutes on Pensions in view of the aforesaid findings against him. By its letter dated 23rd June 2003 (15R4) the Public Service Commission has intimated its decision that the payment of the Petitioner's pension should be withheld in terms of section 12 (1) of the Minutes on Pensions and further directed that disciplinary action be commenced against the Petitioner. The principal question that arises for determination in this case is whether Section 12 (1) of the Minutes on Pensions can be applied to withhold the pension of an officer who has already retired.

Section 12 (1) of the Minutes on Pensions reads as follows :

> "12 (1) Where the explanation tendered by a public servant against whom, at the time of his retirement from public service, disciplinary proceedings were pending or contemplated in respect of his negligence, irregularity or misconduct, is considered to be unsatisfactory by the competent authority, the Permanent Secretary Ministry of Public Administration, Local Government and Home Affairs may either withhold or reduce any pension, gratuity or other allowance payable to such public servant under these Minutes."

Learned Counsel for the Petitioner submits that it is trite law that in order to make an order under Section 12 (1) of the Minutes on Pensions, a disciplinary action against a public officer should have been pending or contemplated at the time of the retirement of the officer in question. He relies on the decision of the Supreme Court in *Wilbert Godawela v. S. D. Chandradasa and Others*[1] in which Amarasinghe J has observed at 343 as follows :-

> "It will be seen that a pension could, in terms of Section 12 (1) be withheld or reduced only where (1) at the time of his retirement from the public service, disciplinary proceedings were pending or contemplated and (2) where the explanation tendered by the public servant concerned is considered to be unsatisfactory. In the matter before us, there was no disciplinary proceedings pending at the time of the retirement. Nor were such proceedings contemplated."

As emphasized by learned State Counsel appearing for the Respondents, the factual circumstances relating to the decision in that case are clearly distinguishable from the instant case as the Petitioner had been called upon by the letter dated 20th December 2002 (P10) to explain certain irregularities relating to certain financial transactions involving the Secondary Education Modernization Project that took place during the period 21st to 29th October 2002, and after the Petitioner tendered his explanations by his letter dated 31st December 2002 (P11), a preliminary investigation had been held and the Interim Report relating to which dated 29th January 2003 (15R3) revealed that the Petitioner was, along with certain other officers, responsible for some of the said financial irregularities. The Public Service Commission has been informed of these findings by the letter dated 13th February 2003 (15R1) albeit two days prior to the retirement of the Petitioner, and the said Commission has determined that the payment of pension to the Petitioner, should be withheld pending the ensuing disciplinary proceedings as evidenced by the letter dated 23rd June 2003 (15R4).

This case materially differs from *Wilbert Godawela v. S. D. Chandradasa(supra) and Others* where the allegations against the officer concerned were apparently not taken seriously by the authorities concerned. In fact, the factual circumstances of the instant case are comparable with the facts of *Peiris vs. Wijesooriya, Director, Irrigation and Others*[2] in which the Supreme Court sanctioned the application of Section 12 (1) of the Minutes on Pensions Indeed in the case before us it is quite fortuitous that the retirement of the petitioner had intervened into the disciplinary and other proceedings which were contemplated not only against the petitioner but also against the officials. I am therefore of the opinion that this is a case in relation to which section 12 (1) of the minutes on pensions may be legitimately applied. In my view, so long as disciplinary proceedings were contemplated against the retiring public officer at the time of his retirement, the relevant disciplinary authority may permit his retirement subject to section 12 of the Minutes on Pensions. In my opinion the mere fact that the Public Service Commission may have made its determination after his actual retirement will not affect the validity of that order.

Learned State Counsel appearing for the Respondent's has also placed reliance on Article 61A of the Constitution which was introduced by the 17th Amendment to the Constitution. The said article provides that -

"Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have the power or jurisdiction to inquire into or pronounce upon or in manner call in question any order or decision made by the Commission, a Committee or any public officer, in pursuance of any power or duty conferred or imposed on such commission or delegated to a committee or public officer under this chapter or any other law".

Learned President's Counsel for the Petitioner has responded to this by submitting that the petitioner is not challenging any order made by the Public Service Commission but is merely seeking a writ of *mandamus* directing the 2nd and/or 3rd - 13th Respondents to forward the necessary papers to the 14th Respondent, Director of Pensions to enable him to take steps for the award of pension to the Petitioner. I am of the opinion that the Petitioner cannot maintain this application for a writ in the nature of *mandamus* if he is not challenging the determination of the Public Service Commission contained in the letter dated 23rd June 2003 (15R4) as it cuts across his case.

In the circumstances the application of the petitioner is refused. There will no order for costs in all the circumstances of this case.

SRISKANDARAJAH, J., - I agree.

Application dismissed

NIMALARATNE PERERA
VS
PEOPLE'S BANK

COURT OF APPEAL
AMARATUNGA J.
CALA 124/2001,
D. C. ANURADHAPURA 174/65M
MAY 12, 2003,
JUNE 17TH, 30TH, 2003

Money Lending Ordinance - Section 5 - Introduction of Law of England Ordinance, 22 of 1986 - Parate Execution of Property - Can the Bank recover as interest a sum exceeding the principal sum lent ? Banking Business ?– People's Bank Act No. 29 of 1961 Amended by 32 of 1986 - 29 D - Resolution - Parate Execution.–Banking?

HELD -

(i) Section 5 Introduction of Law of England Ordinance enacts that the amount recoverable on account of interest or arrears of interest should in no case exceed the principal sum. However there is nothing to prevent the Bank from recovering at any time arrears of interest equal to the principal however much interest the Bank may have previously received.

(ii) The Bank cannot recover any interest in arrears exceeding the principal at the time action is brought, but if the interest is paid from time to time, there is no limit to the amount the Bank may receive.

(iii) By Ordinance 22 of 1986 English Law relating to Banks and Banking was introduced into Ceylon and in all questions which arise in Ceylon with respect of the Law of Banks and Banking the Law is the English Law, 'Banking' embraces every transaction coming within the legitimate business of a Banker.

(iv) The accounts maintained by the Petitioner with the Peoples Bank were current accounts and the law applicable is therefore English Law and under English Law compound interest is recoverable.

(v) Limitation placed by Section 5 on the amount recoverable as interest has no application to interest recoverable relating to a banking transaction.

(vi) The Board of the Bank is not bound by the limitation spelt out in Section 5 - The Board is entitled to pass a Resolution to recover the total of the capital sum remaining unpaid together with the agreed interest thereon.

APPLICATION for Leave to Appeal from an Order of the District Court of Anuradhapura.

Cases referred to :

1. *Sinnathamby Cumaravely and another vs Muttutamby Sittarapuvlapulle* - 1881 - 4 SCC 28

2. *Tennant vs Union Bank of Canada* - 1894 AC 31

3. *National Bank of India vs Stevenson* - (1913) 16 NLR 496

Kalinga Indatissa with *Ranil Samarasuriya* for Petitioner.

Rohan Sahabandu with Ms. *Sitari Jayasundera* for Respondent.

September 3, 2004
GAMINI AMARATUNGA, J

This is an application for leave to appeal against the order of the learned District Judge of Anuradhapura refusing to issue an injunction restraining the respondent Bank from auctioning the properties described in the schedule to the plaint to recover the money due to the Bank from the petitioner.

The Petitioner is a businessman who had two current accounts in the Anuradhapura branch of the respondent Bank. He has obtained several loans from the Bank and according to the plaint the total amount of the loans obtained by him from the Bank totaled up to Rs. 28,50,000. The Board of Directors of the Bank, by virtue of the powers vested in it by the People's Bank Act No. 29 of 1961 as amended, adopted two resolutions to sell by public auction the properties mortgaged to it as security, to recover the amounts due to the Bank from the petitioner. According to the two resolutions the amounts due from the petitioner were Rs. 6,84,130, and Rs. 20,00,000 together with interest (at the rate of 28% and 29%) up to the date of payment.

The Petitioner in his plaint alleged that he had paid more than rupees two million as interest for the loans he had taken. In his plaint the petitioner admitted that a part of the loan he had obtained from the Bank remained unsettled. However in his plaint or in the petition filed in this Court he has not specified the amount that remained due from him to the Bank. In his plaint the petitioner averred that under section 2 of the Money Lending Ordinance, (Cap. 80 CLE 1956 Revision) the Bank could not recover as interest a sum exceeding the sum lent. He therefore sought from the District Court a declaration that the Bank was not entitled to recover from him as interest a sum exceeding the principal sum lent to him. As consequential relief he sought an interim injunction restraining the Bank from auctioning the properties described in the schedule to the plaint.

The Court in the first instance issued an enjoining order restraining the Bank from holding the auction in terms of the resolution passed by its Board of Directors. After the Bank filed its objections to the petitioner's application for an interim injunction, the learned District Judge, for the reasons set out in his order dated 4.4.2001, refused the petitioner's application for an interim injunction. The petitioner now seeks leave to appeal against the said order.

In his petition presented to this Court the petitioner has set out three grounds upon which he sought to assail the order of the learned Judge. Those three grounds are,

(1) that the Judge failed to appreciate the legal principles involved in the issue of injunctions ;
(2) the Judge failed to appreciate that the payments made by the petitioner exceed twice the amount of the principal sum loaned and advanced to the petitioner.
(3) The Judge failed to appreciate the impact of section 5 of the Introduction of Law of England Ordinance, (Cap 79 CLE, 1956 Revision)

An examination of the order of the learned Judge clearly shows that the learned Judge has correctly appreciated and properly applied the legal principles relating to the issue of injunctions to the facts of the petitioner's case. There is no merit in the submission that the learned Judge has failed to appreciate the legal principles relevant to the issue of interim injunctions.

Items No. 2 and 3 above are linked and the validity of submission made in No. 2 above would depend on the interpretation one would place on the provisions of section 5 of the Introduction of Law of England Ordinance. Before I proceed to examine the provisions of the said section 5, I wish to make the following observation. In the District Court the petitioner's contention was that in view of the provisions of section 2 of the Money Lending Ordinance, the Bank was not entitled to recover as interest any sum exceeding the principal sum lent. The learned Judge in his order had very clearly analyzed the provisions of section 2 of the Money Lending Ordinance and had demonstrated that section has no relevance to the petitioner's case at all. In this Court the petitioner has jettisoned the submission based on section 2 of the Money Lending Ordinance and has relied on section 5 of the Introduction of law of England Ordinance which spells out a limitation similar to the limitation prescribed in section 4 of the Money Lending Ordinance.

Section 5 of the Introduction of Law of England Ordinance (cap 79, C. L. E. 1956 Revision) enacts that the amount, recoverable on account of interest or arrears of interest shall in no case exceed the principle. The principle embodied in this section has received judicial interpretation as far back as in 1881. In *Sinnathamby Cumaravely and another vs. Muttutamby Sittarapuvalpulle*[1], Carley C. J. referring to this principle said "there is however, nothing to prevent the obligee of a bond from recovering at anytime arrears of interest equal to the principle, *however, much interest he may have previously received.* He cannot indeed recover any interest in arrears exceeding the principal at the time of actions brought ; *but if the interest is paid from time to time. There is no limit to the amount he may receive.* (emphasis added)

By Ordinance No. 22 of 1866, English Law relating to Banks and banking was introduced into Ceylon and in all questions which arise in Ceylon with respect of the law of banks and banking, the law to be administered is the same as would be administered in England in the like case. The expression 'banking' embrace every transaction coming within the legitimate business of a banker. *Tennant vs. Union Bank of Canada*[2]. Maintaining a current account between a bank and a customer and granting a loan or other banking facilities are legitimate businesses relating to banking and accordingly the law applicable is the English Law.

The accounts maintained by the petitioner with the respondent were current accounts. Therefore, the law applicable to the transactions is the English law. According to English Law compound interest is recoverable. In *National Bank of India vs. Stevenson* [3] the question arose whether in Sri Lanka a bank could charge compound interest. It was argued that although it is possible under the English Law, which is also applicable in Ceylon, the operation of that part of English Law stands removed by reason of section 3 (present section 5) of Ordinance No. 5, 1852, (Introduction of Law of England Ordinance) which limits the amount of interest recoverable. This argument was specifically rejected by Pereira J. This decision clearly shows that the limitation placed by section 5 of the Introduction of Law of England Ordinance on the amount recoverable as interest has no application to interest recoverable relating to a banking transaction.

Further, I hold that when the Board of Directors pass a resolution under section 29D of the People's Bank Act No. 29 of 1961 as amended by Act No. 32 of 1986, the Board is not bound by the limitation spelt out in section 5 of the Introduction of Law of England Ordinance. The Board is entitled to pass a resolution to recover the total of the capital sum remaining unpaid together with the agreed interest thereon.

For the reasons set out above I hold that section 5 of the Introduction of Law of England has no application or relevance to the petitioner's case. In view of this finding it is not necessary for me to consider or answer the second submission urged by the petitioner in support of this leave to appeal application.

In the result I hold that there is no merit in this leave to appeal application. I accordingly refuse leave to appeal and dismiss this application with costs in a sum of Rs. 10,000.

Application dismissed

GAMINI
Vs
CHANDRA AND OTHERS

COURT OF APPEAL
AMARATUNGA J.
CALA APP. 35/02,
D. C. MT. LAVANIA 12/92 (SUMMARY)
SEPTEMBER 02, 2003,
NOVEMBER 28, 2003.

Civil Procedure Code - Section 88 (2) - Cap. 53 Summary Procedure on Liquid Claims - Sections 703, 704 & 707 - Decree Nisi - made absolute - Is it a final order ? Order refusing to set aside Decree Absolute - Is it a final order ?

The Defendant failed to appear is Court to obtain leave to appear and defend. Decree Absolute was entered under Section 704 (1). The Defendant made an application to set aside the said Order which was dismissed. The Defendant sought leave to appeal from the said order.

HELD -

(i) Once the decree is entered in an action brought under summary procedure on liquid claims, the action is finally disposed of. As far as the trial court is concerned, the action is at an end.

(ii) Order refusing to set aside the decree is akin to an order under Section 88 (2).
Petitioner cannot come by way of Leave to Appeal. It is a final order.

APPLICATION for Leave to Appeal from an Order of the District Court of Mt. Lavania.

Cases referred to :

1. Ranjith vs Kusumawathie - 1998, 3 Sri LR 233

2. Air Lanka vs Siriwardena - 1984, 1 Sri LR 286

M. R. de Silva for the Petitioner.

Rohan Sahabandu for the Respondent.

cur. adv. vult.

September 29, 2003
GAMINI AMARATUNGA, J

This is an application for leave to appeal. The respondent has raised a preliminary objection that this leave to appeal application is misconceived in law and that the order complained of was a final order against which the proper remedy is a final appeal.

The plaintiffs-respondents instituted action against the defendant under Chapter 53 of the Civil Procedure Code which sets out summary procedure on liquid claims, to recover a sum of Rs. 258,500 due to them on five cheques. After fiscal reported that summons have been served on the defendant, the latter failed to appear in Court to obtain leave to appear and defend. Accordingly, in terms of section 704(1) of Code, the Court entered decree in favour of the plaintiffs.

Once such a decree is entered it is final subject to the power the Court has, under section 707 of the Code, in special circumstances to set aside the decree and to grant leave to appear and defend. The defendant petitioner made an application to court to set aside the decree and after inquiry the learned Judge dismissed the application. The petitioner having filed a notice of appeal against that order has also filed this leave to appeal application.

The respondent's contention is that the said order was a final order against which a final appeal is the remedy and that the petitioner cannot come by way of leave to appeal.

Once the decree is entered in an action brought under summary procedure on liquid claims, the action is finally disposed of. As far as the trial Court is concerned, the action is at an end. The learned counsel for the petitioner in his written submissions has contended that if the defendants application under section 707 of the Code to set aside the decree was allowed, the action would have proceeded and accordingly, the order complained of, i. e. the order refusing to set aside the decree was an interlocutory decree. He has relied on the case of *Ranjith vs. Kusumawathie* [1].

Sometimes, it is difficult to identify with certainty, whether an order is a final order or an interlocutory order. In such situations, the Courts have

adopted two approaches to decide whether a particular order is a final order or an interlocutory order. One test is the order approach - that is to see whether the order made by Court finally determines the matter in litigation. If it does, it is a final order and not an interlocutory order. This approach was adopted in *Air Lanka vs Siriwardana*[2]

The other approach is the application test - that is to consider the nature of the application. If the order made on such application (for whichever side) finally determines the matter such order is final. But if the order, given in one way, will finally dispose of the matter, but if given in the other way will allow the proceedings to continue, such order is not final but interlocutory. This approach was adopted in *Ranjith vs Kusumawathie. (Supra).* The learned Counsel for the petitioner has based his submissions on the application approach, favoured in *Ranjith vs Kusumawathie. (Supra)*

However, in this instance, it is clear that the decree entered by Court is the final step in the application made by way of summary procedure. The fact that the Court has the power to set it aside, and that the defendant-petitioner has made an unsuccessful application under section 707 to invoke the power of Court under that section cannot change the final nature of the decree and its confirmation by the Court's refusal to set it aside. The order complained of, i. e. the order refusing to set aside the decree is akin to an order contemplated under section 88 (2) of the Civil Procedure Code. Accordingly, I hold that the order complained of was a final order against which the remedy is a final appeal. The petitioner cannot come by way of leave to appeal. The preliminary objection is upheld and the application is dismissed with costs in a sum of Rs. 5,000.

Application dismissed Preliminary objection upheld.

ABBAS

VS

ABBAS AND OTHERS

COURT OF APPEAL
IMAM. J
C.A.L.A. 436/2003
D.C. GAMPAHA 42449/MN
FEBRUARY, 24, 2004

Civil Procedure Code - Sections 75(d), 146(1), 184 Admissions - Provisions of Section 75 - are they imperative ? Should Defendant admit or deny averments in Plaint ?-Defendent putting the plaintiff to strict Proof to Avevments Resulting Position ?

Before the commencement of the trial the Plaintiff petitioner took up the position that as the Defendant Respondent had not denied the averments in paragraphs 5-24 of the plaint that the Defendant Respondent must be deemed to have admitted the averments and moved that judgment be entered in plaintiff-petitioners favour. The Trial Court disallowed the application, to record these averments as admissions on leave being sought :

Held :

i) Section 146(2) of the Civil Procedure Code states that if the parties are at variance the Court shall record the Issues, An Admission is recorded when both sides agree to do so. In this case the recording of Admissions and Issues have still not begun, the trial proper had not commenced. The defendants have put the Plaintiff/Petitioner to prove the averments in paragraphs 5-24 of the Plaint. It is manifest that the Defendants do not admit the averments."

APPLICATION for Leave to Appeal from an Order of the District Court of Gampaha.

Cases referred to :

1. *Fernando vs Samarasekera - 49 NLR 285*
2. *Uvais vs Punyawathie - 1993 2 Sri LR 46*
3. *Hassan vs Iqbal - 2001 - 2 Sri LR at 147*

Plaintiff Petitioner in Person.

M.F. Miskin for 1-5th Defendant Respondents

cur. adv. vult.

June 28, 2004
Imam, J.

This is an application for leave to Appeal against the order of the District Judge of Gampaha dated 04.11.2003. The Plaintiff-Petitioner filed action against the Defendant - Respondents on 15.10.1998 for a sum of Rupees One Million Five Hundred Thousand (Rs. 1,500,000) in the District Court of Gampaha by way of damages seeking compensation from the Respondents for the damages caused to his married life, amongst other reliefs claimed in the prayer to the plaint.

At the District Court of Gampaha the Respondents filed answer on 18.01.1999, and the case was fixed for trial on 22.08.2003. When the case was taken up for trial and issues had to be framed, the Petitioner took up the position that as the Respondents had not denied the averments contained in paragraphs 5 to 24 of the plaint, that the Respondents had admitted the aforesaid averments in those paragraphs, The Petitioner sought to record those averments as Admissions, relying on the provisions of Section 75(d) of the Civil Procedure Code. The Petitioner in paragraph (d) of the Written Submissions filed by him in this Court dated 08.03.2004 states that in the District Court ***"It was then agreed that a ruling by the District Court on the said matter be made upon the tendering of Written Submission by both parties."*** The Respondents in their answer dated 18.01.1999 filed at the District Court of Gampaha state that they urge the Petitioner to prove the said averments. The Respondents thus put the burden on the Plaintiff - Petitioner to prove the said averments.

Section 75(d) of the Civil Procedure Code reads thus :-

> ***"A statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the Dependent means to rely for his defence, this statement shall be drawn in duly numbered paragraphs, referring by number, where necessary, to the paragraphs of the plaint."***

Apparently the Respondents in the said answer have not denied the averments in those paragraphs, but have placed the burden of proving them on the plaintiff Petitioner.

The learned District Judge by her order dated 04.11.2003 based on the written submissions filed by both parties held that the averments contained, in paragraph 6 of the answer of the Defendants do not constitute an Admission of the said averments of the plaint; thereby disallowed the application of the Plaintiff, and fixed the case for trial for 03.03.2004.

The Petitioner in his written, submissions tendered to this Court cited *Fernando Vs. Samarasekera*[1] where Basnayake, J held that under Section 75(d) of the Civil Procedure Code when a Defendant does not deny an averment in the Plaint, he must be deemed to have admitted that averment. In that case it was further held that :

"The provisions of Section 75 are imperative and are designed to compel a Defendant to admit or deny the several allegations in the plaint. So that the questions of fact to be decided between the parties may be ascertained by the Court on the day fixed for hearing of the action. A Defendant who disregards the imperative requirements of this Section cannot be allowed to take advantage of his own disobedience of the statute. To permit such a course of conduct would result in a nullification of the scheme of our Code of Civil Procedure."

It was also urged on behalf of the Petitioner that in *Uvais Vs. Punyawathie*[2] that :

"Section 75 not only requires a Defendant to admit as deny the several averments of the plaint, but also to set out in detail, plainly and concisely the matters of fact and law, and the circumstances of the case upon which he means to rely for his defence."

The Petitioner further submits in paragraph (p) of his Written Submissions tendered to this Court that **Section 184** of the Civil Procedure Code states that Court should give judgment upon the **Admissions** or **upon** the **Evidence** etc. The Petitioner further contends that as the aforesaid paragraphs have been admitted by the Defendants, that judgment must be entered in the Petitioner's favour under Section 184, on the basis of the said "Admissions." Counsel for the Respondents in his Written Submissions filed in this Court referred to the judgement of Justice Weerasuriya and Justice Udalagama in *Hassan vs. Iqbal*[3] where their Lordships held that:-

"Though in the English Courts allegations of fact not denied specifically or by necessary implication are taken to be admitted, in the Code there is no such provision and the non denial of an allegation is not taken as an Admission of it."

This related to a case under the Rent Act, and the question in issue was whether the condition of the premises had deteriorated due to the default and neglect of the Defendant - Respondent (Tenant) within the meaning of Section 22(1) (d). Under Section 184 of the Civil Procedure Code court should give judgments upon the Evidence or upon Admissions **And** after the parties have been heard either in person or by their respective Counsel or registered Attorneys. The District Judge of Gampaha made order dated 04.11.2003 only on the preliminary issue, and fixed the case for trial on 03.03.2004. Hence no **Evidence** has been led in this case so far. The answer of the Defendants (P2) commences with a general denial of the averments in the plaint, save and except those specifically accepted. Paragraph 6 of the answer states that the Defendants challenge the Plaintiff to strictly prove the averments mentioned in paragraphs 5 to 24 of the plaint. Authorities cited on behalf of the Plaintiff - Petitioner held that under Section 75(2) of the Civil Procedure Code, the Defendant should admit or deny the averments in the plaint. The Petitioner in his Written Submissions tendered to this Court referred to C.E. Odgers on ***"Pleadings and practice"*** 20th Edition (1971) (Indian Reprint 2000) at pages 134 and 138 and indicated that denial by a Defendant must be specific, and not general. Although the denial by the Defendants are general in paragraph 1 of the answer, the District Judge has not referred to this aspect in her order, However as the Defendants have put the Plaintiff to strictly prove the averments contained in paragraph 5-24 of the plaint, it is manifest that the Defendants do not admit these averments.

In accordance with Section 146(1) of the Civil Procedure Code, the **Court** shall proceed to determine the issues. The section states that :-

> "On the day fixed for the hearing of the action, or on any other day to which the hearing is adjourned, if the parities are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and the Court shall proceed to determine the same."

Section 146(2) of the Civil Procedure Code further states that ***"if the parties are at variance, the Court shall record the issues."*** An

Admission is recorded when both sides agree to do so. In this case the District Judge has fixed trial for 03.03.2004. Moreover as the recording of Admissions and issues have still not begun before the District judge trial proper has still not commenced. I confirm the order of the learned District Judge of Gampaha dated 04.11.2003, and direct the District Judge to proceed with the trial.

For the aforesaid reasons Leave to Appeal to the Plaintiff Petitioner is refused. Costs is fixed at Rs. 5,000.

Application dismissed.

FINANCE & LAND SALES LTD
VS
PERERA

COURT OF APPEAL
AMARATUNGA J
WIMALACHANDRA J
CA APPL. 1397/2003 (REV)
D.C. KALUTARA 4546/L
MAY 21, 2004.

Ex Parte Decree - Application to set aside same - dismissed - Does Revision lie against the Judgment entered Exparte? Judgment palpably wrong - Miscarriage of Justice - actus curiae neminem gravabit - ex debitio -Justitiae to set aside Judgment - Re - trial -in the interest of Justice.

The trial Judge entered Judgment exparte granting all the reliefs prayed for by the Plaintiff including the relief claimed in the alternative. Application to purge default by the Defendant was dismissed by the trial Judge.

The Defendant sought to canvass the validity of the exparte Judgment on its merits in Revision.

Held:

(i) Although an appeal is not available against an Exparte Judgment, it is possible to move in Revision against an exparte Judgment on its merits.

Held further:

(ii) When the Plaintiff claimed relief in the alternative; the trial Judge has given him all the reliefs set out in the prayer to the Plaint. The Judgement shocks the conscience of this court and that is sufficient for this Court to exercise the Courts extra - ordinary revisionary powers. If the Judgment is not set aside, it would cause serious injustice to the Defendant Petitioner amounting to a miscarriage of justice, accordingly he is entitled to ex debito justitiae to have the Judgment set aside.

(ii) When the Judgment is set aside, it is the end to the Plaintiffs case, a fresh action on the same cause of action will be time barred, that would cause prejudice to the Plaintiff Respondent, the Judgment is set aside due to the serious mistake made by Court - Actus curiae neminem gravabit - as this Court has to ensure that the Court's mistake does not result in prejudice to the Plaintiff, a retrial is ordered on the original plaint. The Defendant Petitioner is entitled to appear and file answer and to participate in the new trial.

Application in Revision from the Judgment of the District Court of Kalutara.

1. *Sirimavo Bandaranaike* vs Times of Ceylon Ltd,. - 1995 1 Sri LR 22 at 35

Ranjan Gunaratne for Petitioner.

W. Dayaratne for Respondent.

January 13, 2005

GAMINI AMARATUNGA J.

The facts relating to this revision application are as follows. The plaintiff - respondent (hereinafter called the plaintiff) guaranteed the due payment of lease rentals by one Thilakawardana who has taken a vehicle on lease from the defendant - petitioner, (hereinafter called the defendant). Thilakawardana defaulted to pay the rentals due to the defendant. The plaintiff on learning that the defendant had got deed No. 31 dated 4.7.1995

executed, conveying his land described in the Schedule to that deed in favour of the defendant instituted case No. 4546/L (the present action) against the defendant seeking the following reliefs.

(a) a declaration that deed No. 31 is null and void.

(b) For a declaration that the defendant is holding the property described in the schedule to the plaint in trust for the plaintiff.

(c) In the alternative a decree against the defendant for Rs. 830,000 (being the actual value of the land) on the basis of unjust enrichment and Laesio Enormis.

After summons were served the defendant failed to appear. The trial was taken up ex-parte. The plaintiff gave evidence and closed his case. The learned trial Judge on 29.12.1997 entered judgment in favour of the plaintiff. At the end of the judgment the learned trail Judge has stated "I enter judgment in favour of the plaintiff as prayed for in the plaint." It is obvious that when the trial Judge wrote the above sentence he has overlooked the fact that the plaintiff has claimed relief in the alternative. When a plaintiff has claimed relief in the alternative the trial Judge has to specify the specific relief granted to the plaintiff. As the judgment now stands,

(1) Deed No. 31 is declared null and void.

(2) There is a declaration that the defendant holds the property in trust for the plaintiff.

(3) The plaintiff is entitled to recover Rs. 830,000 from the defendant.

After the ex parte decree was served the defendant appeared and sought to purge its default. The Application to set aside the ex-parte decree was dismissed after inquiry. The defendant has filed this revision application to canvass the validity of the ex-parte judgment on its merits. Although an appeal is not available against an ex-parte judgment, it is possible to move in revision against an ex-parte judgment on its merits. Vide *Sirimavo Bandaranaike* vs. *Times of Ceylon Limited*[1].

Mr. Dayaratna, the learned counsel for the plaintiff took up a preliminary objection in limine to the effect that there are no exceptional circumstances to exercise revisionary powers of this Court in favour of the

defendant petitioner. As I have already pointed out the learned District Judge's Judgement was manifestly wrong. When the plaintiff claimed relief in the alternative, the learned judge has given him all the reliefs set out in the prayer to the plaint. In other words more than what the plaintiff has asked for. The judgment of the trial Judge shocks the conscience of this Court and that is sufficient for this Court to exercise the Court's extraordinary revisionary powers in favour of the defendant - petitioner. If the judgment of the District Court is not set aside, it would cause serious injustice to the defendant - petitioner, amounting to a miscarriage of justice. Accordingly the defendant - petitioner is entitled *ex debito justitiae* to have the judgment of the District Court set aside.

However this Court has to look at the other side of the coin as well. In giving relief to the petitioner, we have to ensure that it would not result in prejudice to the plaintiff respondent. When we set aside the judgment of the District Court, it is the end of the plaintiff's action. A fresh action, on the same cause of action will be time barred. That would cause prejudice to the plaintiff - respondent. The judgment of the District Court is to be set aside due to the serious mistake made by Court. *"Actus curiae neminem gravabit"* (an act of Court shall prejudice no man). Accordingly this Court has to ensure that the Court's mistake does not result in prejudice to the plaintiff.

Section 753 of the Civil Procedure Code states that "The Court of Appeal may,..... upon revision..... pass any judgment or make any order..... as the interests of justice may require". In the exercise of this wide power I make the following order. I allow the revision application and set aside the judgment dated 09.12.1997 and the decree. I order a re-trial and direct the learned District Judge of Kalutara to hold the re-trial on the plaint filed by the plaintiff - respondent in November 1996. The defendant - petitioner is entitled to appear and file answer and to participate in the new trial. However before filing the answer the defendant - petitioner shall pay to the plaintiff - respondent taxed costs of the abortive trial upto the date (18.06.2003) on which the defendant - petitioner's application to purge default was dismissed. In respect of this revision application the parties shall bear their own costs.

WIMALACHANDRA J. — I agree.

Application allowed, Trial de novo ordered.

JAYAWARDENA AND OTHERS
VS
SAMPATH BANK

COURT OF APPEAL
AMARATUNGA J
WIMALACHANDRA J
CALA APPL.416/2003
D.C.COLOMBO 6468/SPL
OCTOBER 22, 2004
NOVEMBER 1, 2004

Recovery of Loans by Banks (Special Provisions) Act 4 of 1990 - Section 15, 15(2), 16(1) - Civil Procedure Code - cap. 24-Parate Execution - Bank purchasing property - application to District Court to obtain possession under Summary Procedure - Decree Nisi made absolute - is it a Interlocutory Order ?

On the Preliminary Objections raised :

Held :

i) Section 16 of the Recovery of Loans by Banks Act does not provide that an appeal direct or with leave is available against an order under Section 16 - Order to obtain delivery of possession of the property purchased at the auction.

ii) A right of appeal must be specifically provided for. In the absence of a specific right of appeal and in the absence of any provision in the Act incorporating the provisions of the civil procedure code, there is no right to make an application for Leave to Appeal.

Quarere

Since Section 16 by reference incorporates Cap. 24 of the civil procedure code - Does a Direct appeal lie?

APPLICATION for Leave to Appeal from an Order of the District Court of Colombo.

Case Referred to :

1. *Martin vs Wijewardena - 1989 - 2 Sri LR 409*

Ikram Mohamed P.C., with *Thisath Wijegunawardena* and *M.C.M. Muneer* for Petitioner.

Palitha Kumarasinghe with H. Wijegunawardena for the Respondent

cur.adv. vult.

July 11, 2005

Gamini Amaratunga J.

This is an application for leave to appeal against an order made by the District Court of Colombo under section 16 of the Recovery of Loans By Banks (Special Provisions) Act No. 4 of 1990. The 1st and 2nd petitioners mortgaged to the respondent Bank, premises No. 87, belonging to the 1st petitioner, as security for a loan obtained by the 3rd petitioner company. When the 3rd petitioner company defaulted to pay the loan, the Board of Directors of the respondent Bank adopted a resolution under and in terms of Act No. 4 of 1990 to sell the mortgaged property by public auction.

At the auction the respondent Bank itself purchased the property. Thereafter in terms of section 15 of Act No. 4 of 1990, a certificate of sale was signed by the Board of Directors of the respondent Bank. In terms of section 15(2) such certificate is conclusive proof with respect to the sale of the property. Thereafter the respondent Bank, under section 16(1) of Act No. 4 of 1990 made an application to the District Court of Colombo to obtain an order for the delivery of possession of the property purchased by it at the auction. This application was made by way of summary procedure under Chapter 24 of the Civil Procedure Code.

The learned District Judge having considered the application issued a decree nisi. After it was served on the petitioners, they appeared and raised certain legal objections and the learned judge having considered the submissions, made the decree nisi absolute. The petitioners now seek leave to appeal.

The learned counsel for the respondent Bank raised a preliminary objection to the effect that there is no right to make a leave to appeal application against an order made under section 16 of Act No. 4 of 1990. The Act No. 4 of 1990 had been passed in order to permit the Banks defined in it to resort to parate execution to recover the loans granted by those Banks. The Act does not contain a provision bringing in the

provisions of the Civil Procedure Code to cater to situations not covered by the provisions of the Act. Section 16 enables a purchaser to apply to the District Court to obtain an order for the delivery of possession. That is the only instance under the Act where recourse to ordinary courts is permissible. Section 16 or any other provision of Act No. 4 of 1990 do not provide that an appeal, direct or with leave, is available against an order made under Section 16. A right of appeal must be specifically provided for. Such a right cannot be implied. *Martin* vs. *Wijewardana* [1]. In the absence of a specific right of appeal given by Act No. 4 of 1990 and in the absence of any provision in Act No. 4 of 1990 incorporating the provisions of the Civil Procedure Code, there is no right to make an application for leave to appeal. Accordingly I uphold the preliminary objection.

One may argue that since section 16 of Act No. 4 of 1990, by reference incorporates chapter 24 of the Civil Procedure Code, a right of appeal is available against an order absolute entered under that chapter. An order absolute entered under section 387 of the Code is a final order. In that event the proper remedy is not an application for leave to appeal but a direct appeal.

For those reasons I hold that the petitioners' leave to appeal application is misconceived in law. I therefore dismiss the application with costs in a sum of Rs. 10000.

WIMALACHANDRA J. — I agree,

Preliminary objection upheld. Application dismissed.

SIRIWARDENA
vs.
FERNANDO AND OTHERS

COURT OF APPEAL
WIMALACHANDRA J.
C. A. L. A. 127/2004
D. C. NEGOMBO 5828/L
JULY 27, 2001

Civil Procedure Code - Section 754(4), 757(1), 767(1) - Leave to appeal - Computation of the 14 day period - Identical to the computation of 14 days for Notice of appeal.

On the preliminary objection raised that, the application is out of time.

Held :

(i) The impugned order was made on 15.03.2004. Leave to appeal application was filed on 01.04.2004. These two days should be excluded. All Sundays namely 21st, and 29th must also be excluded, then the number of days between 15.03.2004 and 01.04.2004 are exactly 14 days - Section 757(1).

(ii) Computation of time under Section 754(4) for Notice of Appeal - is identical to the computation of 14 days under Section 757(1).

Cases referred to :

1. *Charlet Nona* vs. *Babun Singho* - 2000 - 3 Sri LR 149(SC)
2. *Selenchina* vs. *Mohamed Marikkar and others* - 2000 3 Sri LR 100 (SC)

S. F. A. Cooray for Defendant Petitioners

Lakshman Perera for Plaintiff Respondent

December 14, 2004
WIMALACHANDRA J.

This is an application for leave to appeal from the orders (altogether six orders) made by the District Judge of Negombo on 15.03.2004.

When the matter was taken up for inquiry before this Court the learned Counsel for the plaintiff-respondent raised a preliminary objection that the defendant-petitioner has not filed the notice of appeal within a period of 14 days from the date when the order appealed from was pronounced, as specified in Section 767(1) of the Civil Procedure Code. Section 757(1) provides that an application for leave to appeal shall be presented to the Court of Appeal with a period of 14 days from the date when the order appealed against was pronounced, exclusive of the day of that date itself and the day on which the petition is presented and of Sundays and public holidays.

Therefore it is very clear that in terms of Section 757(1) of the Civil Procedure Code the date of filing the notice of appeal and the date on which the order appealed against is pronounced, should be excluded in the computation of the 14 day period.

In the instant case the date on which the impugned orders were pronounced by the District Judge was 15.03.2004. The leave to appeal application was filed on 01.04. 2004. According to Section 757(1) these two days must be excluded. All Sundays namely, the 21st and 29th must also be excluded. Then the number of days between 15.03.2004 and 01.04.2004 are exactly 14 days, which is within the stipulated period in terms of Section 757(1). It is to be noted that the computation of 14 days under Section 757(1) is identical to the Computation of 14 days under Section 754(4), which is in respect of notice of appeal against a judgment.

In the Supreme Court case of *Charlet Nona* vs. *Babun Singho* [1] Dheeraratne, J. considered a similar application with regard to the computation of time made under Section 754(4) of the Civil Procedure Code in respect of a notice of appeal against a judgment. His Lordship observed:

> "In terms of sub-section 754(4) of the Civil Procedure Code, the notice of appeal shall be presented to the court of the first instance within a period of 14 days from the date when the order appealed from was pronounced, exclusive of that day itself and of the day when the petition is presented, and Sundays and Public Holidays.
>
> In this case the judgment was pronounced by the District Court on 7th May, 1986. The 11th, 18th and 25th were Sundays, the 22nd, 23rd

and 24th were Public Holidays according to the official calendar of 1986. The notice of appeal was filed on 28th which day too has to be excluded from the computation of 14 days in terms of the CPC. Therefore the notice of appeal was in fact filed within the stipulated 14 days."

This position was affirmed by the Supreme Court in the Case of *Selenchina* vs. *Mohamed Marikkar and others*[2]. In this case as well the Supreme Court considered the computation of time under section 754(4) of the Civil Procedure Code which provides that the notice of appeal shall be presented to the Court of first instance within a period of 14 days from the date when the decree or order appealed against is pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and Public Holidays. This provision is identical to Section 757(1) of the Civil Procedure Code, which stipulates the procedure in respect of an application for leave to appeal in terms of Section 757(1). His Lordship, the Chief Justice S. N. Silva J. made the following observations at page 101, with regard to the computation of time under Section 754(4) of the Civil Procedure Code.

"In terms of the section, the days set out below have to be excluded in computing the period of 14 days in which the notice should be presented.

1. The day the judgment from which the appeal is taken is pronounced;
2. Intervening Sundays and public holidays;
3. The day the notice of appeal is presented to the Court.

In this case the notice of appeal was presented on 20.10.1986. If that day is excluded, the period of 14 days excluding the date of judgment pronounced (i.e. 30.09.1986) and intervening Sundays and Public holidays would end on 17.10.86 which was a public holiday. The next day on which the notice should have been presented was the 18th, being a Saturday, on which the office of the Court was closed. The next day, the 19th was a Sunday which too had to be excluded in terms of the section. In the circumstances, the notice filed on 20.10.1986 was within the period of 14 days as provided for in Section 754(4) of the Civil Procedure Code.".

In the circumstances the preliminary objection raised by the plaintiff-respondent that the application for leave to appeal is out of time has no merit.

For the reasons stated above it is my considered view that the notice of appeal was filed within the stipulated period of 14 days in terms of Section 757(1) of the Civil Procedure Code. That is, the said application was filed within 14 days excluding the date of the order, date of filing and intervening Sundays and Public Holidays. Accordingly the preliminary objection raised by the plaintiff-respondent is overruled with costs fixed at Rs. 2,500.

Preliminary Objection over-ruled

SIRIWARDENA AND OTHERS
vs.
JOHN KEELS CO. LIMITED

COURT OF APPEAL
AMARATUNGA J.
CALA APPL. 376/2002
D. C. RATNAPURA 15457/M
MARCH 5, 2003

Civil Procedure Code - Section 27, 247 - Proxy defective? - is the Plaint bad in law? - Could the defect on the proxy be cured? Is the time limit set out in Section 247 a positive legal bar?

When the Plaintiff - Respondent seized the land in question on the decree entered against the 1st Defendant, the 3rd and 4th Defendants successfully preferred their claims to the land in question on the basis that they were the lawful owners. Thereafter the Plaintiff instituted action against all 4 Defendants to obtain a declaration that the transfer deeds are null and void and to obtain a declaration that the said property is liable to be seized in execution of the decree issued by Court.

The Plaint was signed by one "S" Attorney at Law. The proxy contained the names of one "A" "S" one "J" and one "T". The Defendant in their answer objected to the validity of the Plaint on two grounds

(1) that since the four Attorneys are not practising in partnership and/or that the other three Attorneys are not the Assistants of 'A", the Plaintiff cannot present a plaint in the names of all four of them and
(2) the plaint has been signed by an Attorney at Law other than the Attorney to whom the proxy has been given.

The trial Judge over ruled the objection.

Held:

(1) It is a fact that the Plaint has been signed by an Attorney at Law one of the Attorneys named in the proxy. Thus it has been signed by an Attorney on record; further the Plaintiff had sought to revoke the proxy given to Attorney at Law 'A' and has filed a fresh proxy in the name of "S" and some others. This is an indication that "S" had authority of the Plaintiff to act on his behalf.
(2) If the Proctor had infact the authority of his client to do what was done on his behalf, although in pursuance of a defective appointment and if in fact his client had his authority to do so, then the defect is one which in the absence of any positive legal bar could be cured.
(3) As regards the time frame set out in Section 247, as the Plaint had been signed by an Attorney at Law whose name appears in the defective proxy(s), this defect is curable. It appears that the Attorney at Law "S" who had signed the plaint had the Plaintiff's authority to act for him. Thus the time limit set out in Section 247 is not a positive legal bar preventing the Plaintiff from curing the defect in the proxy.

APPLICATION for leave to appeal from an Order of the Ddistrict Court of Ratnapura.

Cases referred to :

1. *Treaby* vs. *Bawa* - 7 NLR 22
2. *Tilakaratne* vs. *Wijesinghe* - 11 NLR 270
3. *Kadiragama Das* vs. *Suppiah* - 56 NLR 172
4. *Dias* vs. *Karavita* - 1999 1 Sri LR 98
5. *Udeshi* vs. *Mather* - 1988 1 Sri LR 12
6. *Paul Coir (Pvt.) Ltd.* vs. *ECJ Vaas* - 2002 1 Sri LR 13

Navin Marapana for Petitioners

Hugo Anthony for Respondent

Cur. adv. vault.

May 22, 2003

GAMINI AMARATUNGA J.

This is an application for leave to appeal against the order of the learned District Judge of Ratnapura rejecting an objection raised on behalf of the defendant-petitioners that there was no proper plaint before Court for the plaintiff-respondent to proceed with the action it has filed against the defendants.

The facts relevant to the objection are as follows. The 1st defendant has obtained monetary assistance from the plaintiff to run his tea factory at Karanketiya. On a cause of action which has arisen on the said money transactions; the plaintiff has filed case No. 3611/M in the District Court of Colombo against the 1st defendant. The 1st defendant by deed No. 2609 of 1986 has transferred his property described in the schedule to the plaint filed in the present action to his two sons, the 2nd and 3rd defendants. Both of them have in turn transferred the said property by deed 3143 of 1989 to the 4th defendant and the latter has by deed 4048 of 1994 has entered into a planting agreement with the 3rd defendant. When the plaintiff seized the land in question on the decree entered against the 1st defendant by the District Court of Colombo, the 3rd and 4th defendants have successfully preferred their claims to the land in question on the basis that they were the lawful owners of the said property. The present action has been filed against all four defendants to obtain declarations that all transactions relating to the transfer of the relevant land have been carried our fraudulently with a view to prevent the plaintiff from seizing the said land in execution of the decree obtained by him in the District Court action instituted in Colombo against the 1st defendant; to obtain a declaration that the said deeds are null and void and to obtain a declaration that the said property is liable to be seized in execution of the decree issued by the District Court of Colombo.

The plaint in the present action has been filed in the District Court of Ratnapura on 29/07/1999. The plaint has been signed by K. Sivaskandarajah, Attorney-at-Law. The proxy filed contained four names as registered attorneys for the plaintiff, namely B. L. Abeyratna, K. Sivakandarajah, Ms. C. N. Jaysuriya and Mrs. N. W. Thambiah. It is not stated in the proxy that B. L. Abeyratna and the other Attorneys-at-Law are practicing in partnership or that they are the assistants of Mr. B. L. Abeyratna.

In the answer of the defendants filed on 10.12.1999 objection has been taken to the validity of the plaint on two grounds. The first ground is that since the four Attorneys named in the proxy are not practicing in partnership and/or that the other three Attorneys are not the assistants of Attorney B.L. Abeyratna, the plaintiff cannot present a plaint in the names of all four of them. The other objection is that since the plaint has been signed by an Attorney-at-law other than the Attorney to whom the proxy has been given the action is not maintainable on that proxy. Despite this objection the replication dated 09/06/2000 has been signed by Attorney B. L. Abeyratna. Thereafter on 25/02/2002 the same objection to the plaint set out above was raised before the learned District Judge and thereupon the parties were directed to file written submissions.

After considering the written submissions the learned District Judge has made order overruling the objection on the basis that the defect in the proxy can be cured. The submission of the learned Counsel for the petitioner is that the learned District Judge has failed to appreciate that the objection was not regarding the defect in the proxy but the objection was that there was no proper plaint before Court as it has not been signed by the Attorney-at-Law to whom the proxy has been given. But this distinction is only a matter of terminology. The alleged defect in the plaint is directly connected to the defective proxy. The argument proceeds as follows. The proxy given to four Attorneys-at-law not practicing in partnership or in the capacity of the principal Attorney-at-Law and his assistants is bad in law. The plaint signed by an Attorney-at-law named in the proxy other than the Attorney -at-law named first in the proxy is therefore bad in law.

It is a fact that the plaint has been signed by Attorney-at-law K. Sivaskandarajah one of the Attorneys named in the proxy. Thus it has been signed by an Attorney on record. However, the proxy is defective for the reason that it is in favour of four Attorneys-at-law. Therefore the real objection flows from the defect in the proxy and if that defect is cured the objection cannot be maintained.

There are instances where proxies which did not carry the name of the Attorney-at-law or the signature of the party were allowed to be rectified. In *Treaby* vs. *Bawa* [1] it has been held that the omissions to insert the name of the Attorney in the proxy is curable. This case has been considered by the learned District Judge. In *Thilakaratna* vs. *Wijesinghe* [2] the plaintiff has failed to sign the proxy and it has been held that this omission was curable.

It appears from paragraph 17 of the written submissions filed on behalf of the defendants in the District Court that the plaintiff has sought to revoke the proxy given to Attorney B. L. Abeyratna and has filed a fresh proxy in the name of K. Sivaskandraja and some others. This is an indication that Mr. Sivaskandaraja had authority of the plaintiff to act on his behalf. It has been held that the provisions of section 27 of the Civil Procedure Code are not mandatory but only directory. *Thilakaratna* vs. *Wijesinghe (Supra)*; *Kadirgama Das vs. Suppiah* [3] and *Dias vs. Karavita* [4] . In *Udeshi vs. Mather* [5] Athukorale J has stated that in considering whether a party should be allowed to cure a defect in the proxy, the question to be considered is whether "the proctor had in fact the authority of his client to do what was done on his behalf although in pursuance of a defective appointment. If in fact his client had his authority to do so, then the defect is one which, in the absence of any positive legal bar could be cured."(page 21) See also *Paul Coir Pvt. Ltd., vs. E. C. J. Vass* [6]

In this case there is no positive legal bar preventing the Court from allowing the plaintiff to cure the defect in the proxy. In the written submissions filed in the District Court on behalf of the defendants it is stated that since the action has been instituted in terms of section 247 of the Civil Procedure Code there is a time frame set out in the section. This submission seems to suggest that if the plaintiff is allowed to rectify the defect in his proxy, it has the effect of regularizing the defect in the plaint resulting in defeating the time bar.

However in this case, as I have already pointed out the plaint had been signed by an Attorney- at-Law whose name appears in the defective proxy. The defect in the proxy is curable. It appears that the Attorney-at-law who had signed the plaint had the plaintiff's authority to act for him. In these circumstances it is my view that the time limit set out in section 247 is not a positive legal bar preventing the plaintiff from curing the defect in the proxy. The learned District Judge has correctly identified the real basis of the defendant's objection and has made his order according to law.

The defendants have cited number of cases where it had been held that when there is a registered Attorney on record a party cannot himself perform the acts to be performed by the Attorney. Those cases have no relevance to the present issue as they deal with a completely different question. There is no merit in this application and accordingly leave to appeal is refused and the application is dismissed with costs fixed at Rs. 10,000.

Application dismissed

7-CM 6553

EKANAYAKE AND OTHERS
vs
PEOPLES BANK

COURT OF APPEAL
WIJAYARATNE, J.
SRISKANDARAJAH J.
C. A./WRIT/APP. NO. 1655/2002 (WRIT)
JULY 23, 2004

Peoples Bank Act 29 of 1961 - amended by Act 32 of 1986 - Sections 5, 29D, 29M - Quantum recoverable challenged - Does the error on the calculation of quantum affect the jurisdiction of the Bank to act under Section 29D?

The Respondent Bank sought to parate execute the property mortgaged. The Petitioner disputed the quantum recoverable and sought to quash the Resolution of the Bank to auction the property mortgaged on that ground.

HELD:

(i) The facts disputed are on the quantum recoverable. The error on the calculation of quantum will not affect the jurisdiction of the Bank to act under Section 29D.

per Sriskandaraja, J.,

> "The calculation of the sum recoverable by the Respondent Bank from the Petitioners is a matter of fact. In these proceedings the Court cannot ascertain the correctness of the sum recoverable from the Petitioners without evidence."

ii. Under Section 29M the Respondent Bank is only entitled to recover the sums of money that is legally due and should return to the petitioners the balance of the proceeds of Sale.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *R vs Fulham etc., Rent Tribunal exp. Zerek - 1951 2 KB 1*
2. *R vs Home Secretary exp. Zamir - 1980 AC 930 at 949*

G. I. T. Alagaratnam with *M. Adamaly* for Petitioners.
Ronald Perera with *Chandimal Mendis* for the Respondent.

March 28, 2005.
SRISKANDARAJAH J.

The 1st Petitioner is the owner of the land that was mortgaged to the Respondent bank, the 2nd Petitioner is the wife of the 1st Petitioner. The 3rd Petitioner is the mother of the 1st Petitioner who has a life interest in the property owned by the 1st Petitioner that was mortgaged to the Respondent bank. The Petitioners by this application are seeking a Writ of Certiorari to quash the resolution of the Board of Directors of the Respondent bank dated 29.11.2001 marked 24B to auction the property belonging to the 1st Petitioner under the powers of Parate Execution, for the recovery of a sum of Rs. 2,437,000 and interest thereon. This decision was communicated to the 1st Respondent by letter dated 20.12.2001 marked P24A. The 1st Petitioner in his affidavit attached to the petition admitted that as indicated in the said letter dated 20.12.2002 he along with one Mr. Bandara has met the Assistant General Manager of the Kurunegala branch of the Respondent bank and had discussed the matter with him in the presence of the Regional Manager and the Assistant Regional Manager. At this discussion, the 1st Petitioner admitted that he had informed them that he was prepared to pay the sum of Rs. 1.5 Million as full and final settlement. The 1st Petitioner stated that ignoring this offer the Respondent bank has published the resolution passed by the Board of Directors to auction the property which belongs to the petitioners in the Government Gazette dated 31.5.2002.

The Petitioner further submitted that the alleged loan of Rupees. 1.65 million sought to be recovered by the Respondent bank was never given to the petitioners and was a mere book adjustment by the Respondent bank for its own convenience. The Petitioners further submitted that the records and, correspondence of the Respondent bank established glaring contradictions in the sums claimed to be due and owing form the petitioner thus establishing the Petitioners' claim that there has been some misappropriation by the Respondent in respect of his account. The Petitioner's position is that the sum claimed in any event is not due in as much as the auditors of the Respondent bank themselves has confirmed that the outstanding debit balance in the 1st and 2nd Petitioners current account and loan account as being only Rs. 767,048.60 on 31.12.2000. The Petitioners also submitted that the Respondent bank is clearly guilty

at the very least for commercial unreasonableness in purporting to compound interest with capital.

The Respondents position is that the 1st and 2nd Petitioners maintained current account No. 4069 at the Kuliyapitiya branch of the Respondent bank since 24.2.1998. The Petitioners requested a loan facility amounting to Rs. 1,650,000. This is borne out by documents marked R2, R2(a), R2(b), R4, R5 and R5(a). The Respondents further submitted that these loan facilities were granted in two stages and separate mortgage bonds were executed with regard to the same facility. The 3rd Petitioner has signed all the said mortgage bonds as the life interest holder of the said property. The Respondents submitted that the Petitioners have admitted that they have received the facilities and that they have failed and neglected to pay the said amounts granted by the Respondent bank. The Petitioners were granted several opportunities to repay the said facilities and since they continually failed and neglected to repay the said amount, the Board of Directors of the Respondent Bank passed the resolution dated 29.11.2001 to auction the property by Parate Execution. The Respondent also took up the position that the decision of the Board of Directors to sell the property of the Petitioners by Parate Execution is not amenable to Writ Jurisdiction.

It is an admitted fact that the petitioners mortgaged the properties that are mentioned in the resolution marked as P24B to the Respondent bank. The Respondent is a statutory body incorporated as a Bank by the People's Bank Act No. 29 of 1961. The powers and functions of the Respondent Bank are stipulated in Section 5 of the said Act. This section enables the Respondent to inter alia carry out commercial banking activities. By the People's Bank Amendment Act No. 32 of 1986 the Respondent Bank was empowered with the right of Parate Execution of mortgaged property, to facilitate the recovery of moneys in default in circumstances where loans/ overdrafts are secured against the mortgage of property.

Section 29D provides ;

"Subject to the provisions of section 29E, the Board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any immovable or movable property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such

loan, and the interest due thereon up to the date of the sale together with the moneys and costs recoverable under Section 29L....."

Under the above provision, the Respondent bank is legally entitled to pass a resolution to sell a property that was mortgaged to the bank as security to recover the unpaid portion of the loan.

It is an admitted fact that the Petitioner obtained an over draft facility of Rs. 750,000 secured by mortgage bond No. 7082 marked P3, a loan facility of Rs. 900,000 secured by a mortgage bond No. 7190 marked P4, an overdraft facility of Rs. 500,000 secured by mortgage bond 8180 marked P 7 and overdraft facility of Rs. 60,000 secured by mortgage bond No. 950 marked P9. The dispute between the Petitioners and the Respondent is in the quantum of the sum of money due to the bank that was secured by these mortgage bonds. Even though the Petitioner took up the position that the alleged loan of Rs. 1,650,000 sought to be recovered by the Respondent bank was never given to the Petitioner and was a mere book adjustment by the Responded bank for its own convenience.

The Petitioner admitted that the auditors of the Respondent bank confirmed an outstanding debit balance in the 1st and 2nd Petitioner's current account and the loan account as being Rs. 767,048.60 on 31.12.2000. The Petitioner has also informed the Respondents as borne out in the affidavit of the 1st Petitioner that they are prepared to pay a sum of Rs. 1.5 million as full and final settlement. The Respondents submits that as the Petitioners have failed and neglected to make payments as undertaken by them in the loan agreement, the said facilities were transferred as past dues, penal interest was calculated and resolution was passed to recover the total sum due from the petitioners.

The facts disputed in this case are on the quantum recoverable. The error on the calculation of quantum will not affect the jurisdiction of the bank to act under Section 29D of the People's Bank Amendment Act. As there is material to show that the property of the Petitioner was mortgaged to the Respondent bank as security for loan and default has been made by the petitioner to settle the loan the Respondent Bank is empowered to recourse to Parate Execution under Section 29D.

The calculation of the sum recoverable by the Respondent Bank from the Petitioners is a matter of fact. In these proceedings, the Court cannot

ascertain the correctness of the sum recoverable from the Petitioners with out evidence.

Administrative Law by H. W. R. Wade and C. E. Forsyth, (Ninth Edition at page 260) the authors states as follows :

> "Although the contrast between questions which do and do not go to jurisdiction was in principle clear-cut, it was softened by the court's unwillingness to enter upon disputed questions of fact in proceedings for judicial review. Evidence of facts is normally given on affidavit : and although the rules of court made provision for cross examination, interrogatories, and discovery of documents, and for the trial of issues of fact, the court did not often order them. The procedure was well adapted for trying disputed facts. If the inferior tribunal had it self tried them, 'the court will not interfere except upon very strong grounds. There has to be a clear excess of jurisdiction' with out the trial of disputed facts de novo. The questions of law and questions of facts were therefore to be distinguished, as was explained by Devilin J. (*R. v Fulham etc. Rent Tribunal exp. Zerek*[1].

Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. But where the dispute turns to a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere.

Lord Wilberforce (R v Home Secretary exp Zamir[(2)] similarly described the position of the court, which hears applications for judicial review :

> It considers the case on affidavit evidence, as to which cross-examination, though allowable does not take place in practice. It is, as this case will exemplify, not in a position to find out the truth between conflicting statements.

In case of conflict of evidence, the court will not interfere in the decision, where there is evidence to justify a reasonable tribunal reaching the same conclusion."

In any event under Section 29M of the People's Bank (Amendment) Act the Respondent bank is only entitled to recover the sums of money that is legally due to the respondent and should return to the Petitioners the balance of the proceeds of the sale. The dispute is in relation to the quantum of the sum recoverable from the Respondents on the mortgage

bonds executed and as this is a question of fact this Court is not inclined to interfere with the decision of the Board of Directors of the Respondent Bank. Therefore this application is dismissed without costs.

WIJAYARATNE, J.- I agree.

Application dismissed.

SELVAMANI
VS
DR. KUMARAVELUPILLAI AND OTHERS

COURT OF APPEAL
SRIPAVAN. J.
SISIRA DE ABREW J.
C. A. APPL. NO. 45/2004 (WRIT)
FEBRUARY 10, 2005

Writ of Certiorari/Mandamus to quash decision to demote and compel authority to restore to the earlier post-Is a writ of Certiorari available as a matter of right?- Has the Court discretion? - will a writ of Mandamus be granted when it appears that it would be futile ?

The Petitioner was requested to hand over the keys of the Projector Room to the Authorities before he went on leave. The Petitioner did not hand over same, The authorities conducted a disciplinary inquiry against the Petitioner for not handing over the keys when he went on leave. After the Inquiry, the Petitioner was demoted and transferred.
The Petitioner contends that he has been severely punished without any charges being framed-thus violating the provisions of the Establishment Code.

\HELD-

(i) It is an undisputed fact that the Petitioner did not hand over the keys to the Authorities when he went on Leave.

The Disciplinary Inquiry and the demotion of the Petitioner arose as a result of the said conduct.

It is not the practice of this Court to exercise the jurisdiction now invoked, to relieve the Petitioner of the Consequences of his own folly, negligence and laches.

Per Sisira de Abrew J.

> "A person who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct, delay, laches, waiver submission to jurisdiction are all valid impediments, which stand against the grant of relief.

The Petitioner has been sent on vacation of post after the Order of demotion. This order has not been challenged by him.

HELD further :

(i) Even if this application of the Petitioner is granted, he is not entitled to resume his earlier office in view of the Order of vacation of post. Therefore issuing a writ of Mandamus would be futile. A writ of Mandamus will not be issued if it will be futile to do so and no purpose will be served.

Application for Writs in the nature of Certiorari/Mandamus.

Cases referred to :

1. *Gunawardena* vs Sugathadasa - CA 1315/9 - CAM 29.11.1991
2. *Jayaweera* vs *Assitant Commissioner of Agrarian Services* - 1996 2 Sri LR 70.
3. *Sethu Ramasamy* vs *Moregoda* - 63 NLR 115
4. *Samsudeen* vs *Minister of Defence and External Affairs* 63 NLR 430
5. *Gunasinghe* vs *Mayor of Colombo* - 46NLR 85
6. *Eksath Engineru Saha Samanya Kamkaru Samithiya* vs *S. L. S. de Silva* 73NLR 260

Srinath Perera for Petitioner

Ms. M. N. B. Fernando S. S. C. for Respondents

cur.adv.vult.

March 14, 2005

SISIRA DE ABREW J.

This is an application for writs of certiorari and mandamus to quash the decision of the first respondent demoting the petitioner and to compel the first respondent to restore the petitioner to his earlier post of Project Operator respectively.

The petitioner was appointed as a sanitary labourer of the Health Department with effect from 01.08.1985 and was promoted to the post of Project Operator with effect from 01.10.2001 by a letter dated 29.09.2001. issued by the first respondent. The petitioner who was attached to the 3rd respondent's office, applied for leave for 05 days from 13.07.2003 and his leave was approved. However, he could not report for duty on the due date as he fell ill and reported for duty only on 28.07.2003. The petitioner was in possession of the keys of the projector room in which the Audio- Visual equipment of the 3rd respondent was installed. Before the petitioner went on leave, the 3rd respondent requested the petitioner to hand over the keys of the projector room to the Administrative Officer, but the petitioner did not hand over the same as the 3rd respondent did not give the said order in writing. The petitioner, in his petition, claims that he requested the 3rd respondent to give the order in writing.

The petitioner states that on 01.08.2003 the 2nd respondent conducted a disciplinary inquiry against the petitioner for not handing over the keys of the said room when he went on leave. The statement of the petitioner was recorded and he signed the said statement. The petitioner alleges that after the said inquiry, the first respondent, by his letter dated 11.09.2003 (P4A), informed the petitioner that he has been demoted to the earlier post of Sanitary Labourer and was transferred to the District Hospital, Cheddikulam, The Petitioner was also asked to pay certain expenses incurred by the 3rd respondent's office as the respondents had to hire an audio-visual equipment during his absence.

The learned Counsel for the petitioner contends that he has been severely punished without any charges being framed and as such respondents have violated the provisions of the Establishments Code.

It is an undisputed fact that the petitioner did not hand over the keys of the projector room to the Administrative Officer when he went on leave for 05 days. It appears from the objections of the respondents that Audio-visual equipment and the public address system were installed in the projector room and no duplicate keys were available to this room. During

the period that the petitioner requested for leave, the access to the projector room became essential as the respondents were getting ready to launch certain programs. The respondents and the other member of the office did not have access to the projector room during the said period as a result of the above-mentioned conduct of the petitioner. In view of the above facts it appears that access to this room was essential in order to maintain smooth functioning of the office of the respondents where the petitioner was employed as a project operator. Hence it becomes the duty of the petitioner to hand over the keys of the said room when he goes on leave. It is not necessary for the 3rd respondent to make an order in writing directing the petitioner to hand over the keys to the Administrative Officer when the petitioner applies for leave.

The petitioner's leave for the period commencing form 14.07.2003 to 21.07.2003 was approved but on 22.07.2003 the petitioner did not report for duty instead, he sent a letter stating the he was unable to report for duty as he was not well. He reported for duty only on 28.07.2003. The petitioner has stated in his counter affidavit that he submitted a medical certificate to the 3rd respondent's office for the period commencing from 21.07.2003 to 27.07.2003. But the respondents have stated in their objections that the petitioner did not submit a medical certificate for this period. No. evidence whatsoever was placed before this court to establish that a medical certificate was, in fact, submitted. It is observed that even on 22.07.2003 the petitioner failed to hand over the keys of the projector room to the 3rd respondent. He did not even indicate his willingness to send said keys to the respondent's office when he informed the 3rd respondent by 3R2 his inability to report for duty.

In view of the aforesaid conduct of the petitioner, failure to hand over the keys of the projector room becomes relevant in this case. The disciplinary inquiry and the demotion of the petitioner arose as a result of the said conduct. In view of the above facts it appears that the petitioner's demotion in P4A has arisen as a result of his own folly and negligence. In my view, the petitioner has come to this Court seeking redress for his own folly. H. W. Senanayake J in *Gunawardena* Vs *Sugathadasa*[1] observed that "It is not the practice of this Court to exercise the jurisdiction now invoked, to relieve the petitioner of the consequence of his own folly, negligence and laches. In the case of *Jayaweera* Vs. *Assistant Commission of Agrarian* Services [2] Jayasuriya J. remarked that " A petitioner who is seeking

relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction - are all valid impediments which stand against the grant of relief". Applying these principles, I hold that a writ of certiorari will not lie to relieve the petitioner of the consequences of his own folly, negligence and laches.

For the above reasons I hold that this Court is not disposed to grant the relief claimed by the petitioner to quash the decision in P4A by way of a writ to certiorari.

The petitioner has now vacated post. This is evident from letter dated 25.08.2004 (3R9A). The petitioner has been sent on vacation of post after the decision in P4A. At the hearing of this application the learned Counsel for the petitioner admitted that no application for writ of certiorari has been filed to quash the said order whereby the petitioner was sent on vacation of post.

The petitioner by this application also moves for a writ of mandamus on the first respondent directing that the petitioner be restored to his earlier position i. e. to the post of Project Operator. Even if this application of the petitioner is granted, he is not entitled to resume his earlier office in view of the order of vacation of post (3R9A). Therefore, issuing a writ of mandamus in this case would be futile. In the case of *Sethu Ramasamy* Vs. *Moregoda*[3] Gunasekara J. Observed that "A mandamus will not be granted when it appears that it would be futile". In the case of *Samsudeen* Vs *Minister of Defence and External Affairs*[4] L. B. de Silva J too remarked that " A writ of mandamus will not be issued if it will be futile to do so and no purpose will be served". In the case of *Gunasinghe* Vs. *Mayor of Colombo* [5] De Kretser J. stated that "A mandamus will not be issued when it appears that it would be futile in its result". In the case of *Eksath Engineru Saha Samanya Kamkaru Samithiya Vs. S. C. S. de Silva* [6] mandamus was sought to compel three respondents, the members of an Industrial Court, to function as an Industrial Court. By the time the application was heard by the Court all three members had ceased to hold office as members of the Court. The writ was refused because parties obviously cannot be ordered to do what they are not qualified to do and are therefore unable to do.

Applying the legal principles stated in the aforesaid decisions, I hold that the mandamus will not be granted when it appears that it would be futile.

I have already pointed out that issuing a mandamus would be futile in this case. The application of the petitioner for writ of mandamus should fail on this ground alone.

The learned counsel for the petitioner argued that the punishments imposed on the petitioner was invalid in law as the respondents had failed to frame charges against the petitioner. I have earlier pointed out that it would be futile to issue a writ of mandamus in this case and the petitioner is not entitled for a writ of certiorari. Therefore, failure to frame a charge against the petitioner does not arise for consideration.

For the above reasons I dismiss the petition of the petitioner. There will be no costs.

SRIPAVAN J.—I agree

Application dismissed.

RAZIK

vs

L. B. FINANCE LTD

COURT OF APPEAL
SOMAWANSA, J. (P/CA)
BASNAYAKE J.
C. A. NO. 293/04
D.C. COLOMBO 7871/MHP
D. C. GAMPOLA/CLAIM/25
DECEMBER 17, 2004

Civil Procedure Code-Sections 87 (3), 218 S241, 343, 344 Inquiry - Is the Judgement Debtor entitled to prefer a claim to the property seized in terms of Section 241 of the Code ?

HELD:

(i) Judgement debtor is not a person who is entitled to prefer a claim to the property seized under Section 241.
(ii) Section 241 sets out the procedure for a third party to prefer a claim to the property and for the Court to investigate such claim. The Judgement debtor is not a person contemplated by Section 241.

Application for Leave to Appeal from an order of the District Court of Gampaha.

Case referred to :

1. *Ghouse* vs *Mercantile Credit* Ltd., 1997, 2 Sri LR 127

Dushan de Alwis for Plaintiff -Respondent Respondent.
Riza Muzni for Defendant Petitioner Petitioner.

cur. adv. vult.

March 17, 2005
Eric Basnayake, J.

The plaintiff-respondent-respondent (plaintiff) instituted case No. 7871/ MHP in the District Court of Colombo against the defendant-petitioner-petitioner (defendant) and two others to recover a certain sum of money. The said case was concluded *exparte* and a writ of execution was issued. In executing the writ the Fiscal of the District Court, Gampola seized the saw mill and accessories belonging to the defendant. The defendant preferred a claim before the District Court of Gampola in terms of Section 241 of the Civil Procedure Code. On 25.2.2004, the day that this case was fixed for inquiry the defendant was absent and unrepresented. Hence, his application was dismissed. On 8.3.2004 the defendant field a petition together with an affidavit and moved court to vacate the order of dismissal in terms of section 87 (3) of the C. P. C. The plaintiff objected to this application.

After inquiry the learned District Judge Gampola dismissed the application of the defendant. The defendant is now moving to have the order of the learned District Judge set aside. He is also seeking leave to appeal at the first instance. When this case was taken up for inquiry for support on the granting of leave, the learned counsel for both parties agreed to file written submissions.

Section 241 of the Civil Procedure code is as follows :-

S. 241. **In the event of any claim being preferred to, or objection offered against the seizure or sale of, any immovable or movable property which may have being seized in execution of a decree or under any order passed before decree, as not liable to be sold, the Fiscal or Deputy Fiscal shall, as soon as the same is preferred or offered, as the case may be, report the same to the court which passed such decree or order ; and the court shall thereupon proceed in a summery manner to investigate such or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he were a party to the action :**

In *Ghouse* Vs. *Mercantile Credit Limited*[1] the question to be decided was whether a judgment debtor was entitled to prefer a claim to the property seized in terms of section 241 of the C. P. C. His Lordship the Chief Justice G. P. S. De Silva held that the judgement debtor is not a person who is entitled to prefer a claim to the property seized under the provisions of section 241 of the C. P. C. and consequently the District Court had no jurisdiction to hold an inquiry. His Lordship held it is the District Court that passed the decree which has jurisdiction in terms of sections 343 and 344 of the C. P. C.

In terms of section 218 of the Civil Procedure Code the judgement creditor "has the power to seize, and to sell or realize in money by the hands of the fiscal all saleable property ..... belonging to the judgement debtor or over which or the profits of which the judgement debtor has a disposing power, which he may exercise for this own benefit, and whether the same be held by or in the name of the judgment debtor or by another person in trust for him or on his behalf ".

His Lordship G. P. S. De Silva observed thus "it is seen that it is necessary to safeguard the rights of a third party who owns the property or claims an interest in the property seized. It is section 241 which sets out the procedure for a third party to prefer a claim to the property and for the court to investigate such claim. The words in section 241 **"and the court shall thereupon proceed in a summary manner to investigate such claim objection with the like power as regard the examination of the claimant or objector, and in all other respects, as if he were a**

party to the action" are indicative of the fact that the judgment debtor is not a person contemplated by the section". His Lordship further observed that "the powers of the court upon an investigation of a claim preferred in terms of section 241 are set out in sections 244 and 245 of the C. P. C. lend further support to the view that a judgement debtor is not entitled to have recourse to section 241".

This being an action filed by the judgment debtor under section 241 therefore cannot be supported. Hence, this court is not required to go into the merits of this case. Leave is therefore refused with costs fixed at Rs. 5,000/-.

ANDREW SOMAWANSA J. - I agree.

Application dismissed.

CHANDANA HEWAVITHARANE
vs.
URBAN DEVELOPMENT AUTHORITY AND ANOTHER

COURT OF APPEAL
WIMALACHANDRA J.
C. A. NO. 1490/2003(REV.)
D.C. COLOMBO 6209/SPL
DECEMBER 3, 20, 2004
JANUARY 31, 2005

Civil Procedure Code - Section 395 - 760(A) - Substitution in the Court of Appeal - Supreme Court Rules - Proper person-is it the Legal Representative? Executor - de-son tort?-Does the cause of action survive to the heirs? - Lex Acquilla - Patrimonial loss - Constitution Article 136

The Plaintiff Petitioner sought to revise the Order made by the trial Judge, where he had dismissed the Plaintiff's action, while the application in Revision was pending the original Plaintiff died and the son filed papers to be substituted. The Respondent objected to the application on the ground that -

(1) the party proposed is not the legal Representative;
(2) cause of action does not survive to his heirs.

Held:

(i) The procedure to be followed where at any time after the lodging of an appeal in any civil action the death of a party to the appeal occurs, is spelt out in Section 760A of the Civil Procedure Code;

(ii) Section 760(A) gives the Court of Appeal a discretion to determine, who in the opinion of the Court, is the proper person to be substituted. The Court may exercise its discretion in the manner provided in the Rules made by the Supreme Court.

(iii) Section 760A should be read in conjunction with Supreme Court Rule 38, and the proper person should be the legal representative and by judicial interpretation includes 'an executor de son tort - in any event, he has obtained Letters of Administration while the Revision Application was pending.

The original Plaintiff filed action against the Defendants to recover a certain sum of money as damages for the demolition of the Petitioner's business premises. The Plaintiff had contended that, as a result of the demolition of the Business premises his income from the business was lost along with his property which was lying at the premises. Thereby the value of his estate diminished causing patrimonial loss.

Held further:

(ii) If the business had continued it would have devolved on his heirs, therefore the heirs of the. Plaintiff have a right to obtain damages from the Defendants.

'Where the wrongful loss has caused patrimonial loss and comes within the principles of lex acquilia, the action does not lapse with the death of the Plaintiff before litis contestatio, but enures to the benefit of the heirs.'

(iii) This is not an action to establish the personal Rights of the Plaintiff.

In the matter of an Application for substitution under Section 760A.

Cases referred to:

1. *Dheeranada Thero* vs. *Ratnasara* Thero - 60 NLR 7
2. *Ramsarup Das* vs. *Ram ashwar Das* - 1950 AIR (Patna) 184
3. *Fernando* vs. *Livera* - 29 NLR 246

I. S.de Silva for Plaintiff Petitioner

Vikum de Abrew, S. C. for 1st Defendant-Respondent.

Ms. M. de. Silva for 2nd Defendant Respondent.

cur. adv. vult.

March 4, 2005
WIMALACHANDRA J.

The plaintiff-petitioner plaintiff) filed this application in revision from the order of the learned Additional District Judge of Colombo dated 21.08.2003 whereby the learned Judge dismissed the plaintiff's action. Whilst this application in revision was pending the original plaintiff died leaving his heirs, the proposed party to be substituted in place of the deceased plaintiff, his wife and two daughters. The first defendant-respondent (1st defendant) filed objections to this substitution.

The first defendant has objected to this substitution on two grounds.

(1) the party proposed to be substituted (the petitioner) in place of the deceased plaintiff has no legal status in that he is not the legal representative of the deceased plaintiff.
(2) the cause of action does not survive after the death of the original plaintiff.

I shall first deal with the first ground of objection urged by the first defendant. The learned counsel for the first defendant submitted that since the petitioner has not obtained the letters of administration he has no locus standi to intervene as he is not the legal representative of the deceased plaintiff.

Section 395 of the Civil Procedure Code deals with the substitution of the legal representative of the deceased plaintiff in the District Court, on the death of the sole plaintiff.

The procedure to be followed where at any time after the lodging of an appeal in any civil action the death of a party to the appeal occurs, spelt out in Section 760A of the Civil Procedure Code. Section 760(A) states as follows :

"Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record become defective by reason of the death or change of status of a party to the appeal, the Supreme Court may in the manner provided in the rules made by the Supreme Court under Article 136 of the Constitution determine, who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who had died or undergone a change

of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid."

The Section 760(A) gives the Court of Appeal a discretion to determine, whom in the opinion of the Court, is the proper person to be substituted in place of the deceased plaintiff. The Court may exercise its discretion to determine who is the proper person to be substituted in the manner as provided in the rules made by the Supreme Court under Article 136 of the Constitution. Next I shall refer to the relevant rule of the Supreme Court Rules published in the Gazette of the Republic of Sri Lanka (Extra Ordinary) No. 665/32 - June 7, 1991.

Rule 38 is relevant to this application. It reads as follows. :

"Where at any time after the lodging of an application for special leave to appeal or an application under Article 136, or a notice of appeal, or the grant of special leave to appeal, or the grant of leave to appeal by the Court of Appeal, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may, on application in that behalf made by any person interested, or *ex mero motu,* require such applicant, or the petitioner or appellant, as the case may be to place before the Court sufficient material to establish who is the proper person to be substituted or entered on the record in place of or in addition to the party who has died or undergone a change of status.
Provided that where the party who has died or undergone a change of status is the petitioner or appellant, as the case may be the Court may require such applicant or any party to place such material before the Court.

The Court shall thereafter determine who shall be substituted or added, and the name of such person shall thereupon be substituted, or added, and entered on the record as aforesaid.

Nothing hereinbefore contained shall prevent the Supreme Court itself *ex mero moto,* where it thinks necessary, from directing the substitution or addition of the person who appears to the Court to be the proper person therefor."

It seems to me that section 760(A) should be read in conjunction with Rule 38. Accordingly, the Court shall determine the person to be substituted in place of the deceased plaintiff who appears to the Court to be the proper person.

In my view the proper person should be the legal representative of the deceased plaintiff. By judicial interpretation the term "legal representative" has

been extended to include "*executor de son tort.*" Any person who intermedius with the property of a deceased person or does any other act characteristic of the office of executor by performing duties which are normally those of a legal representative can be regarded as 'executor de son tort'.

The party proposed to be substituted (petitioner) in place of the deceased plaintiff (petitioner) is the son of the deceased plaintiff. The other heirs are the deceased plaintiff's wife and daughters. The petitioner filed the petition and affidavit in the District Court of Mount Lavinia seeking Letters of Administration to administer the estate of his father, the deceased plaintiff, (vide the document marked "XI") at the same time, he sought the substitution in place of the deceased plaintiff, in the revision application in this court. The petitioner also annexed the documents marked X2(a), X2(b), X2(c) and X2(d) in proof of publication of the notice relating to the application made by the petitioner under section 528 of the Civil Procedure Code. The petitioner in his counter objections stated that all the other heirs of the deceased plaintiff had consented to his appointment as the administrator of the estate of the deceased. In any event whilst this inquiry into the objections filed by the first defendant to the said substitution was pending the Letters of Administration were issued to the petitioner on 02.09.2004 and a certified copy of the same was filed with the motion dated 12.10.2004. Accordingly, the petitioner has now obtained the Letters of Administration and is now entitled to be substituted in place of the deceased plaintiff.

The second argument of the learned counsel for the defendant is that the cause of action does not survive to the heirs of the deceased plaintiff. In support of his argument he cited the case of *Dheerananda Thero vs. Ratnasara Thero*[1] In this Supreme Court case the plaintiff's suit against the defendant was mainly to establish his personal right to an office and the cause of action was purely personal. It was held in this case that if the action was for a declaration of status simplicitor, the cause of action would not survive.

In the instant case the facts are different from the aforesaid case of *Dheerananda Thero* vs. *Ratnasara Thero* (Supra). This is not an action filed to establish the personal rights of the plaintiff. The plaintiff filed this action against the first and second defendants to recover Rs. 50,000,000 as damages from the defendants for the demolition of the petitioner's business premises which was situated at 122, Sir James Peiris Mawatha, Colombo 2. The learned counsel for the plaintiff rightly pointed out in the written submission that as a result of the demolition of the petitioner's business premises by the first and second defendants, his income from the business was lost along with his propety which was lying at the premises and if the business had continued it would have devolved on his heirs. Therefore the heirs of the plaintiff have a right to obtain damages from the first and second defendants for their wrongful and unlawful act which has caused loss to the estate of the deceased plaintiff.

In *Dheerananda Thero* vs. *Ratnasara Thero* (Supra) T. S. Fernando, J. cited with approval the observation made by Sinha, J. in the Indian decision in *Ramsarup Das vs. Ramashwar Das* [2]

> **"If a plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendancy of the suit or of the appeal. But, where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property inquestion, on his death, either during the pendencey of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will therefor abate."**

The learned counsel for the plaintiff also referred to the case of *Fernando vs. Livera* [3] where it was held that in an action to recover damages for injuries implicated by the defendant, and the plaintiff died after the service of summons, the action may be continued by the heirs in respect of the claim for patrimonial loss to the estate of the deceased.

The original plaintiff (now deceased) filed action in the District Court of Colombo against the 1st and 2nd defendants for a sum of Rs. 50,000,000 as damages for the demolition of the petitioner's business premises which was situated at 122, Sir James Peiris Mawatha, Colombo 2 on the basis that as a result of the demolition, his income from the business was lost along with his property, and thereby the value of his estate diminished causing patrimonial loss.

In the aforesaid case of *Fernando vs. Livera (Supra),* Drieberg, J. at 248 made the following observation.

> **"Where the wrongful loss has caused patrimonial loss and comes within the principles of Lex Acquilia the action does not lapse with the death of the plaintiff before litis contestatio, but enures to the benefit of the heirs."**

In the circumstances, it is my considered view that in the instant case the cause of action survives on the death of the original plaintiff.

For these reasons the petitioner, Chandana Hewawitharana, who has now been appointed by the District Court of Mount Lavinia as the Administrator of the deceased plaintiff's estate should be substituted in place of the deceased plaintiff. Accordingly I reject the objections filed by the defendants and order that the said Chandana Hewawitharana be appointed as the substituted plaintiff. The petitioner is entitled to recover the incurred costs of this inquiry from the first defendant respondent.

Application for substitution allowed.