THE
Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2005] 2 SRI L. R. - Part 5

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DIGEST

CIVIL PROCEDURE CODE - *Interim Injunction - Ingredients - Cause of action - quia timet actions - person in possession - No title - Is he entitled to injunctive relief?- Recovery of Loans by Banks (Sp. Pro) Act, and 4 of 1990 - Cause of Action*

Seylan Bank Ltd., vs Piyasena and Another **131**

CONSUMER AFFAIRS AUTHORITY - Act, 09 of 2003- Section *18 (1), (2), (3) – essential goods – Increase of price – discretionary power – compliance with procedural requirements – is it imperative ? – can the authority refuse an application for a price increase in its entirety – should reasons be given ? – if reasons are not given is it fatal ?*

Nestle Lanka ltd. vs Consumer Affairs Authority and Another **138**
(To be continued in Part 6)

ELECTION PETITION - *Parliamentary Elections Act 1 of 1981 - Sections 14(1)(a), 92(1), 92(1)(b), 98, 98(e) - Rules under the Act - Directory or Imperative? - who should sign the Petition? - Notice of Presentation of petition to be served on the Respondents within 10 days - Is it mandatory? - Court of Appeal (Appellate Procedure) Rules 1990 - Affidavit to support Petition ? - circumstances - Local Authorities Elections Law - amended by Act, Nos 48 of 1983 and 25 of 1990 - Section 31(1).*

Dr. Vigneswarn vs. Sambanthan and Others **113**

PARTITION LAW -

(1) *Partition Law 21 of 1977 - Section 25(1), 48, 67 - Investigation of title imperative - Application in Revision - No appeal lodged - Could the application be entertained ? - Evidence Ordinance Section 44.*

Somasiri vs. Faleela and Others **121**

(2) *Section 25(3) - Lot claimed exclusively by certain Defendants -No Statement of Claim filed - Claimant absent on the date of trial - Settlement by other parties - Duty of Court to investigate title - In what circumstances should a party be permitted to file a Statement of Claim under Section 25(3)?*

Tissera and Others vs. Leelawathie and Others **127**

CM 6554 – 2,500 (2006/10)

DR. VIGNESWARN
vs.
SAMBANTHAN AND OTHERS

COURT OF APPEAL
IMAM J
CA (ELECTION PETITION)
2/2004 (TRINCOMALEE)
SEPTEMBER 21, 2004

Election Petition - Parliamentary Elections Act 1 of 1981 - Sections 14(1)(a), 92(1), 92(1)(b), 98, 98(e) - Rules under the Act - Directory or Imperative? - who should sign the Petition? - Notice of Presentation of petition to be served on the Respondents within 10 days - Is it mandatory? - Court of Appeal (Appellate Procedure) Rules 1990 - Affidavit to support Petition ? - circumstances - Local Authorities Elections Law - amended by Act, Nos 48 of 1983 and 25 of 1990 - Section 31(1).

The Petitioner an unsuccessful candidate of the Eelam People's Democratic Party (EPDP) sought a declaration that the election of the 1st and 2nd Respondents as Members of Parliament for the electoral district of Trincomalee be declared null and void.

The Respondents raised preliminary objections to the Petition -

i. that the Petition was not signed by the Petitioner himself;

ii. that the Petitioner failed to give Notice of presentation of the Petition together with a copy thereof within 10 days of the presentation of same to be served on the Respondents.

Petitioner contended that, the Preliminary Objections should be rejected in limine as it is not supported by a valid affidavit as required by the Court of Appeal (Appellate Procedure) Rules.

Held:

(i) According to Rule 3(7) of the Court of Appeal Rules - a statement of objections containing any averment of **fact** shall be supported by an affidavit in support of such averment. The Statement of Objections do **not** contain any averment of fact - and as such an Affidavit is not required.

Held further :

(ii) Rule 4 specifically provides the format for the Election Petition, it should be signed by the Petitioner himself. Rule 4 does not refer to any Agent or Agents.-

(iii) Rule 14(1) - prescribes a 10 days limit - The mere delivery of the Notice to the Registrar within 10 days limit is not sufficient compliance with Rule 14. The actual service on the Respondents must be effected within the time limit specified in Rule 14.

(iv) An application for Leave to withdraw a Petition could be signed by the Petitioner or his Agent - Rule 21(1).

In the matter of an Election Petition in terms of Section 92 - Parliamentary Elections Act .

Cases referred to :

1. D. M. Jayaratne vs. Vass Gunawardena and 114 others - CA 325/2002
2. Malik Mohammd Ikhtiiyar vs. Khanna and another - (28) 1941 AIR Lahore 310.
3. W. M. Mendis & Co. vs. Excise Commissioner -1999 1 Sri LR 351
4. Saravanamuttu vs. R. A. de Mel - 48 NLR 529
5. Chandra Kumar vs. Kirubaran and others - 1989 - Sri LR 35
6. Nathan vs. Chandrananda de Silva , Commissioner of Elections & others 1994 - 2 Sri LR 209

Dr. Jayatissa de Costa with *Ms. Maheswari Velayudan, Asoka Fernando* and *Dushantha Epitawela* for Respondents.

K. Kanag Iswaran., P. C., with M. A. Sumanthiran, Laxman Jayakumar, R. M. Balendra for Respondents.

Janak de Silva State Counsel for 10-11th Respondents.

cur adv vult

November 29, 2004

IMAM , J.,

The Petitioner was an unsuccessful candidate of the Ealam People's Democratic Party (hereinafter referred to as the EPDP) and was allotted No. 3 in the list of candidates of EPDP at the Parliamentary Elections

held on 02.04.2004 for the Trincomalee District. The 1st, 2nd, 8th and 9th Respondents were the elected candidates at the said Election. The 1st-7th Respondents were candidates of Illankai Tamil Arasu Kachchi (hereinafter referred to as ITAK), The 8 th Respondent was a Candidate of the Sri Lanka Muslim Congress (herein after referred to as SLMC) and the 9th Respondent was a candidate of the United People's Freedom Alliance (hereinafter referred to as UPFA.), Although the Petition disclosed 114 Respondents, the addresses of 13-114 Respondents were nor furnished, and Court made order on 22.06.2004 discharging them on application made by counsel for the Petitioner.

By this petition, the petitioner is seeking a declaration that the election of the 1st and 2nd Respondents as Members of Parliament for the Electoral District of Trincomalee be declared null and void.

On 22.06.2004 Counsel for the petitioner submitted to court that he is not seeking to serve Notices on respondents 13-114, and hence the service of Notices on respondents 13-114 was dispensed with by Court. The 8th and 9th Respondents were absent and unrepresented. The parties present agreed to tender written submissions with regard to the Preliminary Objections taken up by the President's Counsel who appeared for the 1st to 7 th respondents, and decided to abide by the decision of this Court on the written submissions.

Section 92(1) of the Parliamentary Elections Act No. 1 of 1981 states that "The election in respect of any electoral district shall be declared to be void on an Election Petition on any of the following grounds which may be proved to the satisfaction of the Election Judge namely ;

(a) that by reason of general bribery, general treating or general intimidation or other misconduct or other circumstances whether similar to those enumerated before or not, a section of electors was prevented from voting for the recognized political party or independent group which it preferred and thereby materially affected the result of the election. Thereby

(b) Non-compliance with the provisions of this Act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance materially affected the result of the election."

In this petition, the Petitioner relies upon the ground of corrupt or illegal practices that were committed by the 1st and 2nd Respondents or with their knowledge or consent or by any agent or the said candidates. It was contended by the Petitioner that the supporters of ITAK with the assistance of LTTE warned the Tamil people in the Electoral District of Trincomalee that they should vote only for the house symbol of ITAK or not vote at all. It is further alleged in the petition that on the polling day, namely 02.04.2004 the supporters and/or candidates of ITAK used more than 50 vehicles which they had previously arranged and transported genuine electors as well as impersonators to polling stations, which matter was reported to the Returning Officer, but that no action was taken to prevent the same. Furthermore on 01.04.2004 and several times later it is alleged that between 4.30 pm. and 10.00 p.m., members of the LTTE announced over loudspeakers that every Tamil should vote for ITAK, and if not such persons would be punished. To support these allegations the Petitioner produced documents marked 'X1', (fax message), 'X2' (result sheet), affidavits marked 'X3(A) to X3(I), an extract of the Government Gazette dated 06.04.2004 marked 'X4', Gazette dated 24.02.2004 marked 'X5', and a letter dated 11.03.2004 addressed to the Commissioner of Elections by the Secretary General EPDP marked 'X6'. The aforementioned affidavits do not make any reference either to the 1st or to the 2nd Respondent.

The Petitioner contended that the Preliminary Objections tendered on behalf of the 1st to 7th Respondents should be rejected in limine as it is not supported by a valid affidavit as required by Rule 3(7) of the Court of Appeal (Appellate Procedure) Rules of 1990. However the aforesaid rule states that ".....A statement of objections containing any averments of **fact** shall be supported by an affidavit in support of such averments." The statement of objections **do not** contain any averment of **fact** and as such in my view do not require an affidavit. Thus I hold that there is no lapse on the part of the 1st to 7th Respondents in this regard and accordingly accept these objections. One of the preliminary objections taken on behalf of the 1st to 7th respondents is that the petitioner has failed to **sign** the Petition as required by **Section 98(e)** of the Parliamentary Elections Act No. 1 of 1981, and the form prescribed in **Rule 4** of the fourth schedule to the Act. Section 98 sets out the contents of an election petition which are

" (a) shall state the right of the Petitioner to petition under section 95 of this Act;

(b) shall state the holding and result of the election;

(c) shall contain a concise statement of the material facts on which the Petitioner relies ;

(d) shall set forth full particulars of any corrupt or illegal practice that the Petitioner alleges, including full statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of such practice, and shall also be accompanied by an affidavit in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice.

(e) shall conclude with a prayer as, for instance, that the election in respect of any electoral district should be declared void, and shall be **signed** by all the petitioners;

Provided however, that nothing, in the preceding provisions of this section shall be deemed or construed to require evidence to be stated in the petition."

It was contended on behalf of the petitioner that Rule 4 of the Fourth Schedule to the Act is only regulatory and not mandatory, and hence the same submission is applicable to section 98(e) of the Parliamentary Elections Act. Furthermore it was pointed out that Rule 21(1) of the Parliamentary Election Petition rules, 1981 states that " **An application for Leave to withdraw a Petition shall be in writing signed by the Petitioner or Petitioners or his or their Agent of Agents** .....

It was thus pointed out by the Petitioner that if in the case of a withdrawal of an Election Petition an **Agent** for the Petitioner is authorised by Law to sign the requisite application, the intention of the Legislature is clear, and thus an Agent of the Petitioner could sign the election Petition. Furthermore it was averred that in **D. M. Jayaratne vs. Vass Gunawardene and 114 others** [1] this Court held that in section 31(1) of the Local Authorities Elections Law (as amended by Act No. 48 of 1983 and Act No. 25 of 1990) the word 'shall' as used in the Act does **not** always mean that compliance with the conditions is obligatory. In the case of **Malik Mohammad Ikhtiyar vs. Khanna and another** [2] it has been stated that "the word "shall" in

an Act does not always mean that compliance with the condition is obligatory. Intention of Legislature should be gathered by reference to the whole scope of the Act. The word "shall" as used in the Act of the Legislature does not always mean that compliance with the condition is obligatory. Whether the matter is imperative or directory only should be determined by the **real** intention of the Legislature, which should be ascertained by carefully attending to the whole scope of the Act." However it is my view that unlike in any other applications in the Court of Appeal where generally Petitions are filed and signed by Attorneys-at-law, **Rule** 4 specifically provides the format for the Petition, and thus should be signed by the **Petitioner himself.** Furthermore in the withdrawal of an election Petition, rule 21(1) of the Parliamentary Election petition Rules refer to the Petition or Petitioner or his or their Agent or Agents. However rule 4 does not refer to any Agent or Agents. Moreover in this case the Election petition has not been signed by the Petitioner himself, but by the Agent of the Petitioner. This does not satisfy the requirements of Rule 4 of the Parliamentary Election Petition Rules, and thus I accept this preliminary objection of 1-7th Respondents.

The 1st to 7th respondents have taken up another Preliminary Objection that the Petitioner has failed to give Notice of the presentation of the Petition together with a copy thereof within 10 days of the presentation of the same to be served on the respondents. It is submitted that the petitioner has thus violated the Mandatory provision of rule 14(1)(a) of the Parliamentary Elections Act, which makes the Petition Void.

Section 14(1) states "Notice of the presentation of a Petition, accompanied by a copy thereof shall, within ten days of the presentation of the Petition

(a) be served by the Petitioner on the respondent; or

(b) be delivered at the office of the Registrar for service on the Respondent, and the Registrar or the Officer of his Department to whom such notice and copy is delivered shall, if required, give a receipt in such form as may be approved by the President of the Court of Appeal."

On 22.06.2004 President's Counsel appearing for the 1-7th Respondents indicated to court that in accordance with Rule 14 of the Parliamentary Elections Act No. 1 of 1981 notice of the Election Petition and a copy

thereof had not been served on the aforesaid respondents within ten days of the presentation of the petition as required by law, and thus he tendered Preliminary Objections to the Petition, setting out other grounds as well. At this stage, Learned counsel for the Petitioner invoked section 97 of the Parliamentary Elections Act No. 1 of 1981, stating that he could join as Respondents to the election Petition certain parties, but did not state that copies of the Petition had been served on 1-7th respondents **within 10 days as stipulated by the law.** It was submitted on behalf of the Petitioner that an Election Petition should not be dismissed merely on the grounds of highly technical objections without giving it a hearing, and an Election Petition should not be dismissed without trying it's issues at the trial. Rule 15 of the Parliamentary Election Petition Rules, 1981 were referred to which states "On the expiration of the time limited for making petitions, the Petition shall be deemed to be at issue".

The Petitioner further referred to the Judgment in ***W. M. Mendis and Co.* vs. *Excise Commissioner*** [23] where it was held that "The object of rules of procedure is to decide the rights of parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence."

The Judgment by ***Dias J in Saravanamuttu* Vs. *R. A. de Mel*** [4] which stated "Since certain fundamental rights of citizens are involved in an Election Petition Inquiry, it is not merely a contest between litigants but a matter in which the whole electorate, not to say the whole country has a vital interest." was also referred to.

The 1-7 respondents in their written submissions referred to the Judgment in ***Chandra Kumar* Vs. *Kirubaran* and others** [5] where two preliminary objections almost identical to this were taken up. One of the Objections was that the Petitioner failed to give Notice to the Respondents of the presentation of the Petition together with a copy within ten days of the presentation of the Petition. It was submitted that the Petitioner violated the **Mandatory Provisions of Rule 14(1)(a)** of the Parliamentary Elections Act which is fatal to the Petition. It was held that "the ten days limit"..... prescribed by Rule 14(1) of the Parliamentary Election Petition Rules for service of notice of presentation of Election Petition on the Respondent is mandatory and applies to every mode of service of notice set out under paragraphs (1)(a) and (b) and paragraph 2. The mere delivery of the Notice

to the registrar within the 10 day limit ..... is not sufficient compliance with rule 14. The actual service on the respondents must be effected within the time limit specified in paragraph 1 of Rule 14". Furthermore in ***Nathan vs. Chandrananda de Silva, Commissioner of Elections and others*** [6] it was held that under Rule 14, Notice of presentation of an election petition must be served on the respondents within 10 days of the presentation of the Petition.

Having examined this Preliminary objection, I am of the view that the Petitioner has violated the Mandatory Provisions of Rule 14(1)(a) of the Parliamentary Elections Act No. 1 of 1981, and thus I uphold the preliminary objections taken up by the 1-7 Respondents in this regard too.

The statement of Preliminary Objections tendered by the 1st to 7th Respondents set out four grounds on which the Petition should be dismissed **in limine.** This Court has already accepted grounds (b) and (c) as set out in the aforementioned objections, considered the written submissions tendered on behalf of the parties, and other material placed before it. This Court has also examined grounds (a) and (d) of the Preliminary Objections, and in view of the fact that no valid Petition has been tendered to Court, there is no necessity to scrutinize this application further.

Having considered the details of this Election Petition and connected matters, I proceed to make an order under section 92(1) (b) of the Parliamentary Elections Act, No. 1 of 1981 which would meet the ends of justice. As the Election petition tendered to Court **cannot** be accepted for the reasons I have set out, I uphold grounds (b) and (c) of the Preliminary Objections raised on behalf of the 1st to 7th Respondents and proceed to dismiss the Petition in limine subject to Rs. 35,000 as total punitive costs due to the 1-7 Respondents.

Preliminary objections upheld.
Election Petition dismissed.

SOMASIRI
vs.
FALEELA AND OTHERS

COURT OF APPEAL
SOMAWANSA J(P/CA)
BASNAYAKE J.
C. A. No. 497/2004(REV.)
D. C. GALLE No. 13105/P
FEBRUARY 10, 14, 2002

Partition Law 21 of 1977 - Section 25(1), 48, 67 - Investigation of title imperative - Application in Revision - No appeal lodged - Could the application be entertained ? - Evidence Ordinance Section 44.

The 8th Defendant Petitioner sought to revise the Judgment of the Trial Court, on the basis that Court had not investigated title. Court over-ruled the preliminary objection and held that it has power to exercise revisionary jurisdiction having regard to the exceptional circumstances pleaded.

Held :

(i) The error had arisen owing to the failure of the Trial Judge to investigate title. The trial Judge had without examining the deeds personally followed the easy way by allotting the shares as prayed for in the Plaint, and had disregarded the amended statement of claim of the Petitioner.

(ii) The trial Judge must satisfy himself by personal Inquiry that the Plaintiff has made out a title to the land sought to be partitioned and that the parties before Court are solely entitled to the land.

(iii) While it is indeed essential for parties to a partition action to state to Court the points of contest inter-se and to obtain a determination on them the obligations of the courts are not discharged unless the provisions of Section 25 of the Partition Law are complied with quite independently of what parties may or may not do.

APPLICATION in Revision from the Judgement of the District Court of Galle.

Cases referred to :

1. *Cynthia de Alwis* vs. *Marjorie de Alwis and others*- 1997 3 Sri LR 113
2. *Kumarihamy* vs. *Weeragama* - 43 NLR 265

3. *Mather* vs. *Thamotharampillai* - 6 NLR 246
4. *Thayalnayagam* vs. *Kanthiresa Pillai* - 8 CWR 152
5. *Juliana Hamine* vs. *Don Thomas* - 59 NLR 546

W. Dayaratne for 8th Defendant Petitioner.

Bimal Rajapakse for Plaintiff Respondent.

cur. adv. vult.

March 14, 2005

ERIC BASNAYAKE J.

This is an application in revision by the 8th defendant petitioner (8th defendant) to revise the judgment of the learned District Judge of Galle dated 02.10.2003. By this judgment the court had ordered a partition as prayed for by the plaint. The plaintiff had given 19860/166200 shares to the 8th defendant in the plaint. In the judgment, the 8th defendant had been given the same share. The 8th defendant complains that he was deprived of 1.3 perches of land and the buildings No. 1,2 and 9 in the preliminary plan marked 'X'.

This court issued notice on the parties and after the objections and the counter objections were filed, a preliminary objection was taken by the plaintiff disputing the rights of the 8th defendant to invoke revisionary powers of the Court of Appeal without exercising the right of appeal in terms of section 67 of the Partition Act. The preliminary objection was overruled by this Court and held that it has power to exercise revisionary powers having regard to the exceptional circumstances of this application. The counsel thereafter agreed to dispose of this inquiry by way of written submissions. Those submissions have been tendered now.

The facts of this case are as follows. The plaintiff filed this case in the District Court of Galle on 29.03.1996 to have the land described in paragraph 2 to the plaint partitioned. In the plaint the plaintiff allotted 19860/166200 shares to the 8th defendant. The defendant obtained this share by deed 8 V 1. The defendant filed a statement of claim on 11.10. 1999. By this statement the 8th defendant claimed the rights he acquired through deed '8V1', the buildings No. 1 and 9 and the area covered by the building bearing the assessment No. 441 in plan 'X'. The building bearing the assessment No. 441 is identified as building No. 6 in the plan 'X'. At the preliminary survey, the 8th defendant claimed buildings ,1, 2 and 9, which is a well. The assessment number of building No. 1 is No. 449. There is no

separate assessment number for building No. 2. The buildings 1 and 2 are adjacent to each other. The plaintiff claimed buildings No. 1 and 2. There were no other claimants for building No. 9 before the surveyor, other than the 8th defendant.

At the commencement of the trial there was no dispute with regard to the corpus and the pedigree of the plaintiff. The dispute was with regard to the buildings 1, 2 and 9 over which issues 1 and 3 were raised. While the case was proceeding, the 8th defendant filed an amended statement of claim. In the amended statement the 8th defendant claimed 1.3 perches in addition to what he claimed through deed 8V1. This 1.3 perches was purchased from the 1st defendant prior to the institution of this action through deed No. 920 and marked '8V2'. The 8th defendant claims that he owned building bearing assessment No. 449 with an area of 1.3 perches, through this deed. The building bearing assessment No. 449 is shown in plan 'X' as building No. 1 which the 8th defendant had already claimed in the original statement. In evidence too the 8th defendant (through his witness) claimed 6.62 perches over which there is no dispute and 1.3 perches and building No. 1 in plan 'X' (assessment No. 449) through deed '8 V 2'. He also claimed the well which is No. 9 in plan X. The 8th defendant did not claim building bearing assessment No. 441 (No. 6 in plan 'X') either in the amended statement of claim or in oral evidence. It appears to me that 441 is a typing error as there is no basis to claim building No. 441. The correct No. appears to be No. 449 which is building No. 1 in the plan X.

The learned District Judge identified the main dispute in this case as involving buildings No. 1, 2, 6, 7 and 9. The learned Judge states that the 8th defendant failed to superimpose the plan (No. 2549) showing the lands that he had purchased on plan 'X'. Therefore he said that the lands referred to by deeds 8V 1 and 8 V 2 fall outside the corpus. Hence the learned Judge finds that the 8th defendant failed to prove the ownership to buildings No. 1 and 2. The learned counsel for the plaintiff too submits in the written submissions tendered to court that the burden was on the 8th defendant to prove that the lands purchased by the 8 th defendant on deeds '8V1' and '8V2' formed part of the corpus and the 8th defendant failed to discharge this burden. The learned counsel further submits that this is a frivolous application which should be dismissed with heavy costs.

The 8th defendant produced two deeds marked '8V1' and '8V2' to prove his case. By considering the deed 8V1, it may be construed that the plaintiff had given the 8th defendant 19860/166200 shares in the plaint. The learned District Judge too had given 19860/166200 shares to the 8th defendant in the judgment on the same basis. That is by regarding the 8th defendant as having obtained a share through this deed. Therefore, it becomes clear that the learned Judge erred in stating that the land referred to by deed 8V1 does not form part of this land.

The 8th defendant claimed 1.3 perches together with building No.1 through deed marked 8V2. The learned Judge states that the land referred to by this deed too does not form part of the corpus. By deed 8V2 the 8th defendant purchased 1.3 perches of land together with building No. 449 from the 1st defendant in 1995. This action was filed in 1996. The building 449 is shown in the preliminary plan marked X as building No. 1. The 8th defendant claimed buildings No. 1, 2 and 9 before the surveyor. The plaintiff too claimed buildings 1 and 2 before the surveyor. The plaintiff said in evidence that he had no possession. Although, the 8th defendant does not say anything about possession, one can assume that the 8th defendant had been in possession, considering the fact that the 8th defendant purchased this building from the 1st defendant. The learned counsel for the 8th defendant states in the written submissions filed that the 8th defendant's son constructed a building and has a barber salon in that premises. This fact had not been challenged by the plaintiff. It is against all these unchallenged evidence that the learned Judge states that the land referred to in deed 8V2 outside the corpus. I am of the view that the learned Judge erred in this respect too.

The error had arisen owing to the failure of the learned District Judge to investigate the title of the parties which he was required to do in terms of section 25(1) of the Partition Law No. 21 of 1977. The section provides that :-

> "On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, ***the court shall examine the title of each party*** and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made" (emphasis is mine).

Justice F.N.D. Jayasuriya observed in Cynthia de Alwis vs. Marjorie de Alwis and two others[1] as follows :

> **"A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial.** His Lordship cited a dicta by Justice De Kretser in Kumarihamy vs. Weeragama [(2)] where His Lordship states thus "A number of decisions of this court have emphasized the duty of the court to investigate title fully and not to treat a partition action as an action inter partes. His Lordship also quoted Chief Justice Layard in Mather Vs. Thamotharam Pillai[3] that ***"the trial judge must satisfy himself by personal inquiry that the plaintiff has made out a title to the land sought to be partitioned and that the parties before court are solely entitled to the land".*** In the exercise of this sacred duty to investigate title a trial judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases - Thayalnayagam vs. Kanthiresa Pillai.[(4)]
>
> His Lordship L. W. De Silva A. J. held in Juliana Hamine vs. Don Thomas [(5)] that ***"a partition decree cannot be the subject of a private arrangement between parties on matters of title which the court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the court the points of contest inter se and to obtain a determination on them, the obligations of the courts are not discharged unless the provisions of section 25 of the Act (same as section 25 of the Partition Law) are complied with quite independently of what parties may or may not do. The interlocutory decree which the court has to enter in accordance with its findings in terms of section 26 of the Act is final in character since no interventions are possible or permitted after such a decree. There is therefore the greater need for the exercise of judicial caution before a decree is entered. The court of trial should be mindful of the special provisions relating to decrees as laid down in section 48 of the Act. According to its terms, the interlocutory and final decrees shall be good and sufficient evidence of the title of any person as to the interests awarded therein and shall be final and conclusive for all purposes against all persons, whomsoever, notwithstanding any omission or defect of procedure or in the***

proof of title adduced before the court, and notwithstanding the provisions of section 44 of the Evidence Ordinance, and subject only to the two exceptions specified in sub-section 3 of section 48 of the Act".

It is unfortunate that the learned District Judge, without examining the deeds personally, followed the easy way by allotting the shares as prayed for in the plaint and fell into this grave error in concluding that the lands referred to in deeds 8V1 and 8V2 did not form part of the corpus. The plaintiff had given the due share to the 8th defendant on deed 8V1. The 8th defendant had acquired building No. 1 (assessment No. 449) by deed 8V2 and claimed same in the original statement filed on 11.10.1999, Although the 8th defendant was entitled to the soil as well (1.3 perches) by this deed, he had failed to claim the same in the original statement. This he has done in the amended statement of claim filed thereafter. The 8th defendant's amended statement of claim was allowed after an inquiry, subject to costs. The learned Judge by holding that the lands referred to by the deeds 8V1 and 8V2 do not form part of the corpus deprived the 8th defendant of what he acquired by deed 8V2; that is 1.3 perches of land and the building No. 1 which he is occupying. The 8th defendant is therefore entitled to the share allotted to him in the judgment namely 19860/166200 and 1.3 perches of the soil.

The 8th defendant acquired this 1.3 perches of land from the 1st defendant. Therefore, the 1st defendant's share should be less 1.3 perches. This 1.3 perches is the area that is covered by the building bearing the assessment No. 449 (building No.1 in plan X). Therefore, it is the 8th defendant who is entitled to this building. The 8th defendant was the only claimant before the surveyor of the well which is numbered as No. 9 in plan X. The plaintiff who was present before the surveyor and claimed buildings No. 1 and 2 did not claim the well. There is no evidence that it was the plaintiff who constructed it. There is no evidence of the plaintiff even using this well. The plaintiff had no possession in the land. Therefore, there is no basis to give the well to the plaintiff. On the material before court, it is the 8th defendant to whom this well should have been given. Therefore, I am of the view that it is the 8th defendant who is entitled to the well.

The building No. 2 appears to have had no separate assessment number. It appears that it is part of the building No. 449. The building No. 2 was claimed by the 8th defendant and the plaintiff. If the plaintiff had no possession in the land, it was the 8th defendant who occupied this building

and therefore buildings No. 1, 2 and 9 should have been given to the 8th defendant. In view of the foregoing reasons I allow this application by the 8th defendant in terms of prayer (C) to the petition with costs fixed at Rs. 5,000.

ANDREW SOMAWANSA J. (P/CA) — I agree

Application allowed.

TISSERA AND OTHERS
vs.
LEELAWATHIE AND OTHERS

COURT OF APPEAL
WIMALACHANDRA J.
C. A. 2163/2002
D. C. NEGOMBO 2243/P
JULY 27, 2004

Partition Law, 21 of 1977 - Section 25(3) - Lot claimed exclusively by certain Defendants -No Statement of Claim filed - Claimant absent on the date of trial - Settlement by other parties - Duty of Court to investigate title - In what circumstances should a party be permitted to file a Statement of Claim under Section 25(3)?

At the preliminary survey, a certain Lot (1) was exclusively claimed by the Defendant-Petitioner as no other party claimed the said Lot, no Statement of Claim was filed. On the date of trial, the Defendant-Petitioners were absent, and the parties entered into a settlement, with the Plaintiff being given a portion of Lot 1 - though all the parties conceded that Lot 1 was exclusively possessed by the Defendant Petitioners.

The application under Section 25(3) of the Partition Act by the Defendant

Petitioners was rejected by the trial Court.

HELD

(i) It is to be observed that it is only the Defendant Petitioners, who claimed Lot 1 in the Preliminary Plan, and had claimed exclusive rights to same before the Surveyor, and if they are not before Court, it is not proper for the Judge to allow a compromise between parties present in Court, so as to permit the Plaintiff to have a portion of Lot 1.

(ii) Language of Section 25 is wide enough to provide the Court with wide powers to examine the right, title and interest of each party and hear evidence in support thereof. The Court may permit, under section 25(3), a party in default to file a Statement of Claim if that party establishes the *bona fide* of his claim, upon such terms as to costs or otherwise as the Court shall deem fit.

(iii) The Court has given its consent to a settlement thereby allowing the Plaintiff to have a portion of Lot 1, this settlement is prejudicial to the rights of the Defendant-Petitioners who had claimed Lot 1 exclusively.

AN APPLICATION in Revision from an Order of the District Court of Negombo.

Case Referred to :

1. *Cathirina* vs. *Jamis* - 73 NLR 49.

Padmasiri Nanayakkara with Ms Indika de Alwis for 3rd and 4th Defendant Petitioners.

Sanjeewa Dissanayake for Plaintiff Respondent.

September 10, 2004.

WIMALACHANDRA, J.

This is an application in revision from the order dated 15.02.2002 made by the learned District Judge of Negombo, refusing leave to file statement of claim made by the 3rd and 4(a) defendants in terms of Section 25(3)of the Partition Act.

Briefly, the facts relevant to this application as set out in the petition are as follows:

The plaintiff instituted this partition action in the District Court of Negombo

to partition the land called and known as "Dewatagalakurunduwatte". The Court issued a commission to a surveyor to carry out a preliminary survey. The preliminary plan No. 2843 made by the Commissioner was duly transmitted to the Court along with a report and a certified copy of his field notes. The lot (1) of the plan 2943 (marked X2) was exclusively claimed by the 3rd and 4(a) defendants. No other party disputed the claim of the 3rd and 4(a) defendants to the lot (1). Since no claim was made by any other party to lot (1) of the preliminary plan 'X2', the 3rd and 4(a) defendants did not file a statement of claim. It is to be noted that no party has made any claim to lot No. 1 in their statements of claim.

When the case was taken up for trial on 11.09.1998, the plaintiff, 1st, 2nd, 6th, 7th and 8th defendants were present in Court and the 3rd, 4th and 5th defendants were absent and unrepresented. The plaintiff and the other parties who were present in Court reached a compromise in respect of their disputes as to the *corpus* and settle it among the parties present before any evidence was led. This settlement was effected with regard to 1/3rd of the land. A commission was issued to a surveyor in terms of the said settlement to prepare a plan. When the case was called on 04.07.2001, a comprehensive settlement was entered into between the plaintiff and the 1st, 2nd, 5th, 6th, 7th, 8th and 9th defendants. The 3rd and the 4(a) defendants were not present. According to this settlement, the lot (2) was given to the 1st defendant, lot (4) to the 7th, 8th and 9th defendants and the plaintiff was given Lot 5 and a portion of Lot (1) of the preliminary plan. It is to be noted that, according to the preliminary survey report all the parties conceded that the lot (1) was exclusively possessed by the 3rd and the 4(a) defendants and did not make any claim to it.

It is to be observed that it is only the 3rd and the 4(a) defendants who claimed the lot (1) in the preliminary plan. When it appears that the 3rd and the 4(a) defendants who were in possession and had claimed exclusive rights to Lot (1) before the surveyor are not before the Court, it is not proper for the Judge to allow a compromise between the parties present in Court, so as to permit the plaintiff to have a portion of Lot (1). In my view, since this action being a partition action it is the duty of the Judge to bring the parties who had claimed exclusive rights and were in exclusive possession of lot (1), although the case had reached the trial stage. The law requires the Court to examine the rights of each party. It appears that when the learned Judge made the said order allowing the plaintiff to have a portion of Lot (1), he had not considered the fact that only the 3rd and 4(a) defendants had made their claim to lot (1) before the surveyor which had been in their possession.

In the impugned order the learned Judge has stated that the 3rd and 4(a) defendants failed to give valid reasons to the satisfaction of Court to permit them to file their statement of claim.

In the case of Cathrina Vs. Jamis [1] it was held that when a defendant in a partition action fails to file a statement of claim on the due date, an *exparte* hearing and disposal of his case are not authorised by the law.

At page 51, H. N. G. Fernando, CJ. said :

"The Partition Act, while it entitles a defendant to file a statement of claim and requires him to file a list of documents on which he proposes to rely, does not declare that a party may not prove his rights at the trial unless he has previously filed a statement of claim and a list of documents. If, for instance, a defendant relies solely on prescription, there is no provision in the (Partition) Ordinance which expressly prevents him from leading evidence at the trial to establish his right."

In the instant case the learned Judge has dismissed the 3rd and 4(a) defendants' application made in terms of Section 25(3) of the Partition Act, on the ground that they have failed to establish a *prima facie* right, share or interest in lot (1) of the *corpus* and that the application of the 3rd and 4(a) defendants was not made *bona fide*.

However, the language of Section 25 is wide enough to provide the Court with wide powers to examine the right, title and interest of each party and hear and receive evidence in support thereof. In terms of Section 25(3), the Court may permit a party in default to file a statement of claim if that party establishes the *bona fides* of his claim and upon such terms as to costs and filing of a statement of claim or otherwise as the Court shall deem fit.

The learned Judge in his order has failed to assess the fact that the 3rd and 4(a) defendants have been in exclusive possession of the lot (1) of the *corpus* and the fact that none of the parties had claimed any right, title or interest to lot (1). As the circumstances suggest, the 3rd and 4(a) defendants may be having prescriptive rights to lot (1).

Besides, the Court has failed to consider the compromise entered into

between the plaintiff and the 1st, 5th, 6th, 7th, 8th and 9th defendants, on 04.07.2001 (marked S17), where in the parties agreed to allow the plaintiff to have a portion of lot (1). The Court has given its consent to this settlement thereby allowing the plaintiff to have a portion of lot (1). This settlement is prejudicial to the rights of the 3rd and 4(a) defendants who claim lot (1) exclusively.

In these circumstances I am of the view that the learned Judge should have allowed the 3rd and the 4(a) defendants to file a statement of claim on such terms as to costs etc. which would have allowed them to participate in the trial, at least to establish a prescriptive right.

For these reasons the order of the learned District Judge dated 15.02.2002 is set aside and the learned Judge will now entertain the statement of claim subject to costs etc. in terms of Section 25(3) of the Partition Act.

Application allowed,
Defendant petitioners permitted to file statement of claim.

SEYLAN BANK LTD.,
VS
PIYASENA AND ANOTHER

COURT OF APPEAL
WIMALACHANDRA J
C.A.L.A. 326/03
D.C. EMBILIPITIYA 7713/L
JANUARY 27, 28, 2005

Civil Procedure Code - Interim Injunction - Ingredients - Cause of action - quia timet actions - person in possession - No title - Is he entitled to injunctive relief? Recovery of Loans by Bank (Sp. Pro) Act, and 4 of 1990 - Cause of Action

The plaintiff - respondent mortgaged a certain land to the 1st Defendant Petitioner Bank, and as he had defaulted the repayment of the loan, the Bank sought to recover same by invoking the Provisions of Act No. 4 of 1990.

The plaintiff Respondent had stated that the corpus belonged to the 2nd Defendant Land Reform Commission and that the Land Reform Commission is taking steps to transfer the property to him, and that the Bank has no authority to parate - execute the property. The Court granted the injunction sought by the Plaintiff restraining the Defendant Petitioner Bank from parate execution of the property.

On leave being sought by the Defendant Bank :

1) It appears that the boundaries of the land mortgaged are different from that of the land which is the corpus. Even if the Plaintiff has no title to the property, the facts placed before Court show that at the time of filing action he was in possession of the land.

   It may be possible to file action against a person who has threatened to disturb the possession of the Plaintiff and to use the evidence which he has at hand to establish his possession against the person who only threatens and does not so far disturb his possession.

2) An interim injunction will be granted *quia-timet* to restrain an apprehended or threatened injury, if in addition to the other requirements necessary to qualify for an interim injunction, it is established that firstly the injury is certain or very imminent and secondly that the likely mischief will be of a very substantial nature.

3) The land belongs to the Land Reform Commission and the Land Reform Commission was taking steps to transfer it to the Plaintiff. The Plaintiff had established that there is a strong possibility that the apprehended mischief will in fact arise, the Defendant-Bank has already taken steps to auction the land in question.

4) If the wrong land is auctioned the inconvenience which the Plaintiff will suffer by the refusal of the injunction is greater than that which the 1st Defendant will suffer if it is granted, the balance of convenience favours the Plaintiff.

5) The relief claimed by the Plaintiff is founded on the violation of his right to possession of the land described in the plaint by the 1st Defendant Petitioner. A person in possession is entitled to possess it without fear of unjustifiable interference from outsiders.

   Application for Leave to Appeal from an Order of the District Court of Embilipitiya.

Cases referred to :

1. *Preston vs Luck - 1887 27 ch. 497 at p. 505 and 506.*
2. *Jinadasa vs Weerasinghe - 1929 - 31NLR 33*
3. *Montgomery vs Montgomery - 1964 2 AER 22*
4. *Gouriet vs Union of Post Office Workers - 1978 AC 435, 1977 3 WLR 300, 1977 3 AER 70 HL (E)*
5. *Richard Perera vs Albert Perera 1963 67 NLR 443 at 448.*
6. *Jackson vs Spittel - 1880 LR 5 CA 542.*
7. *Lowe vs Fernando - 16 NLR 398.*
8. *Ceylon Land and Produce Co. Ltd. vs. Malcolmson - 12 NLR 16 at 19.*
9. *Fernando vs Silva - 1878 - 1 SCC 28*

Tilaka Bandara Waduressa for 1st Defendant Petitioner.
Rohan Sahabandu for 2nd Defendant Respondent.
Plaintiff Respondent absent and unrepresented.

cur. adv. vult.

May 12, 2005
WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the District Judge of Embilipitiya dated 19.08.2003. By that order the learned judge has granted the interim injunction sought by the plaintiff-respondent (plaintiff) prayed for in the prayer to the plaint, restraining the 1st defendant - respondent (1st defendant) from auctioning the land described in the schedule to the plaint.

The petitioner states that the land described in the schedule to the statement of objections of the petitioner filed in the District Court, at one stage belonged to D.D. Sepala Ratnayake and he had transferred it to Imiyage Don Gunaratne by deed No ;34858 dated 28.02.1968 attested by D.M.A. Diyagama N.P.

The said Gunaratne had transferred the said land to Kekunawala Pathirage Piyasena, who is the plaintiff, by deed No. 883 dated 04.12. 1979 attested by B. Vithanage N.P.

The Plaintiff had mortgaged the said land to the 1st defendant by notarial deeds No. 1012 dated 1.7.1992, and No. 1152 dated 16.11.1993, both attested by K.S. Abeyratne N.P. He had also executed mortgage bonds No. 7213 dated 13.5.1996 and No. 6656 dated 28.04.1995, both attested by S.E. Weeraratne, N.P. The Plaintiff had obtained Rs. 2058981/73 from the 1st defendant by keeping the aforesaid land as security. The plaintiff had defaulted the repayment of the loan facilities he obtained from the 1st defendant and the 1st defendant had taken steps to recover the defaulted sum as at 29.2.2000, amounting to Rs. 2,058,981/ 73, in terms of the provisions of the recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990.

It is the position of the plaintiff that the said land depicted as lot 1 in plan No. 1193 LR 6/204dated 10.04.2001 prepared by the licensed Surveyor G.W.K. Manamperi belongs to the Land Reform Commission, the 2nd defendant, and the 2nd defendant is in the process of taking steps to transfer the said land to the plaintiff. Accordingly, the plaintiff states that the petitioner has no right to auction the land by way of parate-execution under the Recovery of Loans by Banks (Special) Act. This position is confirmed by the 2nd defendant - Respondent (defendant), the Land Reform Commission. The 2nd defendant has taken up the position in its answer filed in the District Court that the land mortgaged to the 1st defendant Bank belongs to the 2nd defendant and the 2nd defendant was taking steps to transfer the property, which is the subject matter of this action, to the plaintiff.

The learned Judge in his order has granted the interim injunction prayed for by the plaintiff mainly on the ground that the main question that has to be decided is whether the land in question belongs to the 2nd defendant, the Land Reform Commission.

In deciding the question whether to issue an interim injunction, the first requirement that has to be established is whether the plaintiff has a *prima* facie case. The plaintiff filed this action for a judgment, that he be declared as the possessor of the land described in the schedule to the plaint and to prevent the 1st defendant-bank from selling the land by public auction.

In issuing an injunction, it is settled law that there must be a *prima facie* case, meaning that there is a serious question to be tried at the hearing, and that on the facts of the case before Court there is a probability

that the plaintiff is entitled to relief. *Preston vs Luck* [1] at 505 and 506, *Jinadasa Vs. Weerasinghe* [2]. Moreover, on the face of the plaint the person applying for an injunction must show that he is not bound to fail by virtue of some apparent defect. (Row on Injunctions 6th edition at page 247)

The Court will issue an interim injunction only to protect a legal right *(Montgomery Vs. Montgomery)* [3] where the plaintiff has no legal right recognisable by the Courts, an interim injunction should not be issued *(Gouriet Vs. Union of Post Office Workers)* [4] " There must be some apparent violation of rights to which the plaintiff appears to be entitled and not merely of rights which he claims" per H.N.G. Fernando, J. *in Richard Pereka Vs Albert Perera*[5] per Justice Soza, at page 84 of Judges Journal, Volume I.

In the light of the above discussion it is appropriate to examine whether there is a cause of action against the 1st defendant. The plaintiff has not prayed for a declaration of title to the property described in the schedule to the plaint. His main reliefs are ; that

(i) the plaintiff's possession to the land described in the schedule to the plaint be confirmed.
(ii) the 1st defendant - bank has no legal right to auction the land described in the schedule to the plaint.

Every action is based on a cause of action. A cause of action means a particular act on the part of the defendant-which gives the plaintiff his cause of action (*Jackson Vs. Spittel* [6])

A question arises as to whether a cause of action is fully accrued to the plaintiff as at the date of the institution of this action. It appears that the relief claimed by the plaintiff in paragraph (1) of the prayer to the plaint is founded on the violation of his right to possession of the land described in the plaint by the 1st defendant.

It was held in the case of *Lowe Vs. Fernando* [7] that the expression "cause of action" generally imparts two things, viz. a right in the plaintiff and a violation of it by the defendant and cause of action means the whole cause of action *i.e.* all the facts which together constitute the plaintiff's right to maintain the action.

Admittedly the plaintiff is in possession of the property which is the subject matter of this action. A person who is in possession is entitled to possess it without fear of unjustifiable interference from outsiders.

The 2nd defendant, the Land Reform Commission filed answer and has taken the position that the land belongs to the Land Reform Commission. The 2nd defendant in its answer states that the 2nd defendant was taking steps to transfer the property in question to the plaintiff. It appears that the plaintiff is in possession of the property in anticipation of the transfer of title deeds in his favour.

The 1st defendant's position is that the plaintiff mortgaged the said land to the 1st defendant as security for the repayment of the banking facilities obtained from the 1st defendant. However it appears that the boundaries of the land mortgaged to the bank are different from that of the land which is subject matter of this action. The 2nd defendant, the Land Reform Commission claims to be the owner of this land. In these circumstances, it is important to ascertain and identify the land mortgaged to the 1st defendant by the plaintiff. In these circumstances, it appears that there is a serious question to be tried at the hearing, and that on the facts before this Court the plaintiff has a fair question to raise to the existence of a legal right. Moreover, the 2nd defendant in no uncertain terms has stated that the land, which is the subject matter, belongs to the 2nd defendant and was taking steps to transfer the land to the plaintiff and it was the 2nd defendant who placed the plaintiff in possession of the said land.

Even if the plaintiff has no title to the property, the facts placed before Court show that at the time of filing action he was in possession of the land. It may be possible to file action against a person who has threatened to disturb the possession of the plaintiff and to use the evidence which he has at hand to establish his possession against the person who only threatens and does not so far disturb his possession.

With regard to this type of action, *Wood Renten J.* in the case of the *Ceylon Land and Produce Co. Ltd. Vs. Malcolmson*[8] 19, cited with approval the following passage in the Judgment of Phear, C.J. *in Fernando* Vs. Silva[9]

" If nothing has yet happened to prevent, or to interfere with, the plaintiff's present enjoyment of his property, where no cause

has yet occurred to render it necessary for him to have actual recourse to a Court of Justice for remedy, yet it may sometimes be right that he should be afforded an opportunity of making *de bene esse* use of that evidence which he has at hand to establish title against a person who only threatens and does not yet disturb it."

At page 20, Wood Renten, J. said:

" The necessary ingredients in an action *quia timet* are, (a) actual or imminent injury ; (b) prospective damage of a substantial, if not, irreparable kind"

Justice Soza, in his article " the Interim Injunction in Sri Lanka" published in the Judges Journal Vol. 1 at page 89 states as follows :

"An interim injunction will be granted *quia timet* to restrain an apprehended or threatened injury if in addition to the other requirements necessary to qualify for an interim injunction, it is established that firstly the injury is certain or very imminent and secondly that the likely mischief will be of a very substantial nature."

In the instant case that plaintiff has established that there is a strong probability that the apprehended mischief will in fact arise. The 1st defendant- bank has already taken steps to auction the land which is the subject matter of this action.

According to the documents marked P3(b) P3(c), P3(d) and P3(e) it appears that the plaintiff has obtained banking facilities from the 1st defendant- bank and as security for repayment he has mortgaged a property called and known as Kirilawel-Katuwa depicted as lot 247 in V.P. 779 which is in extent of 2A. 00R. 00P. The land described in the schedule to the plaint is a portion of Kiralawel - Katuwa Nindagama depicted as Lot 1 in Plan No. 1193 prepared by Licensed Surveyor G.W.K. Manamperi dated 1.5.2001 and L.R.C. No. 6/204 which is in extent of 00A. 03R. 17.6 P. In the circumstances the correct identification of the land is necessary, which can only be ascertained at the trial and not at this stage.

As regards the balance of convenience, the Court will have to determine whether the harm which the 1st defendant will suffer if the injunction is granted be greater than the harm which the plaintiff will suffer if it is refused. In the instant case, it appears that if the wrong land is auctioned the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the 1st defendant will suffer, if it is granted. Accordingly, the balance of convenience favours the plaintiff.

For these reasons, I see no necessity to interfere with the order made by the learned District Judge dated 19.08.2003. Accordingly, leave to appeal is refused and the 1st defendant's application is dismissed without costs.

Application dismissed

NESTLE LANKA LTD.
VS
CONSUMER AFFAIRS AUTHORITY AND ANOTHER

COURT OF APPEAL
SRIPAVAN J
BASNAYAKE J
CA 2146/2004
30TH JUNE, 2005
11TH JULY, 2005

Consumer Affairs Authority Act, 09 of 2003 Section 18 (1), (2), (3) – essential goods – Increase of price – discretionary power – compliance with procedural requirements – is it imperative ? – can the authority refuse an application for a price increase in its entirety – should reasons be given ? – if reasons are not given is it fatal ?

The petitioner sought the approval from the Respondent Authority for an increase in the price of its full cream milk powder products Nespray and Nido, as full cream powder is an essential good for the life of the community, the retail or whole sale price of milk powder cannot be increased without the prior written approval of the Respondent Authority. The approval sought was refused.

Held

(1) When an application is made to get the approval to increase the retail/ whole sale price the authority would have to –

(i) hold an inquiry ;

(ii) see whether such increase is reasonable ;

(iii) approve any other increase as the authorities may consider reasonable.

(2) No inquiry has been held, reasons have not been given for the refusal – the impugned decision is illegal and invalid.

(3) The Respondent authority cannot refuse an application for a price increase in its entirety, thus the impugned decision is not a decision in terms of section 18(4) and hence is void and a nullity.

(4) Application for a price increase remains undetermined as the purported decision is not a decision in the eyes of the law.

Per Sripavan J.

"function of a Judge is to give effect to the expressed intention of parliament as stated in the Enactment. If the words of an Act are plain and clear a Court must follow them and leave it to Parliament to set it right rather than alter those words to give a different interpretation."

Application for a Writ of Certiorari and Writ of Mandamus.

Sanjeewa Jayawardene with Suren de Silva for Petitioner.

N Idroos S. C., for Respondent

July 18th, 2005

cur adv vult

SRIPAVAN, J

The Petitioner is a public company duly incorporated in Sri Lanka and produces internationally known branded products such as Nespray, Lactogen, Nestomalt, Milo etc at its factory at Pannala.

The Minister of Commerce and Consumer Affairs acting under and in terms of Section 18(1) of the Consumer affairs Authority Act, No. 09 of 2003 by order published in the Gazette prescribed "full cream milk powder" as an essential good to the life of the community. Thus in terms of Section 18(2) of the said Act, the manufacturers and/or traders cannot increase the retail or wholesale price of milk powder except with the prior written approval of the first respondent Authority.

The Petitioner by its application dated 02nd September, 2004 sought the approval of the first respondent Authority for an increase in the price of its full cream milk powder products Nespray (01Kg, 400g and 200g packs) and Nido (01Kg and 400g packs) as evidenced by P6. Along with the application, the petitioner submitted a detail cost structure for Nespray and Nido together with supporting documents to enable the first respondent Authority to consider the price increase sought. By letter dated 08th September, 2009, the first respondent Authority called for further information form the petitioner which was duly furnished by it by letter dated 10th September, 2004. Again, the first respondent by letter dated 14th September, 2004 sought further clarification from the petitioner which was replied by the petitioner on the same day as evidenced by the documents marked P7 (b) and P7 (c) respectively. The petitioner was informed by letter dated 24th September, 2004 received by fax on 27th September, 2004 and by post on 29th September, 2004 marked P8 and P8(a) respectively that its application for the increase of the prices of Nespray and Nido had been rejected. No reasons whatsoever were adduced for the said rejection. The petitioner seeks, *inter-alia,* an order in the nature of a writ of certiorari to quash the said determination of the first respondent dated 24th September, 2004 marked P8/P8(a).

The preamble to the Consumer Affairs Authority Act, No. 09 of 2003 reads thus :–

> "Whereas it is the policy of the Government of Sri Lanka to provide for the better protection of consumers through the regulation of trade and the prices of goods and services and to protect traders and manufacturers against unfair trade practices and restrictive trade practices..."