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 7

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CM 6556 – 2,500 (2006/08)

It may be relevant to consider the case of *Trade Exchange (Ceylon) Limited Vs. Asian Hotels Corporation Limited*[2] where a three-judge bench of the Supreme Court held that the action of a public commercial company incorporated under the Companies Ordinance, although its capital was mostly contributed by the Government and was controlled by the Government, is a separate juristic person and its actions are not subject to judicial review in an application for a writ of certiorari, Sharvananda, J (as he then was) at page 76 observed as follows :

> "The actitivites of private persons, whether natural or juristic, are outside the bounds of administrative law. A public commercial company like the respondent, incorporated under the Companies Ordinance in which the Government or a Government sponsored Corporation holds shares, controlling or otherwise, is not a public body whose decisions, made in the course of its business, can be reviewed by this court by way of writ."

Moreover, the petitioners have no legal right to insist on the first respondent to extend their services on the basis of a right conferred by any statutory provision. Nor the first respondent is under a statutory duty to extend the petitioners' services. Thus, the petitioner's application for relief by certiorari must fail. Accordingly, the court does not see any justifiable ground to extend the interim orders. The interim orders issued by this court on 11.01.2005 and 19.01.2005 are not extended any further.

Basnayake, J - I agree,

Application dismissed.

CHANDRARATNE
VS
WIJETILLAKE

COURT OF APPEAL,
AMARATUNGA J,
WIMALACHANDRA J,
CALA 408/2002 (LG),
D.C. NEGOMBO 290/SM,
MARCH 23.2004,
JUNE 24, 26, 2004.

Civil Procedure Code - Cap. 53-Section 704-Summary Procedure-Leave to Appear and defend-Doubt exists as to the - Security to be Ordered - Not averred for what valuable consideration the cheques were issued-Acceptability - sustainable defence.

The Plaintiff Respondent instituted action against the Defendant Petitioner under Cap. 53 of the Civil Procedure Code for the recovery of a certain sum of money due on 5 cheques. The defendant moved to file Answer unconditionally. The trial Judge refused the application for unconditional leave and allowed the Petitioner to appear and defend upon depositing the entire amount claimed.

The Defendant sought leave to appeal with leave being granted it was contended that—

(*a*) the Plaintiff had failed to disclose the circumstances in which the said cheques were issued.

(*b*) That although the Plaintiff has stated that the said cheques were given for valuable consideration he has not stated what the said consideration was.

HELD;

1. Although the Plaintiff has not averred in the plaint for what consideration the cheques were issued, the Plaintiff has stated that the cheques were given for valuable consideration. He may prove this at the trial by establishing that value has been given for the cheques.

2. Defence raised by the Defendants cannot be believed. No credibility can be attached to it. Even where there appears to be a defence, if

court is doubtful of its genuineess, the defendant may be ordered to give security.

APPLICATION for Leave to appeal, with leave being granted from an order of the District Court of Negombo.

Cases referred to :

1. *C. W. Mackie and Co. Ltd., Vs. Translanka Investments Ltd., 1995 2 Sri LR 6*
2. *De Silva vs De Silva - 49 NLR 219*
3. *Walling Ford vs The Mutual Society - 1880 5 App. Cap. 704*

Sunil A Corray for Degendant Petitioner.

Chandradasa Mahanama for Plaintiff Respondent.

September 10, 2004
Wimalachandra J.

Cur.adv.vult

AMARATUNGA J.

I agree.
Appeal dismissed.

L. K. WIMALACHANDRA J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) instituted action aginst the defendant-petitioner (hereinafter referred to as the defendant) in the District Court of Negombo under chapter 53 of the Civil Procedure Code for the recovery of a sum of Rs. 200,000 due on five cheques marked 'X1', 'X2', 'X3', 'X4', and 'X5' annexed to the plaint, each to the value of Rs. 40,000. The petitioner moved to file answer unconditionally.

After inquiring, the learned District Judge on 01.10.2002 made order refusing the petitioner's application for unconditional leave and allowed the petitioner to appear and defend upon depositing Rs. 200,000 which is the entire amount climed by the respondent upon the aforesaid five cheques. It is against this order the petitioner has filed this leave to appeal application.

When this application was taken up for inquiry on 23.03.2000, it was agreed between the parties that proforma leave to appeal be granted and the appeal be decided on the written submissions and documents that would be filed by the parties. Accordingly both parties tendered written submissions.

The defendant filed a petition and affidavit dated 12.03.2002 to obtain leave to appear and defend. The Court is required by Section 704 of the Civil Procedure Code, to consider the petition and affidavit with any documents filed, and decide whether the defendant has a *prima facie* sustainable defence or a reasonable doubt exist as to the *bona fide* of the defence. If the Court is of the opinion that a reasonable doubt exists as to its good faith, the defendant may be ordered to give security before being allowed to appear and defend.

It must be noted that, at this stage the Court is not called upon to inquire into the merits of the case of either party.

By his affadavit the defendant admits that he issued the said five cheques to the plaintiff, but states that the said five cheques were issued to meet certain urgent financial requirements of the plaintiff (*vide* paragraphs 15 and 16 of the affidavit). The defendant states that he owes nothing, as those cheques were issued on the condition that they were never to be encashed (paragraph 16 of the affidavit). Then in several paragraphs he averred about a cheetu transaction and stated that the only money that was due to the plaintiff was under a cheetu transaction. In any event it appears that the cheetu transactions referred to in the affidavit were separate transactions which had no connecton to the issue of the five cheques to the plaintiff.

This defence raised by the defendant cannot be believed. No credibility can be attached to it.

In the case of C. W. Mackie and Co. Ltd. V. Translanka Investments Ltd.(1) 'it was held that even where there appears to be a defence, if Court is doubtful of its genuieness, the defendant may be ordered to give security. Ranaraja, J. at page 11 said ;

> **"Where Court feels a reasonable doubt exists as to the honesty of the defence, it is entitled to order a defendant to appear and defend, only on condition of depositing in Court the sum of money for which he is being sued. Howard, CJ. in De Silva, Vs.**

De Silva quotes[2] Lord Blackburn, (in Wallingford V. The Mutual Society[3] where he explains thus -

"It is not enough to say 'I owe nothing', he must satisfy the Judge that there is reasonable ground for saying so. It is difficult to define it, but you must give such an extent of definite facts.....as to satisfy the Judge there are facts which make it reasonable that you should be able to raise that defence"

The learned counsel for the defendant submitted that the plaintiff has failed to disclose the circumstances in which the said cheques were given. Although the plaintiff has stated that the said cheques were given for valuable consideration, he has not stated what the said valuable consideration was.

Byles on Bills of Exchange, 21st edition, at page 132 states thus ;

"If a man seeks to enforce a simple contract, he must in pleading, aver that it was made on good consideration, and must substantiate that allegation by proof. But to this rule bills or notes are an exception. It is never necessary to aver consideration for any engagement on a bill or note or to prove the existance of such consideration.....In the case of other simple contracts, the law presumes that there was no consideraton till a consideration appears ; in the case of contracts on bills or notes, a consideration is presumed till the contraty appears or at least appears probable"

As regards the nature of the consideration for a bill, the Bills of Exchange Ordinance 1927, section 27, states that valuable consideraton for a bill may be constituted by-

(*a*) any consideration which by the law of England is sufficient to support a simple contract ;

(*b*) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

Weeramantry in his Treatise on the Law of Contract Valume 1 at page 225, states as follows :

"It will be observed that the expression, 'antecedent debt or liability' covers past consideration, so that, for example, a plaintiff suing upon a negotiable instrument may prove valuable consideration by showing that value had once been given for it. He is under no obligation to prove that he himself has again furnished consideration for it."

In the circumstances there is no merit in the submission made by the learned counsel for the defendant that the plaintiff has not averred in the plaint for what valuable consideration the said five cheques were issued, though the plaintiff has states that the said cheques were given for valuable consideration. However, he may prove this at the trial by establishing that value has been given for the said cheques.

It is to be noted that the Court has to decide whether the defendant has a sustainable defence by perusing his affidavit. On an examination of the affidavit we cannot see any triable issue or a sustainable defence. The learned Judge had correctly addressed his mind when he held that there was no sustainable defence.

It is also to be noted that the defendant has drawn the said cheques after the account had been closed, as such he knew at the time the cheques were issued the bank would not honour them. It appears that the defendant has committed a fraud on the plaintiff by issuing the said cheques after he closed his account in the Bank.

In these circumstances, it is our considerd view that the order of the learned District Judge should not be disturbed.

For the reasons stated in this judgement we dismiss the appeal with costs fixed at Rs. 5,000.

Judge of the Court of Appeal

GAMINI AMARATUNGE J, - I agree

Judge of the Court of Appeal.

THAMEL
VS
ROAD DEVELOPMENT AUTHORITY AND OTHERS

COURT OF APPEAL
SALEEM MARSOOF P. C., J (P/CA).
SRISKANDARAJAH J,
C. A. 532/2003
SEPTEMBER 1, 2004

Writ of Certiorari - Government Quarters (Resocvery of Possession) Act 7 of 1969 as amended by Act 8 of 1981 - Section 3, 9 - Is the power to serve a quit notice limited to a case where the person in occupation is an employee of the State? Can an independent contractor be evicted? Locus standii?

The Petitioner who was a private sub-contractor for the Road Construction Development Company (RCDC), In 1988, the house in dispute had been handed over to him by the RCDC and occupied by him from 1988 while he was working for the R. C. D. C. The R. C. D. C. requested the Petitioner to hand over possession of the said premises to the Road Development Authority (R. D. A.) and as these premises were not handed over as required a quit notice under the provisions of the Government Quarters Recovery of Possession Act was issued by the R. D. A.

The Petitioner contends that the premises were not handed over to him by the R. D. A. and therefore the Respondents are not entitled to issue a Notice to quit.

HELD

(i) The premises belong to the R. D. A. The R. C. D. C. had requested the R. D. A. to hand over the premises for a stated purpose and it was handed over to the R. C. D. C. by the R. D. A.

The R. C. D. C. is the construction arm of the R. D. A., when the RCDC handed over the premises to the Petitioner it was given on behalf of the R. D. A. Therefore the Respondent R. D. A. is entitled to issue a quit Notice.

(ii) The power to serve a quit Notice is not limited to a case which the person in occupation is an employee of the State, Quarters provided "to anyperson" by a Public Corporation can be recovered under the Act.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. Balasundaram vs Chairman, Janatha Estate Development Board and others 1977- 1SLR 84 at 85

Sunil F. Cooray with *Liyanage* for Petitioner.
M. N. Idroos State Counsel for Respondent.

October 15, 2004

cur. adv. vult.

SRISKANDARAJAH J.,

Marsoof, P. C., J (P/CA) - I agree.

Application dismissed.

S. SRISKANDARAJAH, J

The Petitioner after retirement from the Department of Highways in 1986 had been functioning as a private sub contractor for the Road Construction Development Company from 1988. The house in dispute had been occupied by the petitioner from 1988 while he was working as a contractor for the Road Construction and Development Company Private Limited. By a letter dated 16.12.1998 (X9) the District Manager of the Road Construction and Development Company had requested the petitioner to hand over possession of the said premises to the Road Development Authority the respondent. It is common ground that the premises had been originally handed over to the petitioner by the Road Construction and Development Company.

The respondent by his letter dated 27.1.2003 had issued a quit notice under Section 3 of the Government Quarters (Recovery of Possession)

Act No. 7 of 1969 as amended by Act No. 8 of 1981, notifying the petitioner to vacate the premises in dispute on or before 10.4.2003. The petitioner submits that the premises in dispute on which the aforesaid quit notice had been issued is not given to the petitioner by the respondent. But it was handed over to the petitioner by the Road Construction and Development Company and therefore the respondents is not entitled to issue a quit notice under Government Quarters (Recovery of Possession) Act for the said premises as a competent authority under the said Act. Therefore he submitted the quit notice is ultra vires and it has to be quashed.

The counsel for the respondents submitted that on the request made by the Road Construction and Development Company Limited which is the construction arm of the respondent by its letter dated 19.10.1990 (Y1) handed over the said premises to the Road Construction and Development Company Limited (Y2). Thereafter On the 4th November 98 (X8) the respondent requested the possession to be restored and consequence to this request the Road Construction and Development Company Limited requested the petitioner who was in occupation of the said premises to hand over possession to the respondent by it's letter dated 3rd February 1999 (X9). In the mean time the respondent also by its letter dated 25th July 2000 requested the petitioner to hand over possession of the said premises within fourteen days. The petitioner by his letter of 9th August 2000 (Y7) requested respondent to grant him time to vacate the premises and the respondent acceded to this request and permitted the petitioner to occupy the said premises for a period of two years from 9.8.2000. And at the expiration of the two years the respondent by its letter dated 24th December 2002 requested the petitioner to hand over vacant possession of the said premises. The petitioner had sought further six months time to vacate the said premises by his letter of 26th August, 2002 (Y9). The respondent after considering this request had given him further period of four months until the 9th of December, 2002 by its letter dated 29.8.2002 (Y10). As the petitioners failed and neglected to hand over possession of the said premises to the respondent a notice of quit was sent to the petitioners by the respondent a notice of quit was sent to the petitioners by the respondent on 13th December, 2002 (Y11) in terms of Government Quarters (Recovery of Possession) Act.

In this instance case the respondent has sought the provisions of the Government Quarters (Recovery of Possession) Act to recover possession of a premises belonging to them. This was given to the respondent by the

Road Construction and Development Company Limited which is the cosntruction arm of respondent. The position of the petitioner is that he was neither an employee of the respondent nor an employee of the Road Construction and Development Company Limited but he is only a sub contractor to the said company when he went into occupation and now he is an independent contractor. In addition he takes up the position that the respondent has not given this quarters to him for occupation, for these reasons the respondent has no authority to invoke the provisions of the Government Quarters (Recovery of Possession) Act to recover possession of the said quarters.

Kulathunga, J in Balasundaram The Chairman, Janatha Estate Development Board and Others at 85 observed ;

"Section 3 of the Act empowers a competent authority to serve a quit notice "on the occupier of a Government quarters" Under section 9 as amended by Act No. 8 of 1981 -

> "Government quarters" means any building, room or other accommodation occupied for the use of resident which is provided by or on behalf of the Government or any public corporation **to any person** and includes any land or premises in which such building or room or other accomadation is situated, but does not include any house provided by the, Commissioner for National Houseing to which Part V of the National Housing Act applies.

It is thus clear that the power to serve a quit note is not limited to a case where the person in occupation is an employee of the estate. Quarters provided "to any person" by a public corporation can be recovered under the Act."

Therefore the respondent is entitled to invoke the provisions of the Government Quarters (Recovery of Possession) Act to recover possession of the quarters provided to the petitioner even though the petitioner was not an employee of the respondent.

The next question that has to be determined is whether the said premises belongs to the respondent and if it so was it given on behalf of the respondent. The fact that the said premises belongs to the respondent is not disputed. The petitioners also by his letter of 9th August 2000 (Y7) and of 26th August, 2002 (Y9) accepted this position and had sought

extensions of time from the respondent to occupy the send premises. Even though the petioner has not disclosed these facts in the petition, when these communications were brought to the notice of this court by the respondents the petitioner admited this fact in his counter affidavit. It is also evident from the pleadings of the petitioner that after his retirement in 1988. He was functioning as a private sub contractor to the Road Construction and Dvelopment Company Limited and he has submitted bills of payments issued by the said company for September 96 (X4) and May 97 (X5). The petitioner also submitted that he came into occupation of the said premises when he was functioning as the sub contractor to the Road Construction and Development Company Limited. But the petitioner has no document to substantiate the date or the year on which he went into occupation.

The respondents submitted when the Road Construction and Development Company Limited by its letter dated 19th October 1990 (Y1) requested the respondents to hand over the said premises for their purpose and accordingly it was handed over on the 5th November 1990 (Y2) to the said company. By these letters it is established that the premises in question belongs to the respondent. The Road Construction and Development Company Limited which was the construction arm of the respondent has requested this premises from the respondent for storage and distribution purpose and it was given to the petitioner. In these circumstances it can be construed that the said premises was given on behalf of the respondent. Therefore the respondent is entitled to invoke the provisions of the Government Quarters (Recovery of Possession) Act, as it provides to recover possession of Quarters provided to any person by a public corporation. For the foregoing reasons I hold that the impugned quit notice is valid and that there is no grounds for quashing it by way of certiorari. Accordingly I dismiss this application without cost.

Judge of the Court of Appeal.

Saleem Marsoof P. C., J. (P., C/A) - *I agree.*

President of the Court of Appeal.

IYER
VS
IYER AND ANOTHER

COURT OF APPEAL,
AMARATUNGA J
CALA 192/2002,
D. C. PT. PEDRO 17830/L
AUGUST 23, 2004.

Civil Procedure Code – Section 219 – Examination of Judgment Debtor – Money Decree – Undertaking given to Court – Violation – Is it contempt of Court ? Inherent powers of Court.

The Plaintiff sought a declaration that he is entitled to perform a certain flag hoisting ceremony and an order to restrain the Defendants from obstructing the Plaintiff. The matter was settled and the Defendant under took to deposit a certain sum of money in Court. The Defendant did not honour this undertaking. The Plaintiff sought to examine the Defendant under Section 219 which was objected to by the Defendant but the trial Judge allowed the application . The Defendant sought leave to appeal against the said order.

HELD (i) Section 219 is a step in the process of executing a money decree. If there is no money decree entered against the Defendant, he is not a Judgment Debtor and accordingly he cannot be examined under Section 219.

The 1st Defendant however by signing the court record had given an undertaking that he would deposit the sum as directed.

(ii) The Court has the power to inquire as to why the party giving the undertaking failed to honour the undertaking. In the exercise of the power court can summon and examine the party concerned. Though the Defendant cannot be examined under Section 219, the order to examine the Defendant was correct as it is an exercise of the inherent power of Court.

(iii) An undertaking entered into or given to Court by a party or his Counsel is equivalent to and has the effect of an order of the

Court, so far as any infringement thereof may be maid the subject matter of an application to the Court to punish for its breach. The undertaking to be enforced need not necessarily be embodied in an order.

(iv) When a party has not acted according to an undertaking given to Court the Court has the power to inquire as to why the party giving the undertaking failed to honour the undertaking – That is an inherent power of Court.

APPLICATION for Leave to Appeal from an order of the District Court of Point Pedro.

Cases Referred to :

1. *In Re. P. K. Enso* – 62 NLR P 509 at 571

A. Mutukrishna with Nilanthie Devasinghe for Petitioner.

Ms. C. Rajasingham with Kanchana Nagarajah for Plaintiff Respondent.

January 10, 2005

Gamini Amaratunga, J.

Cur adv vult.

Application dismissed.

GAMINI AMARATUNGA J.

This is an action between the parties who have rights to administration and management of the Hindu Temple known as Sellasannathy Temple at Thondamanaru. The rights of the parties were exercised in rotation, one party exercising his rights in one year and another party in another year and so on. The party having the rights of management in any particular year has the right to conduct the annual festival that year and the income derived from the festival belongs to that party and the others who are entitled to shares.

In the year 2000 there was a dispute between the plaintiff and the 1st, 4th, 5th and 6th defendants about who should conduct the flag hoisting ceremony for the year 2000. The plaintiff filed this action praying *inter alia*

for a declaration that he was entitled to perform the flag hoisting ceremony in that year and for an order restraining the 1st, 4th, 5th and 6th defendants from obstructing the plaintiff. Whilst this action was pending, the Divisional Secretary negotiated with the parties to bring about a settlement. The parties agreed to auction the right to perform the flag hoisting ceremony. The 1st defendant was the highest bidder for the light. He was awarded the right for a sum of Rs. 900,000/-. This arrangement was without prejudice to the rights of the other parties. When this arrangement was notified to Court, an order was made directing the 1st defendant to deposit in Court a sum of Rs. 900,000/- out of the income derived from the ceremony, to be proportionately divided among the parties at the end of the case. The 1st defendant agreed to this and signed the case record.

The 1st defendant sought permission of Court to deposit Rs. 500,000/- in the first instance. Permission was granted to deposit Rs. 500,000/- first and Rs. 400,000/- later. The 1st defendant deposited Rs. 500,000/- but failed to deposit the balance 400,000/-. The first defendant's position was that the ceremony did not yield the income he expected and that therefore he was unable to deposit the balance sum.

The above is the short factual background which led to the making of the order challenged in this appeal. When the 1st defendant's failure to deposit the balance Rs. 400,000/- continued, the plaintiff moved for permission of Court to examine the 1st defendant under section 219 of the Civil Procedure Code. The learned Judge made order permitting the examination of the 1st defendant under section 219 of the Civil Procedure Code. In this appeal the learned counsel for the 1st defendant appellant contended that section 219 provides for the examination of a judgment debtor against whom a money decree has been entered. Section 219 is a step in the process of executing a money decree. The learned counsel contended that since there was no money decree entered against the 1st defendant he is not a judgment debtor and accordingly he cannot be examined under Section 219.

This argument is correct. However consequent to the order made by Court directing the 1st defendant to deposit Rs. 900,000/- in Court, the 1st defendant by signing the Court record had given an undertaking to Court that he would deposit the sum as directed. "An undertaking entered into or given to Court by a party or his counsel is equivalent to and has the effect of an order of the Court, so far as any infringement thereof may be made the subject matter of an application to the Court to punish for its breach. The undertaking to be enforced need not necessarily be embodied in an order. In Re. *P. K. Enso*[1] at 571.

When a party has not acted according to an undertaking given to Court the Court has the power to inquire as to why the party giving the undertaking failed to honour the undertaking. That is an inherent power the Court has to ensure that undertakings given to it are honoured. In the exercise of this inherent power the Court can summon and examine the party concerned. In the Court finds that the undertaking was not honoured without any excuse the Court has the power to punish the party concerned for contempt.

In the present case when the Court allowed the application to examine the 1st defendant to ascertain his means and to find why the 1st defendant did not honour the undertaking the Court was acting in the exercise of its inherent power. The only mistake made by Court was to refer to that examination as one sanctioned by section 219 of the Code. Though this reasoning was wrong the order to examine the 1st defendant was correct as it is an exercise of the inherent power of Court.

Thus there is no merit in this appeal. The appeal is dismissed and the order to examine the 1st defendant is hereby affirmed. The 1st defendant shall pay a sum of Rs. 15,000/- to the plaintiff as costs of this appeal.

Ige of the Court of Appeal.

LESLIE SILVA
vs
PERERA

COURT OF APPEAL,
SOMAWANSA, J (P/CA)
C. A. 304/2004 (REV)
DC MT. LAVINIA 139/L
MAY 13, 2005

Civil Proceduere Code - Section 40(d), 147, 454(2) - Issues of Law to be tried first - when ? Refusal by trial court - No leave to appeal application filed - Is revision available ? - Court of Appeal (Appellate Procedure Rules 1990) Rule 46 Supreme Court Rules.

The defendent-Petitioner sought to revise the order of the trial court refusing to hear and determine issue No. 13 as a preliminary Issue-whether the Plaint has conformed to the provisons of Section 40D of the Civil Procedure Code. The trial court held that the said issue is not a pure question of law and in order to answer the said issue the Court has to consider the evidence that would be held at the trail but went to answer the said issues in the negative

The Defendant moved in Resivion

HELD:

(i) The Court after deciding that Issue No. 13 is not a pure question of law erred by answering the issues in the negative

(ii) In terms of Section 40(d), the Plaint should contain a statement as to where and when the casue of action arose and is not a fact which should be kept to be disclosed at the trial. The Plaint, it is apparent does not say as to when the purported action arose.

(iii) No other evidence/documents are required to decide whether the plaint is drawn out in compliance with Section 40(d) - this is a fatal defect which goes to the root of the case.

(iv) The Defendant Petitioner has invoked the revisionary jurisdiction to avert a miscarriage of jutice caused to him by the error committed by the trial Judge, and in the circumstances, this is a fit and proper instant to exercise the revisionary jurisdiction.

PER SOMAWANSA, J. (P/CA)

"the error committed by the trial judge by answering Issue No. 13 in the negative without giving a hearing and in fact according to the reasons given by her she could not have answered the said Issue in any event without considering evidence..... is a clear and unforgivable error committed by the trial Judge....."

APPLICATION in Revision from the Order of the District Court of Mt. Lavinia.

Cases referred to :

1. *Mutukrishna vs Gomes, 1994 3 Sri LR 1*
2. *Atukorale vs Samyanathan* - 41 NLR 165
3. *Silva vs Silva* - 44 NLR 494
4. *Sinnathangam vs Meera Mohideen* –60 SLR 394
5. *Gnanapandithan vs Balanayagam* - 1998 1 Sri LR 391
6. *Manam Bee Bee vs Syed Mohamed* - 68 NLR 36 at 38
7. *Somawathie vs Madawala* –1983 2 Spl LR 15 at 30 and 31

May 13, 2005

Lasitha Kanuwanaratchi for Defendent Petitioner
Ranjan Suwandaratne with Malinda Nanayakkara for Substitued -Plaintiff-Respondent

Cur.adv.vult

ANDREW SOMAWANSA, J.

This is an application for revision and or restitutio in integrum under Article 138 of the Constitution seeking to revise and set aside the order of the learned Additional District Judge of Mt. Lavinia dated 23.05.2003 refusing to hear and determine issue No. 13 as a preliminary issue of law and to direct the learned Additional District Judge to try the aforesaid issue No. 13 as preliminary issue of law, to answer the same in favour of the defendant-petitioner and to dismiss the plaint in limine.

At the hearing of the application both parties agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

Issue No. 13 පැමිණිල්ල සිවිල් නඩු විධාන සංග්‍රහයේ 40වැ වගන්තියේ ප්‍රතිපාදනවලට පටහැනිව ඉදිරිපත් කර ඇත් ද ?

Section 40(b) of the Civil Procedure Code reads as follows :

> "A plain and concise statement of the circumstances constituting each cause of action, and where and when it arose. Such statement shall be set forth in duly numbered paragraphs ; and where two or more causes of action are set out, the statement of the circumstances constituting each cause of action must be separate, and numbered"

When consel for the defendant-petitioner made an application to Court to try issue No. 13 as a preliminary issue of law in terms of Section 147 of the Civil Procedure Code, the plaintiff-respondent objected to the said application and consequently parties had agreed to tender written submissions on the question of whether the aforesaid issue No. 13 should be tried as a prelimary issue. Both parties had tendered their written submissions only on the question whether the said issue No. 13 could be tried as a preliminary issue of law. However as submitted by counsel for the defendant-petitioner the learned Additional District Judge has come to a finding that the said issued No. 13 is not a pure issue of loaw and in order to answer the said issue the Court has to consider the evidence that would be adduced at the trial. Having come to this conslusion that this particular issue No. 13 cannot be answered without considering the evidence, the learned Additional District Judge proceeded to answer the aforesaid issue No. 13 in the negative. I would hold that the aforesaid finding is a gross misdirectin of law on the part of the learned Additional District Judge.

It is submitted by counsel for the defendant-petitioner that the only matter the learned Additional District Judge was called upon to decide was whether issue No. 13 should be tried as a preliminary issue of law. This fact is borne out by the journal entry No. 57 dated 28.01.2003 which reads as follows :

විභාගය (08)

විසඳිය යුතු ප්‍රශ්ණ ඉදිරිපත් කරන ලදී. ඒ අනුව අංක 13 දරන විසඳිය යුතු ප්‍රශ්ණ මූලික විසඳිය යුතු ප්‍රශ්ණ ලෙස විභාග කළ යුතු ද නැද්ද යන්න විමසීම ලිඛිත දේශණ සඳහා දින දෙමි

ලිඛිත දේශන : 2003.03.04

And also as per proceedings and the order made by the learned Additional District Judge dated 21.01.2003 marked P5 which reads as follows :

නියෝගය :-

මේ අවස්ථාවේ දී මෙම අංක 13 දරන විසඳිය යුතු ප්‍රශ්ණය මූලික විසඳිය යුතු ප්‍රශ්ණයක් ද, නැද්ද යන්න විභාග කිරීමට ඒ සම්බන්ධයෙන් විමසා බැලීමට කරුණු ඉදිරිපත් කළ යුතුය.

ඒ සඳහා ලිඛිත දේශන : 2003.03.04

Vide also paragraph 05 of the written submissions tendered by the plaintiff-respondent marked P7 and the final paragraph on page 14, it is to be seen that first paragraph of the written submisisons of the defendent-petitioner marked P6 also corroborates this fact which reads as follows :

මෙම නඩුවේ වර්ෂ 2003.01.28 දිනට විභාගයට ගත් අවස්ථාවේ අධිකරණ බලය පමණක් පිළිගත් අතර, පැමිණිල්ල වෙනුවෙන් 1 සිට 6 දක්වා විසඳිය යුතු ප්‍රශ්ණ ද විත්තිය වෙනුවෙන් 7 සිට 14 දක්වා විසඳිය යුතු ප්‍රශ්ණ ද ඉදිරිපත් කරන ලදී. විත්තිය වෙනුවෙන් යෝජනා කරන ලද 13 වන විසඳිය යුතු ප්‍රශ්ණය මූලික විසඳිය යුතු ප්‍රශ්ණයක් ලෙස පිළිතුරු දීම උදෙසා සිවිල් නඩු විධාන සංග්‍රහයේ 147 වගන්තියේ ප්‍රතිපාදන ප්‍රකාරව පිළිතුරු දීම උදෙසා විත්තිකරු වෙනුවෙන් මා අධිකරණයෙන් අයැද සිටින ලදී. අධිකරණයට මා සහ මගේ මිත්‍රයා විසින් කරුණු දැක්වීමෙන් අනතුරුව 13 වන විසඳිය යුතු ප්‍රශ්ණය මූලිකව විසඳිය යුතු ප්‍රශ්නයක් ලෙස ගත යුතුද නැද්ද පිළිබඳව කරුණු ඉදිරිපත් කිරීමට අධිකරණය අවස්ථාව ලබා දෙන ලෙස

Vide also the first paragraph of the order of the learned Additional District Judge dated 23.05.2003 which reads as follows :

මෙම නඩුවේ නඩු විභාගයේ දී පැමිණිල්ල සහ විත්තිය විසඳිය යුතු ප්‍රශ්ණ ඉදිරිපත් කර ඒ අනුව විත්තිය ඉදිරිපත් කළ අංක 13 දරන විසඳිය යුතු ප්‍රශ්නය මූලික විසඳිය යුතු ප්‍රශ්ණයක් ද නැද්ද යන්න මත නියෝගයක් කිරීමට දෙපාර්ශවය එකඟ වී, ඒ අනුව නියෝගයක් කළ යුතුව ඇත.

Thus the only matter that the Addmitional District Judge had to decide was whether issue No. 13 should be tried as a preliminary issue of law or whether it shuld be tried along with the other issued raised by parties on the evidence to be placed before her by both parties.

On an examination of her order dated 23.05.2003, it is to be seen that the learned Additional District Judge having come to a conclusion that issue No. 13 is not a pure question of law and that it involves facts which has to be considered after calling evidence had prceeded to answer the aforesaid question in the negative before any evidence was led and without a hearing. The last two paragraphs of her order reads as follows :

තව ද පැමිණිල්ලේ 6, 7, 8 වන ඡේදවලට අදාළ කරුණු ඉහත සඳහන් කළ පරිදි සිවිල් නඩු විධාන සංග්‍රහයේ විධිවිධානවලට ද අදාළ බව සාක්ෂි මගින් එළිදරව් වීමට ඉඩ ඇතිවාක් මෙන්ම ඉහත සඳහන් කළ 86697 දරන නඩුවට අදාළ ලියවිලි මෙම නඩුවේ කොටසක් සේ සලකන ලෙස පැමිණිල්ල අයැද ඇත.

මේ අනුව 13 වන විසඳිය යුතු ප්‍රශ්නයට 'නැත' යනුවෙන් පිළිතුරු සපයමි.

මෙම විසඳිය යුතු ප්‍රශ්නය මූලික විසඳිය යුතු ප්‍රශ්නයක් නොවන බවත්, මෙයින් නියෝග කරමි.

In *Mutukrishna* vs. *Gomes* [1] it was held as follows :

> "Under Section 147 of the Civil Proceudre Code for a case to be disposed of on a preliminary issue, it should be a pure question of law which goes to the root of the case".
>
> Judges of original courts should, as far as practible, go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the case"

In the instant action, it is to be seen that the learned Additional District Judge after deciding that issue No. 13 is not a pure question of law and it involves facts which have to be considered after calling evidence has erred in law by answering the said issue in the negative.

In view of the aforesaid provisioons contained in Section 40(d) of the Civil Procedue Code it is clear that the plaint itself should contain a satement as to where and when the case of action arose and is not a fact whihc should be left to be disclosed at the trail. For if this procedure is adopted it would certainly result in undue hardship and injustice to the defendant-petitioner in formulating his defence.

In the instant action the plaint does not say as to when the purported action arose. The relevant paragraph in the plaint *viz.* paragraph 4 reads as follows :

මෙම නඩුවේ විත්තිකරු ඔහුට කිසියම් අයිතියක් හෝ හිමිකමක් නොමැතිව පැමිණිලිකරුගේ නැගෙනහිර මායිම ඔස්සේ තිබූ වැට ක්‍රමයෙන් වෙනස් කර පැමිණිලිකරුට අයත් එකී 31/1999 දරන පිඹුරේ ලොට් 2 දරන ඉඩමේ කොටස් යා කරගෙන පැමිණිලිකරු සම හබ කරයි.

Thus it is to be seen that no other evidence or documents are required to decide whether the plaint is drawn out in compliance with Section 40(d). The plaint itself would speak to this fact. However as to whether the failure of the plaintiff-respondent to comply with this provision contained in Section 40(b) of the Civil Procedure Code is a fatal defect which goes to the root of the case has to be decided by the learned Additional District Judge.

For the foregoing reasons my considered view is that the learned Additional District Judge's order dated 23.05.2003 should not be permitted to stand

At this point, I would also consider the objections taken by the plaintiff-respondent to the maintainability of this application. One of the matters raised by the counsel for the plaintiff-respondent is that the defendant-petitioner should have invoked the provisions of Section 754(2) of the Civil Procedure Code by way of leave to appeal and having failed to do so the defendant-petitioner is not entitled to invoke the revisionary jurisdiction of this Court. For this proposition of law counsel for the defendant-petitioner has made reference to relevant decisions in paragraph 22 of his written submissions. However I would rather incline to follow the following decisions in this respect.

Atukorale vs. Samyanathan[2]

"The powers given to the Supreme Court by way of revision are wide enought to give it the right to revise any order made by an original court whether an appeal has been taken against it or not.

This right will be exercised in a case which an appeal is pending only in exceptional circumstances as for example, to ensure that the decision given on appeal is not rendered nugatory"

Silva vs Silva

"The Supreme Court has the power to revise and order made by an original court even where an appeal has been taken against that order.

In such a case the court will exercise its jurisdiction only in exceptional circumstances and in order to ensure that the decree given in appeal is not rendered nugatory"

Sinnathangam vs. Meeramohaideen[4]

"The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though and appeal agaisnt such decision has been correctly held to have abated on the ground on non compliance with come of the technical requirements in respect of the notice of security.

In this respect I would say it is settled law and our Courts time and again has held that the revisionary jurisdiction of this Court is wide enough to be exercised to avert any miscarriage of justice irrespective of availability of alternative remedy or inordinate delay.

In the case of *Ganapandithan Vs. Balanayagaman* application was made to the Court of Appeal to set aside the judgment in a partition action after 2 1/2 years was disallowed mainly on the ground of undeu delay which remained unexplained. In appeal to the Supreme Court the appeal was allowed as the judgment of the learned District Judge was manifestly wrong and the order of the Court of Appeal also was set aside as it had focussed only on the question of delay and not on the merits. Per G. P. S. de Silva, CJ at pages 397/398

"On a consideration of the proceedings in this case. I hold that there has been miscarriage of justice. The object of the power of revision as stated by Sansoni, CJ in Marian beebee vs. Seyed Mohamed[6] at 389 "is the due administration of justice....." In the words Soza J, in Somawatie vs. Madawala and others at 30 and 31. "The court will not hesitate to use its revisionary powers to give relief where as miscarriage of justice has occured..... *Indeed the facts of this case cry aloud for the intervention of this court to prevent what otherwise would be a miscarriage of justice.* "The words underlined above are equally applicable to the present case. I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its revisionary powers having regard to the very special and exceptional circumstances of this partition case."

Also per sansoni, CJ in the case of Marian Beebee Vs. Seyed Mohamed (Supra)

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometines committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in come case by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injutice will result. The Partition Act has not, conceive, made any change in the respect, and the power can still be exercised in respect of any order or decreed of a lower Court."

The defendant-petitioner in the instant action has invoked the revisionary jurisdiction of this Court to avert a miscarriage of justice caused to him by the error committed by the learned Additional District Judge by answering issue No. 13 raised by the defendant-petitioner in the negative without giving a hearing and in fact according to the reasons given by her she could not have answered the aforesaid issue in any event without

considering evidence. I would say this is a clear and unforgivable error committed by the trial Judge. In the circumstances my considered view is that this is a fit and proper instant to exercise the revisionary jurisdiction of this Court.

Objection has been taken by counsel for the plaintiff-respondent to the maintainability of this application in view of not complying with the provisions contained in Rule 3(1)(b) of the Court of Appeal (Appellate Procedure Reul 1990 or Rule 46 of the Supreme Court Rules of Appellate Procedure). I would say that I am quite satisfied that all the relevant documents have been made avialabe to this Court and the documents referred to in paragraph 25 of the written submissions of the plaintiff-respondent are irrelevant to htis application. Hence there is no merit in this objection.

Another objection taken by the plaintiff-respondent is that when there is an objection in relation to the Rules of Procedure as set out in the Civil Procedure Code they must be taken up prior to the farming of issues with notice to the respondent. This requirement appears to have been complied with by the defendant-petitiner in paragraph 12 of his answer.

For the foregoing reasons, I would allow this application for revision and set aside the order of the learned Additional District Judge 23.05.2003 and direct the learned Additional District Judge to try the aforesaid issue No. 13 as a preliminary issue. The plaintiff-respondent will pay to the defendant-petitioner Rs. 5,000 as costs of this application.

President of the Court of Appeal

MAHANAYAKE
VS
CHAIRMAN CEYLON PETROLEUM CORPORATION AND OTHERS

COURT OF APPEAL
WIJEYARATNE J.
SRISKANDARAJAH J.
CA 1323/2002
JANUARY 10, 2005
MARCH 24, 2005

Writs of certiorari/Mandamus – on an order of the Human Rights Commission Does Writ lie ? – Termination – Contractual – Alternate remedy ? – availability of a Writ to reinstate – Natural Person holding public office – Recommendation of Human Rights Commission – Does it create a legal right ?

The petitioner sought a writ of Certiorari to quash the Order of the 2nd Respondent Corporation terminating her services and a writ of Mandamus to compel the 01st and 02nd Respondents to reinstate the Petitioner as directed by the 03rd Respondent – Human Rights Commission.

HELD

(i) The order arises out of a contract of employment and the termination complained of is based upon a breach of her contract of employment. Where the relationship between the parties is purely contractual one of commercial nature neither Certiorari nor Mandamus would lie.

(ii) When a specific remedy is given by a statute (Industrial Disputes Act), deprives the person who insists upon a remedy of any other form of remedy than that given by the statute.

(iii) A Writ of Mandamus could only issue against a natural person, who holds public office. Petitioner cannot seek a writ of mandamus against the 03rd Respondent the Human Rights Commission is not a natural person, the Petitioner has failed to name the Members of the Commission to seek this remedy.

(iv) The Human Rights Commission is a body which can only make a recommendation. This recommendation neither creates a legal right for the Petitioner to claim re-instatement nor does it create a legal duty for Respondent Corporation to reinstate the Petitioner.

Per Sriskandarajah J.

"A Writ of Mandamus would lie where a statute mandates certain action, in defined circumstances and despite the existence of such circumstances, the required action has not been performed."

Cases referred to :

1. *Jayaweera* vs *Wijeratne* – 1985 2 Sri LR 413
2. *Hendrick Appuhamy* vs *Johan Appuhamy* - 69 NLR 32
3. *Haniffa* vs *Urban Council, Nawalapitiya* - 66 NLR 48
4. *Mageswaran* vs *UGC & others* – 2003 – 2 Sri LR 282, 285

Rohan Sahabandu for Petitioner.

Varuna Basnayake P. C., with Ms Yamuna Kuruppu for 1st and 2nd Respondents

Ms Yuresha de Silva S. C., for 3rd Respondent

MAY 25, 2005

cur adv vult

SRISKANDARAJAH J.
WIJAYARATNE J.

I agree.

Application dismissed.

S. SRISKANDARAJAH. J

The Petitioner in this application has sought a writ of Certiorari to quash the order of the 02nd Respondent terminating the services of the Petitioner on 29.08.2000. The Petitioner has also sought a writ of mandamus to compel the 01st and 02nd Respondents to reinstate the Petitioner with back wages or in the alternative to compel the 01st and 02nd Respondents to reinstate the Petitioner as directed by the 03rd Respondent or in the alternative to compel the 03rd respondent to this matter to Her Excellency the President.

The Petitioner with a reference letter of Dr. Chandiama de Mel, the then Chairmen of the 02nd Respondent Corporation applied on 25.07.2000 for a

suitable job in the 02nd Respondent Corporation. The Petitioner was informed by P1 that her application would be considered when an opportunity arises. Subsequently she was called for an interview and after an interview on 11.08.2000, she was appointed as a Record Keeper, Grade B4 from 15.08.2000 by the letter of appointment P3. Her service was terminated by letter dated 29.08.2000 P4 on the basis that she has misrepresented and misled the interview board by suppressing her personal data.

The Petitioner in this application is seeking to quash the aforesaid order of termination of her employment P4. The order is arising out of a contract of employment and the termination complained of based upon a breach of her contract of employment. In *Jayaweera v Wijeratne*[1], G. P. S. de Silva J held where the relationship between the parties is a purely contractual one of a commercial nature neither certiorari nor mandamus will lie. On the other hand the petitioner had effective alternate remedies such as seeking redress before a Labour Tribunal under the Industrial Dispute Act. In *Hendric Appuhamy v Johan Appuhamy*[2] the court held where a specific remedy is given by a statute thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute. Under these circumstances a writ of certiorari will not be available to quash the order of termination dated 29.08.2000 or a writ of Mandamus to compel the 01st and 02nd Respondents to reinsate the Petitioner with back wages.

The Petitioner had decided to seek the intervention of the Human Rights Commission in this matter and the Human Rights Commission after an inquiry recommended that the Petitioner should be re-instated. The 02nd Respondent Corporation did not act upon this recommendation and the chairman of the 02nd Respondent by his letter dated 21.05.2001, 2R14 informed the Human Rights Commission as to why he was not implementing the recommendation. The Petitioner by this application seeking a writ of mandamus to compel the 01st and 02nd Respondents to reinstate the Petitioner as directed by the 03rd Respondent or in the alternative to compel the 03rd respondent to refer this matter to Her Excellency the President to compel the 01st and 02nd Respondents to reinstate the Petitioner. A writ of mandamus can only issue against a natural person who holds a public office. In *Haniffa v Urben Counsel Nawalapitiya*[3], the Court held, that in an

application for a writ of mandamus against the Chairman of an Urban Council the Petitioner must name the individual person against whom the writ can be issued. Therefore The Petitioner in this application cannot seek a writ of mandamus against the 03rd Respondent the Human Rights Commission as it is not a natural person and the Petitioner has failed to name the members of the commission to seek this remedy. Further a writ of mandamus may issue to compel something to be done under a statue it must be shown the statute impose a legal duty. In *Mageswaran v University Grants Commission and Others*[4], the court held "A writ of mandamus only commands the person or body to whom it is directed to perform a public duty imposed by law. In other words a writ of mandamus would lie where a statute mandates certain action in defined circumstances and despite the existence of such circumstances, the required action has not been performed." The human rights commission is a body, which can only make a recommendation. This recommendation neither creates a legal right for the petitioner to claim reinstatement in the 2nd Respondents Corporation nor does it create a legal duty for the Respondent Corporation to reinstate the petitioner. For the reasons stated above the Court dismiss this application without costs.

Judge of the Court of Appeal.

P. WIJAYARATNE J.

I agree.

Judge of the Court of Appeal.