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

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KULATUNGA
VS
RANAWEERA

COURT OF APPEAL
EKANAYAKE. J.,
RANJITH SILVA, J.
C. A. 893/94(F)
D. C. HORANA 4000/L
JUNE 14, 2005

Declaration of a right of way - Partition Decree - Blocking of right/access - waiver and abandonment of right of user ? - Right of way granted by Deed - Could it be lost by non - user ? Issues framed - Pleadings recede to background ? - Perverse Judgment – When could the Appellate Court interfere ? - Raising no Issues in the appellate Court ? - Evidence Ordinance S 114

The plaintiff - Appellant sought a declaration of a right of way over Lot 5, which was provided as a right of access to Lots 2, 3 and 4 in a Partition Decree, the Respondent who was the owner of lots 3 and 4 blocked the said right of access to Lot 2 over lot 5 by erecting a fence across the road (Lot 5). The Defendant - Respondent filed Answer denying the allegations and pleaded that, the strip of land covered by Lot 5(a) was not used as a road - way by any one as there was access to lot 2 from the public road, and the Appellant had waived or abandoned his right to use Lot 5 as his right of access. The Trial Court dismissed the Plaintiffs action.

On appeal -

Held

(i) The Appellant was not claiming any right or title derived or on the strength of the Partition Decree, therefore in the absence of any specific issue as to whether the Appellant was entitled to a rght of way over Lot 5 by virtue of or based on the partition decree, the trial Judge cannot be faulted for not holding in favour of the Appellant.

'Once issues are framed the case which the Court has to hear and determine become crystallised in the issues and the pleadings recede to the background.'

Per de Silva J

"Servitude to be lost by abandonment, the abandonment must be deliberate and intentional, the abandonment of a servitude destroys the right not only when the abandonment is express but also when it is tacit. Further where something is conceded to the owner of the servient tenement which naturally and of necessity obstruct the use of

the servitude there is tacit abandonment of the servitude provided the abandonment is deliberate and intentional and certainly not behind the back of the person entitled to the servitude."

(ii) A right of way granted by a Deed is not lost by mere non user.

(iii) The appellant had not raised appropriate relevant and pertinent issues, it is not fair at this stage for the Appellate Court to frame an issue and answer that issue on its own as the parties have not addressed their minds specifically to that issue.

(iv) Appellate Court can and should interfere even on questions of fact although those findings cannot be branded as "perverse" unless the issue is one of credibility of witnesses. When the issue is mainly on the credibility of witness an appellate Court should not interfere unless the findings are perverse and not in regard to findings on other issues from the facts which are either proved or admitted.

Appeal from the Judgment of the District Court of Horana.

Cases referred to :

1. Hanafi vs Nallammah - 1998 1 Sri LR 73
2. Fernando vs Mendis - 14 NLR at 101
3. Inagamani vs Vinayagamoorthy - 24 NLR 438
4. Paramount Investments Ltd., vs Cader - 1986 Sri L. R. Vol. 2 at 309
5. Fradd vs Brown & Co. Ltd 20 NLR 282
6. Wickramasuriya vs Dedoleena - 1996 2 Sri LR 95

Appellant absent and unrepresented.

Rohan Sahabandu for respondent

Cur. Adv. vult.

July 12, 2005

W. L. RANJITH SILVA, J.

On 12.07.2004 when this matter came up for argument before another division of this court the plaintiff Appellant (hereinafter referred to as the appellant) was absent and unrepresented. Mr. Sahabandu had appeared and concluded his oral submissions on behalf of the Defendant-Respondent and a date was granted for written submissions. The journal entry of that date is to the effect that as the Appellant failed to appear in court despite repeated notice on the appellant, the court decided to dispose of the appeal after a consideration of the petition of appeal. On 30.09.2004 this matter came up before another division of this Court and that Court referred this matter to this division of the Court of Appeal. On a perusal ; of the docket

it appears that notice on the appellant and his Registered Attorney at Law were dispatched on several occasions on the orders of this court and that none of the notices so issued returned undelivered. Therefore this court can safely presume under Sec. 114 of the Evidence Ordinance that the relevant notices were not only dispatched but also were duly served on the appellant and his Registered Attorney.

On 18.02.2005 this matter was fixed for argument for the 14.06.2005 when it came up for argument Mr. Sahabandu, counsel for the Respondent informed court that he was prepared to abide by the written submission already filed on behalf of the respondent and that the matter could be resolved on the written submissions. But on a request made by this court Mr. Sahabandu made a brief outline of the case for the benefit ot this court since this case shuttled from one court to another in the past.

The facts

The Appellant instituted action bearing No. 400/L in the District Court of Horana seeking - *inter alia* for a declaration of a right of way over lot 5 morefully described in the second schedule to the plaint, for an order for the removal of all obstructions thereon and for damages.

The plaintiff's position was that one Richard Kulatunga became the owner of the land morefully described in schedule 1 to the plaint (lot 2 in plan No. 178) by virtue of the partition decree in P/5116 and that the said Kulatunga transferred the land to one Victor Alvis Kulatunga and the two Kulatunges aforesaid transferred the same to one Gunaratne Alvis Kulatunge by deed No. 13664 of 24.05.78 and that Alvis Kulatunga transferred 13 perches of the said land to the appellant by deed No. 14529 of 13.09.1982.

It is common ground that by the final decree in P/5116 lot 5 was provided as a right of access to lot 2 aforesaid and to lots 3 and 4 of the said plan No. 178. The Appellant in his plaint alleged that the Respondent who was the owner of Lots 3 & 4 blocked the right of access to lot 2 over lot 5 by erecting a fence across the said road (lot 5) on or about 28.02.1986.

The Respondent filed answer denying the allegations levelled against him in the plaint and pleaded that from about 1953 the strip of land covered by lot 5(a) was not used as a road way by any one as there was access to lot 2 from the public road. (Thannanwilla road). The Respondent further averred that neither the appellant nor his predecessors in title ever used the road after the public road called "Thannanawilla" road aforesaid came into existence and that the Appellant waived or abandoned his right to use lot 5 as his right of access, and pleaded that he had prescribed to lot 5.

When the matter was taken up for trial in the District Court four issues were framed on behalf of the Appellant. They are as follows :

(1) Did the plaintiff use lot 5(A) and lot 5(B) as access road to reach lot 2(A) ?
(2) Did the defendant on or about 9 obstruct the road shown as lots 5(A) & 5(B) ?
(3) Did the defendant on or about 22.01.1989 obstruct the road shown as lots 5(A) & 5(B) ?
(4) Is the plaintiff entitled to obtain an order against the defendant to remove all the obstruction in lots 5(A) & 5(B) ?
(5) Is the Plaintiff entitled to claim damages from the defendant ?

After trial the Learned District Judge by its judgement dated 21.04.1994 dismissed the Appellant's action and the appellant being aggrieved by the said judgement preferred this appeal to this Court.

At a glance one could see that the appellant by his issues framed was not seeking to establish a servitude of right of way acquired by prescription or on a deed. He was not even seeking to establish the right of way shown as lot 5 in plan 178 granted by the partition decree in P/5116. Whatever the admissions or the pleadings are a case is ultimately decided on the issues framed by the parties or by the court itself irrespective of the pleadings. It was held in *Hanafi Vs. Nallamma* by G. P. S. De Silva, C. J. that once issues are framed the case which the court has to hear and determine becomes crystallised in the issues and the pleadings recede to the background. In the case in hand the first issue is whether the Appellant used lot 5(A) ; and lot 5(b) as a road access to reach lot 2(A). It is clear that the Appellant was certainly not claiming any right or title derived or, on the strength, of the partition decree in case No. 5116/P. Therefore in the absence of any specific issue as to whether the appellant was entitled to a right of way over lot 5(a) or lot 5(b) or both by virtue of, or based on the partition decree in case No. 5116/P the Learned District Judge cannot be faulted for not holding in favour of the appellant on that issue as there was not sufficient evidence on that issue to prove that the Appellant used the particular road for any length of time. On the other hand issue No. 1 does not speak of a date as to when the appellant commenced using the said road, or for how long he used that road. Since the Appellant was not relying on title or a right she derived based on the partitioned decree referred to above the appellant could not in any event have succeeded in this action. On the other hand the Appellant failed to frame an issue on

prescription either. Even if he did he failed to prove that he had prescribed to lots 5(A) and 5(B) as he was silent as to the date she started using the road or when the disputes arose as to the said right of way.

THE LAW

I shall now deal with some of the cases cited by the Respondent in order to show that a right of way is lost by non user or abandonment. The statement of law made by the counsel for the respondent is good in regard to normal servitudes but not for servitudes granted by deeds. In *Fernando Vs. Mendis*[2] at 101 the well which was the subject matter in that action was filled up with the consent of both parties, and the court held that there was an express abandonment. *Inagamani Vs. Vinayagamurthy*[3] it was laid down that for servitde to be lost by abandonment the abandonment must be deliberate and intentional. According to **Voet** the abandonment of a servitude destroys that right not only when the abandonment is express but also when it is tacit. On the other hand there is also the proposition that servitudes are lost by permitting or allowing the servient tenement owner anything to be done which is repugnant to or inconsistent with the servitude of right of way to be built upon, or a wall to be constructed across the road or a drain to be cut across the road. In other words where something is conceded to the owner of the servient tenement which naturally and of necessity obstruct the use of the servitude, there is tacit abandonment for the servitude provided the abandonment is deliberate and intentional and certainly not behind the back of the person entitled to the servitude. In any case all the authorities cited by the counsel will not be relevant to a situation where the servitude is created by way of a Deed of Conveyance as in the present case in view of the decision in Paramount *Investments Ltd. Vs. Cader*[1] at 309. Althought this case was not cited before me, the judgement in this case lays down the principle very clearly. It was held in that case that a right of way granted by a deed is not lost by mere non-user. In this case too, the servitude was first recognised by the partition decree and was later conveyed to the Appellant by a Deed of Transfer. There is no evidence in this case to prove that the appellant or his predecessors in title ever conceded their rights in respect of the said servitude intentionally or deliberately.

Therefore I respectfully disagree with the submissions made by the Respondent that there had been a tacit or express abandonment by the appellant or her predecessor in title of the servitude of a right of way in

respect of lots 5(A) and 5(b) (lot 5 in plan 178). But unfortunately for the Appellant there was no appropriate, relevant or pertinent. Issue framed on his behalf. The only issue that has some relevance to this topic is issue No. 5 based on prescription, raised by the Respondent and that too was answered in the negative.

It was also the contention of the counsel for the Respondent that in any event this court should not intervene in this matter as the judgement of the learned District Judge, is not perverse. He has cited among other authorities *Fradd Vs. Brown & Co. Ltd.*(5) What was held in that case was that when the issue is mainly on the credibility of witnesses an Appellate Court should not interfere unless the findings of the judge are perverse and not in regard to findings on other issues from the facts which are either proved or admitted ? And in the last place what witnesses are to be believed ? It is only in the last question any special sanctity attaches to the decision of a court of first instance. On the first two questions no special sanctity attaches. By any special sanctity is meant the disinclination on the part of an appellate body to correct a judgment as being erroneous. (*Vide, Wickramssooriya Vs. Dedoleena*(6).

Therefore it is seen that an Appellate Court can and should interfere even on question of facts although those findings cannot be branded as "perverse." unless the issue is one of credibility of witnesses. Even though I disagree with the learned counsel appearing for the respondent on certain views expressed by him, which I have enumerated above I agree with him that the Appellant failed to raise the appropriate issue at the trial. I also find that it would not be fair at this stage for this court to frame an issue and answer that issue on its own as I find that the parties have not addressed their minds specifically to that issue.

For the aforesaid reasons I find that there is no merit in this appeal and the same is hereby dismissed with costs fixed at Rs. 5,000 to be paid by the Appellant to the respondent. The Registrar is directed to send the record to the appropriate court for necessary action.

EKANAYAKE, J. - I agree.

Appeal Dismissed.

SANJEEWA JAYAWARDENE

vs

HARSHANI KARUNASINGHE

COURT OF APPEAL
SOMAWANSA J (P/CA)
WIMALACHANDRA J.
CALA : 338/2004
DC PANADURA 2784/D
MAY 25, 30, 2005

Civil Procedure Code - S- 614, 614 (1), 614 (3) - Application for Alimony Pendente lite - should an Inquiry be held ? - Is it different from costs of litigation?

The Plaintiff (husband) instituted action for divorce against the Defendant Respondent (wife). On the Summons returnable date Defendant appeared in Court and filed proxy, on this day she was paid Rs. 1,500 as costs. After the pleadings were completed, the Defendant Respondent made an application in terms of Section 614 for alimony - pendente - lite and for costs by way of summary procedure.

The Plaintiff raised a preliminary objection that as the defenant had already obtained Rs. 1,500 as costs of suit she is not entitled to make a further application under Section 614 (3). The Court overruled the objection and set the matter for inquiry. On Leave being sought :

HELD

(1) Alimony pending action is different from costs of litigation. Under Sec: 614 (1) the wife may present a petition for alimony pendente lite.

(2) Under Section 614 (3) where one of the spouses is not possessed of sufficient income or means to defray the cost of litigation the Court may at any stage of the action order the spouse who is possessed of sufficient income means to pay to the other spouse cost as the Court thinks reasonable.

(3) The payment of Rs. 1,500 is not an order made upon an application under Section 614 - The court can make such order on the husband for payment to the wife alimony -pendente lite only after a proper inquiry held under Section 614. Similarly court can order the plaintiff to defray the expenses of the proceedings to the wife after an inquiry upon an application under Section 614 (3).

(4) Just because the court has merely ordered the Plaintiff to pay Rs. 1500 as cost of litigation it cannot in law prevent the wife from making an application under Sec : 614 (1) and 614 (3). The cost of litigation has to be decided after a due inquiry held according to law.

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

Case referred to :

(1) *Edirippuli vs. Wickremasinghe* - 1995 2 Sri LR 22

Saliya Peiris with A Devendra for Plaintiff Respondent Petitioner

Ranjan Suwandaratne with *Ms. Anusha Ratnayake* for Defendant Petitioner Respondent.

Cur. Adv. Vult.

September, 15th 2005

WIMALACHANDRA, J.

The plaintiff - respondent - petitioner (the plaintiff) filed this application for leave to appeal from the order of the learned District Judge of Panadura dated 24.08.2004.

The plaintiff instituted the above action for divorce against the defendant - petitioner - respondent (defendnt) on the ground of constructive malicious desertion. On the summons returnable date the defendant appeared in Court and filed the proxy. On that day she was paid Rs. 1,500 as costs. (j. E. No 2 date 2.6.2003). On 8. 9. 2003 the defendant filed her answer and prayed inter - alia for the dismissal of the plaintiffs action and also prayed for a divorce on the grounds of malicious desertion on the part of the plaintiff, and a sum of Rs. 100,000 as permanent alimony and the custody of the two children.

Thereafter the plaintiff sought to amend the plaint and the amended plaint was filed and the defendant amended her answer and it was filed on 15.12.2003. The defendant thereafter made an application in terms of section 614 of the Civil Procedure Code for alimony *pendente lite* and for costs. This application was filed as provided for by section 614 and by way of summary procedure.

The plaintiff raised preliminary objection to the application made by the defendant for *alimony pendente* lite, that as she had already obtained Rs. 1,500 as costs of suit from the plaintiff, she is not entitled to make a further application under Section 614 (3) of the Code.

In any matrimonial action, whether instituted by the wife or the husband, the wife is entitled to make an application for alimony pending the action. Alimony pending the action is different from costs of litigation. Under Section 614 (1) the wife may present a petition for alimony pending the action. Under Section 624 (3), where one of the spouses is not possessed of sufficient income or means to defray the cost of litigation, the Court may at any stage of the action order the spouse who is possessed of sufficient income or means to pay to the other spouse costs as the Court thinks reasonable.

The plaintiffs complaint is that because the Court has ordered him to pay Rs. 1,500 to the defendant on the summons returnable date, the Court has no power to inquire into the application made by the defendant under Section 614 of the Code. It appears from the journal entry dated 02.06.2003, that it is not an order made upon an application made under Section 614 of the Code. The Court can make such order on the busband for payment to the wife alimony pending the action only after a proper inquiry held on an application made under section 614 of the Code. Similarly, the court can order the plaintiff to defray the expenses of the proceedings to the wife after an inquiry upon an application made under Section 614 (3) of the Code.

In the case of *Edirippuli Vs. Wickramasinghe* S. N. Silva, J. (as he then was) made the following observations.

> **"We are of the view that an application made under Section 614 for alimony and costs is made in the course of the action for divorce and pertains only to a matter of**

procedure ..... Only matters at issue in an application for alimony *pendente lite* are the needs for financial support on the part of the applicant spouse that stems from the lack of his or her income and the income of the respondent spouse. This is made very clear by the proviso to Section 614 (1) which states that the alimony ordered shall not be less than 1/5 of the respondent spouse's average income for the 3 years preceding the date of the order. Similarly in an application for costs the only matters at issue in terms of Section 614 (3) are insufficiency of income or means of the respondent spouse defray the costs of litigation and the income or means of the respondent spouse"

Therefore it is only after a proper inquiry the Court can decide the amount of alimony pending action that has to be awarded to the wife. similarly, the Court can decide only after an inquiry whether the wife is possessed of property and is in a position to find means to defend the action or whether the husband is liable to pay his wife's costs. In the circumstances just because the Court has merely ordered the plaintiff to pay Rs. 1,500 as costs of litigation to the defendant, it cannot in law prevent the wife from making an application under Section 614 (1) and 614 (3) of the Civil Procedure Code. Moreover, the said amount of Rs. 1500 was ordered without any inquiry and without taking into consideration the need for financial support on the part of the applicant spouse and the income and means of the applicant spouse to defray the costs of litigation. The court cannot arbitrarily determine the cost of litigation. It has to be decided after a due inquiry held according to law.

In the circumstances it seems to us that the learned District Judge is correct in deciding to hold an inquiry with regard to the application made by the defendant in terms of Section 614 (1) and 614 (3) of the Civil Procedure Code.

For these reasons the leave to appeal application is dismissed with costs fixed at Rs. 10,000.

SOMAWANSA, J. (P/CA). - 1 agree.

Application dismissed.

PODI MENIKA
VS
GUNASEKERA

COURT OF APPEAL
WIJEYARATNE J,
C. A. 696/2003,
DC. WELIMADA No. L/486,
(FORMALLY DC. BANDARAWELA)
JULY 5, 2004.

Civil Procedure Code - Section 328 - Resistance - Is the claimant obliged to prove her title? - in Sec. 328 inquiry what is required to be proved?

HELD

(1) An application under Section 328 requires only the proof of possession and not title. All that had to be established is that the possession of the disputed land was *bona fide* on his own account or on account of some person other than the Judgment Debtor and that he was not a party to the action in which the decree was passed.

Per Wijayaratne J,

"In this application made under Section 328 there is a legal obligation to prove title only to establish that she was in *bona fide* possession of the same"

APPLICATION in Revision from an Order of the District Court of Welimada.

Cases referred to :

(1) Pathirana vs. Aahangama 1982 1 Sri LR 392

(2) Abdul Cadar vs. Nagaratnam 1985 2 Sri LR 1

(3) Ariff vs. Kandasamy Pille 1982 2 Sri LR 741

F. C. Perera for Applicant Petitioner.
Parakrama Agalawatte for Defendant Respondent.

Cur. Adv. Vult.

July, 5th 2005
WIJEYARATNE, J

This is an application to revise the order of the learned District Judge dated 03.04.2003 made after an inquiry under Section 328 of the Civil Procedure Code. The inquiry commenced on the application of the present Petitioner to this application H. M. Premalatha Podimenika who was the Petitioner-Claimant in that application caliming that the fiscal of the District Court of Bandarawela on 12.09.98 attempted to eject her and members of the her family from the land they are in occupation and where they have constructed the house, on the pretext of execution of the decree entered in favour of the defendant in case No. L/486 of that Court.

The Defendant has prayed for the issue of writ of possession and the Petitioner-Claimant has claimed that she had improved the land she had put up the house, and she along with her mentally affected husband and children are living in that house on the land in suit.

The application was resisted by the Defendant on the strength of the decree entered in the District Court of Bandarawela, action No. L/486.

A perusal of the decree disclosed that the defendant, D. M. Gunasekera was declared entitled to lot 02 in Plan No. 274 dated 27.2.1945 drawn by W. B. W. Welgolla Licensed Surveyor, and that was by way of settlement between the Plaintiff and the Defendant whereby the Plaintiff was declared entitled to lot 1 in the said plan.

The learned District Judge having inquired into this application has recorded the evidence of the Intervenient claimant P. Podimenika and Surveyor who has prepared the plan No. 208 which was marked X in the proceedings.

The learned District Judge having heard the evidence rejected the Petitioner-claimant's claim on the grounds that he did not believe the evidence of surveyor Nandasena because of discrepancies of his evidence and the Claimant Podimenika did not establish the prescriptive title to the land which was described as State land.

In his order the learned District Judge has clearly stated that the decree had been entered on the strength of Plan No. 208 marked X which is factually wrong. A perusal of the decree shows that it is on the strength of

Plan No. 274 drawn by the Surveyor W. B. W. Welgolla in the year 1945 only.

The learned District Judge has clearly mistaken that he is entitled to issue writ of execution of decree in respect of land described in a plan and depicting the lot bearing same number but on a plan bearing different number from the number referred to in the decree.

Secondly the learned District Judge has erred in law when he looked for the proof of claimant's title to the land, she was in possession and from where she was to be ejected from. He has categorically stated that "as claimed by the petitioner claimant, she is obliged to prove that she has title to the same."

This is a clear misdirection of himself with regard to the relevant provisions of law. The application under Section 328 requires only the proof of possession and not title.

In *Pathirana Vs Ahangama*[1] it was held in an action under Section 328 of the Civil Procedure Code only question that arises is that of possession and not title.

Again in *Abdul Cadar vs Nagaratnam*[2] it was held that "under Section 328 of the CPC all that had to be established was that the possession of the disputed land was *bona fide* on his own account or account of some person other than the Judgment debtor and that he was not a party to the action in which the decree was passed.

According to the evidence of Claimant the plot of land which she herself claimed and put up the house of 03 bed rooms, Hall and kitchen. It was specifically mentioned that after the illness of her husband with a head injury her husband Ganethirala could not do any work and it was the claimant who has cleared this land developed it and put up the house and there is nothing to suggest that she did so under any parties to this action L/846. It is also in evidence according to her own statement, the report of Surveyor, and the report of fiscal and the very application of the Defendant-Respondent that the claimant Podimenika was in possession of this land as at the date the writ of execution was issued.

However, according to the fiscal report her husband is said to have undertaken to remove the house within 02 weeks ; whether that is done is

not known but the Court has issued this writ of execution of decree after rejecting the claimant's claim on the basis that she had not proved title in terms of the above decisions that the Claimant Podimenika is not obliged in law to prove. In this application made under Section 328 of the CPC there is legal obligation to prove her title but only to establish that she was in *bona fide* possession of the same, which she has done. Even the Learned District Judge who rejected her application accepted the evidence to the effect that she has put up the house, she is resident there by being in possession of the same.

However, by reason of execution of the decree entered between the two parties under any one of whom the claimant was not claiming possession, the decree was executed by ejecting the Claimant.

In *Ariff vs. Kandasamy Pille* (3) it was held that the "..... the Court is obliged to restore him to possession of which he was deprived by the fiscal in the execution of decree which did not authorize his dispossession".

In the instant case, the Defendant-Respondent who obtained writ of execution did not establish that the Claimant was one claiming under the other party to the decree. On the contrary the evidence of the Claimant was that she was in independent *bona fide* possession of the land which is not identified as lot 2 in Plan No. 274 which the Defendant-Respondent was declared entitled to.

Following the said decisions in *Ariff vs. Kandasamy Pillai* (Supra), this Court is obliged to restore the Claimant to possession after setting aside the order of the Learned District Judge who refused the application and dismiss the claim of the Claimant who had already been dispossessed.

The application for revision is allowed with costs fixed at Rs. 5,000/-

The Claimant is free to seek legal remedy by way of compensation if advised.

Application allowed.

PAN ASIA BANK LTD.
VS
KANDY MULTI PURPOSE CO-OPERATIVE SOCIETY AND OTHERS

COURT OF APPEAL
SOMAWANSA J (P/CA).
BASNAYAKE J,
CALA 92/2004,
D. C. KANDY X/12785
14TH FEBRUARY, 2005
4TH MARCH, 2005

Bank Guarantee - Enforcement - Circumstances? - Rule 3 (a) Court of Appeal (Appellate Procedure) Rule 1990 - Civil Procedure Code Sec.757 (1) - Affidavit- - Catholic affirming - deponent placing his signature not in the presence of the Justice of Peace - validity ? - Constitution - Article 140, 141 Oaths Ordinance Sec. 6.

The 1st and 2nd Defendants entered into an agreement with the Plaintiff Respondent (Co-operative Society), wherein the plaintiff was appointed the sole distributor of a specific area for the purpose of distribution and sale of a product: For this purpose the plaintiff gave a Bank Guarantee in a sum of Rs. 1 Million in favour of the 3rd Defendant Petitioner Bank (Pan Asia Bank) and at the time of collecting the product the Plaintiff (Co-operative Society) was required to issue a cheque from the same Bank that gave the Bank Guarantee (4th Respondent Peoples Bank) for the entire value in favour of the 1st and 2nd Defendants. The 3rd Defendant Petitioner (Pan Asia Bank) made a claim from the 4th Defendant (People's Bank) for a sum of Rs. 1 Million on the above guarantee.

The Plaintiff Respondent (Co-operative Society) instituted action seeking a declaration that the Plaintiff Respondent owes nothing to the 1st and 2nd Defendants and that the 3rd Defendant Petitioner (Pan Asia Bank) has no right to demand any payment on the Bank Guarantee from the 4th Respondent (People's Bank).

The Court issued an interim injunction restraining the 4th Defendant People's Bank from honouring the demand on the guarantee.

HELD

(1) The liability of the 4th Defendant Respondent Bank (People's Bank) arises in the event the principal fails or neglects to pay the sum or sums of money on the due date under a credit agreement between the beneficiary and the principal.

(2) The Plaintiff is not a party to the above guarantee the parties to the guarantee are the 1st and 2nd Defendants (the principal debtors) the 3rd Defendant Petitioner (Pan Asia Bank the beneficiary) and the 4th Defendant Bank the People's Bank (the Guarantor)

(3) Nowhere in the Guarantee it is stated that the 4th Defendant People's Bank will be liable in the event the plaintiff defaults payments in respect of the products supplied.

(4) Judges who are asked to issue an injunction restraining payment by a Bank under a bond or a guarantee or letters should ask whether there is any damage to the validity of the letter, bond or the guarantee itself, if there is not .... *prima facie* no injunction should be issued and the Bank should be left free to honour its contractual obligations.

Held further

(5) The deponent in the affidavit states that he being a Roman Catholic do hereby make oath, the attestation clause instead of stating that the deponent having sworn to the contents thereof, states the contents thereof are affirmed thereto. The affidavit is bad in law.

(6) It is also apparent that the deponent had placed his signature at a different place and not in the presence of the Peace Officer.

(7) There is no proper affidavit as required by law therefore the 3rd Defendant Petitioner cannot succeed.

APPLICATION for Leave to appeal from an Order of the District Court of Kandy.

Cases referred to :

1. *Smith vs. Hughes* 6QB 597 at 607
2. *L. Schuler AG Vs. Wickman Machine Tool Sales Ltd.* 1974 AC 235, 263, 1973 2AU ER 39 at 35
3. *Bolovinter Oil SA Vs. Chase Manhattan Bank* (1984) 1 All ER 351, (1984) (1984) Lloyds Rep. 251

4. *Jeganathan Vs. Sefyath* - 2003 2 Sri LR 372
5. *Clifford Ratwatte Vs. Thilanga Sumathipala and Others* 2001 2 Sri LR 55
6. *Inaya Vs. Lanka Orix Leasing Company Ltd.* 1999 3 Sri LR 197.

SA Parathalingam PC with *Varuna Senadheera* and *K. Kaneshyogan* for the 3rd Defendent Petitioner.

Gomin Dayasiri with *Mursheed Maroof* for Plaintiff Respondent.

Ronald Perera with *Ms. Deepa Govinna* for 4th and 5th Respondents.

September 14, 2005
ERIC BASNAYAKE J.,

The 3rd Defendant petitioner (hereinafter referred to as the 3rd defendant) filed this petition seeking leave to appeal against the order of the learned District Judge, Kandy dated 17.02.2004.

The facts in this case are as follows. The 1st and the 2nd defendant respondents (hereinafter referred to as the 1st and 2nd defendants) were in the business of distributing milk powder by the name of "Lakcow". The 3rd defendant was their bank.

The 1st and the 2nd defendants entered into an agreement with the plaintiff respondent (plaintiff) (P1b) wherein the plaintiff was appointed the sole distributor of a specified area for the purpose of distribution and sale of the said milk powder. For this purpose the plaintiff was required to have a bank guarantee in a sum of Rs. 1 million in favour of the 3rd defendant bank. At the time of collecting the milk powder the plaintiff was required to issue a cheque from the same bank that gives the guarantee for the entire value in favour of the 1st and the 2nd defendants.

In terms of the above agreement, on the instructions of the plaintiff, a bank guarantee was issued by the 4th defendant respondent (hereinafter

referred to as the 4th defendant) in favour of the 3rd defendant in a sum of Rs. 1 million. On 11.09.2003 the 3rd defendant made a claim from the 4th defendant a sum of Rs. 1 million on the above guarantee. On 18.09.2003 the plaintiff filed action in the District Court of Kandy seeking a declaration that the plaintiff owes nothing to the 1st and 2nd defendants and that the 3rd defendants therefore has no right to demand any payment on the bank guarantee from the 4th defendant. The plaintiff also prayed for an interim injunction restraining the 4th defendant from making any payment to the 3rd defendant on the said bank guarantee.

The 3rd defendant filed objections (P2) and the learned District Judge after Inquiry, on 17.02.2004 issued an interim injunction as prayed for in the plaint. An English translation of the relevant passages of the order of the learned District Judge is as follows :-

> "*The plaintiff had given a guarantee in a sum of Rs. 1 million through the 4th defendant bank with regard to the sale and the distribution of Lakcow milk powder*".
>
> "*The law relating to bank guarantees is clear. The bank guarantee was issued in respect of the milk powder supplied to the plaintiff by the 1st and the 2nd defendants. If the plaintiff had defaulted payments in respect of the milk powder so supplied the 4th defendant is obliged to pay on demand on the said guarantee. The facts in this case are different. The bank guarantee is in respect of the milk powder supplied to the plaintiff by the 1st and the 2nd defendants.*
>
> *The bank guarantee cannot be used to settle any other dues of the 1st and the 2nd defendants to the 3rd defendant*".

I will now set out some parts of the bank guarantee marked 'P1d'. "The principal (1st and the 2nd defendant,) having requested from the Pan Asia Bank (3rd defendant, the beneficiary) for credit facilities amounting to Rs. 1 million for the distribution of"Lakcow" milk powder to the plaintiff - the 3rd defendant has agreed to grant the said facilities on condition **that the principal furnishes a bank guarantee from a reputed bank to the value of Rs. 1 million.**

> *We (4th defendant) hereby guarantee and undertake to pay the beneficiary a sum of Rs. 1 million in the event the principal fails or neglects to pay the sum or sums of money on the due date under a credit agreement between the beneficiary and the principal.*

This guarantee will be in force from 03.01.2003 until 02.01.2004 ..... Claims if any under this guarantee should be submitted to us in writing to reach us on or before the expiry date 02.01.2004 ..... (emphasis added)."

The liability of the 4th defendant bank arises "**in the event the prinicpal fails or neglects to pay the sum or sums of money on the due date under a credit agreement between the beneficiary and the principal**". The plaintiff is not a party to the above guarantee. The parties to the guarantee are the 1st and the 2nd defendants (principal debtors), the 3rd defendant (beneficiary) and the 4th defendant (guarantor). Nowhere in the guarantee it is stated that the 4th defendant will be liable in the event the plaintiff defaults payment in respect of milk powder supplied.

Although the bank guarantee was issued in the instance of the plaintiff by the plaintiff's bank, namely the 4th defendant, the liability could be attached only by interpreting the bank guarantee itself.

The effect of a guarantee like that of other contracts depends on the words of the contract. In *Smith vs. Hughes*[1] at 607 Blackburn J said "if whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the party's terms". "The question to be answered always is "what is the meaning of what the parties have said?" not "what did the parties mean to say" Lord Simon of *Glaisdae L Schuler AG Vs Wickman Machine Tool Sales Ltd.*[2]

The observation made by the Court of Appeal in *Bolovinter Oil SA V Chase Manhattan Bank*[3] is that 'the judges who are asked to issue an injunction restraining payment by a bank under an irrevocable letter of credit or performance bond or guarantee should ask whether there is any challenge to the validity of the letter, bond or the guarantee itself. If there is not ..... *prima facie* no injunction should be granted and the bank should be left free to honour its contractual obligations .... The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent'. The court further observed that 'if, save in the most exceptional cases, he is to be allowed to derogate

from the bank's personal and irrevocable undertaking. ... by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined'.

I am of the view that the learned District Judge erred in interpreting the bank guarantee and thereby erred in issuing an interim injunction restraining the 4th defendant (People's Bank) from honouring the demand made on the guarantee.

However, the learned counsel for the plaintiff submits that the 3rd defendant cannot succeed in this case due to the following reasons :-

(1) There is no valid affidavit filed along with the petition as required by Rule 3 (1) (a) of the Court Appeal (Appellate Procedure) Rules of 1990 and Section 757 (1) of the Civil Procedure Code. Counsel submits that whilst the person giving the affidavit is a Roman Catholic and at the beginning of the affidavit states that he "do hereby make oath and state as follows", the jurat to the affidavit states "Affirmed there to". Therefore he submits that the affidavit is defective and should be rejected.

(2) Failure to tender the document marked 4 VI amounts to suppression of a material fact.

(3) The Bank Guarantee in pursuance to an agreement between the plaintiff and the 1st and the 2nd defendants was for the purpose of distribution and sale of Lakcow milk powder. The learned counsel submits that the bank guarantee is only for the purpose of covering the monies the plaintiff could have owed the 1st and 2nd defendants under and in terms of the agreement marked P1b. He further submits that all the documents pertaining to this transaction should be examined ; that the bank guarantee should not be considered in isolation.

In *Jeganathan vs. Sefyath* [4] where the plaintiff has commenced her affidavit after making an oath does not end the jurat in a manner consistent with the oath she has taken, the court held that she has not sworn to the contents of the affidavit in the true sense of the expression as expected by law. In *Clifford Ratwatte vs. Thilanga Sumanthipala and Others* [5] on similar

facts Edussuriya J. states "It is not a case where there has been an omission to make any oath, or make any affirmation or the substitution of anyone for any other of them has taken place. Nor is there a question of any irregularity in the form in which the oath or affirmation was administered ..... If the contents of the affidavit were read and explained by the Justice of Peace, I cannot fathom how he could have, after having read that the deponent was a Christian and was making oath, at the end in the jurat clause stated that the deponent affirmed ..... The contradiction that has occurred could never have occurred, had the Justice of Peace (actually) read over and explained to the deponent the contents of the affidavit as he claims he did ..... or had the deponent (actually) made oath and sworn to the contents of the affidavit in the presence of the Justice of Peace".

Edussuriya J. held that "the Justice of Peace did not read and explain to the deponent the contents of the affidavit as he claims in the jurat clause, nor did the deponent make oath and swear to the contents of the affidavit in the presence of the Justice of Peace, but that the Justice of Peace "blindly" signed an "affidavit" which had been already signed by the deponent in some other place at some other time". The affidavit was therefore held not an affidavit which has any legal validity and/or sanctity and therefore there was no affidavit as required by law. In *Inaya vs. Lanka Orix Leasing Company Ltd.*[6] the defendats being Muslims had failed to solemnly, sincerely and truly declare and affirm the specific averments set out in the affidavit. The recital merely states that they make a declaration and in the jurat there is no reference as to whether the purported affidavit was sworn to or affirmed to. Jayasinghe J, said "the technicalities should not be allowed to stand in the way of justice. But however the basic requirements of the law must be fulfilled".

The bank guarantee marked 'P1b' does not refer to the agreement the plaintiff had with the 1st and the 2nd defendants and therefore the terms of the agreement cannot be considered in interpreting the bank guarantee. The document 4VI is relevant only if the agreement is material. Further more there is no dispute that the guarantee was issued at the instance of the plaintiff on the agreement marked 'P1b".

Anyhow I am of the view that the plaintiff respondent should succeed on the point raised with regard to the validity of the affidavit filed by the 3rd respondent. The petition of the 3rd respondent in this case is supported by an affidavit in terms of the Court of Appeal (Appellate Procedure) Rules

1990 which states thus, "every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein....." Section 757 (1) of the Civil Procedure Code states thus, "Every application for leave to appeal against an order of court made in the course of any civil action proceeding or matter shall be made by petition ..... Such petition shall be supported by affidavit". The Oaths Ordinance in Section 6 states that "All oaths and affirmations made..... shall be administered according to such forms and with such formalities as may be ... prescribed by rules ..."

The deponent in that affidavit states that he being a Roman Catholic "do hereby make oath". The attestation clause, instead of stating that "the deponent having sworn to the contents thereof" states thus : "the contents thereof affirmed thereto". It may be argued that the Peace Officer who made the attestation made a mistake in the attestation. The matter to be considered is in fact whether there was an attestation or not ; that is whether the deponent had placed the signature at a different place and sent the papers to the Peace Officer for his signature, to make it look as if the signatures were placed at the same time.

There is another fact which assists the court in coming to the conclusion that the deponent placed his signature at a different place and not in the presence of the Peace Officer. I find that the deponent has placed the signature on two crosses made with a ball pen which is visible to the naked eye. The two crosses would usually indicate where one should place the signature. If the oath was administered and the signature was placed in the presence of the Peace Officer, there is no necessity to indicate where to place the signature. Therefore it could be safely assumed that the signatures were placed at different places and the contents were never read over and hence there was no swearing in at all. Hence, I take the view that there is no proper affidavit as required by law and therefore the 3rd defendant cannot succeed. Hence leave is refused.

SOMAWANSA J. P/CA.- *I agree.*

Application dismissed

JAWARD
VS
DIRECTOR GENERAL OF CUSTOMS AND OTHERS

COURT OF APPEAL,
IMAM, J.
SRISKANDARAJAH, J,
CA (WRIT) 992/99,
JUNE 17, 2005

Writ of Certiorari-Customs Ordinance-Sections 154, 163,165-Passenger possessing foreign currency-Forfeiture-Penalty-Power to mitigate-Who has the right ?–Forfeited property-Is it State property ? - Can property which is seized as forfeit be restored ? - Part released -Subsequently order cancelled-Order to release - is it a nullity-Does writ lie ?

The petitioner a passenger to Bangkok possessed Japanese foreign currency, and he had failed to declare same at the Airport. After an inquiry, order was made forfeiting the foreign currency, and a further penalty was imposed. After paying the penalty, the petitioner gave notice to the 1st respondent under Section 154, this notice was rejected as being out of time. Another appeal was lodged, and a fresh inquiry was held and after the inquiry the petitioner was informed that out of 7,775,000 Yen, 5,000,000 Yen would be released but subsequently the said Order was cancelled. The petitioner sought to quash the said Order and further sought a writ of mandamus to enforce the earlier order. It was contended that, the 1st respondent was functus after the first Order.

HELD

(i) Once goods become seized as forfeited the goods become State property.

(ii) Specific provisions are laid down to release goods that are seized as foreited under Section 164.

(iii) The consideration under Section 163 could only mitigate punishments and he has no authority to release goods that are seized as forfeited.

(iv) The decision of the 1st respondent releasing a part of the forfeited sum is ultra vires the powers of the Director General of Customs vested under Section 163. The said decision is a nullity.

(v) The letter canceling the earlier order is not a decision of the 1st respondent but a correction informing the correct procedure.

(vi) The said correction is not amenable to courts jurisdiction.

(vii) A writ of mandamus cannot be used to enforce an Order that is a nullity.

APPLICATION for a Writ of Certiorari/Mandamus

Referred to :

(1) *Bangamuwa vs. S. M. J. Senaratne, Director General of Customs and Another* 2000 1 Sri LR 106

J. S. Boange for petitioner

Sanjaya Rajaratnam, Senior State Counsel for 1st and 2nd respondents.

A. S. M. Perera, P. C. with *Herath Ananda* for intervenient petitioner,

Cur. adv. vult

11th July, 2005.

SRISKANDARAJAH, J

The Petitioner in this application has sought a writ of certiorari to quash a decision of the 1st Respondent dated 27th September, 1999 P4 cancelling an earlier order dated 20th September 1999 P3 informing the Petitioner that a sum of Japanese Yen 5,000,000 will be released to the Petitioner. The Petitioner also has sought a writ of mandamus on the 1st Respondent to enforce the order dated 20th September, 1999 by which a sum of Japanese Yen 5,000,000 was to be released to the Petitioner.

The Petitioner a passenger to Bangkok was possessing foreign currency of 7,755,000 Japanese Yen but he has failed to declare the same at the Airport to the customs. On detection of this currency an inquiry was held by the customs and an order was made forfeiting the foreign currency of 7,755,000 Japanese Yen and a further penalty of Rs. 100,000 was imposed. This penalty was paid by the Petitioner. Thereafter the Petitioner had given notice to the 1st Respondent under Section 154 of the Customs Ordinance but this notice was rejected as being out of time. The Petitioner submitted that he thereafter made an Appeal to the Respondent and a fresh inquiry was held at which the key witnesses gave evidence. After the inquiry he received a letter dated 20 September, 1999 stating that a sum of 5 million Japanese Yen would be released out of the sum of 7,775,000 Japanese Yen. Subsequently the 1st Respondent had cancelled the said order by the letter of 27.09.1999. The Petitioner submitted that the 1st Respondent had no power or jurisdiction to vary his earlier Order as he was functus after the first order of 20.09.1999 and that the purported cancellation was *mala fide* and/or made at the instance of interested parties who were seeking to gain a reward in the event of the cancellation of the

order of 20.09.1999. The Petitioner further submitted that in this instant case the Petitioner had already paid the penalty and therefore there was no question of mitigation of penalty. The Petitioner's appeal to the Director General of Customs is to mitigate the forfeiture of the Japanese Yen and the 1st Respondent has retained the forfeiture in respect of a certain amount of Japanese Yen thereby mitigating the earlier forfeiture and released part of the Japanese Yen and thereby he was acting within the relevant Section. The Petitioner further submitted that in any event he becomes functus, and only a Court of Law or the Minister could review the order that the 1st Respondent had made.

The respondents submitted that in terms of Section 163 of the Customs Ordinance it is only the Director General of Customs who has the power to mitigate the forfeiture. It does not authorize the Director General to restore any property which is seized as forfeit. The only power the Director General has in terms of Section 163 is to mitigate a foreiture or penalty if it is deemed such forfeiture or penalty is unduly servere. In support of this contention the Senior State Counsel cited *Bangamuwa vs. S. M. J. Seneratne, Director General of customs and Another*[1] *at 111* in which case J. A. N. D Silva J after considering Section 163, 164 and 165 of the Customs Ordinance held, that the order of the Director General to release the vehicle to Haskell Lanka (Pvt.) Ltd. is ultra vires the powers vested in him.

In reply to the above submission the Petitioner submitted that it is necessary to look into the definition of the terms 'mitigation', 'forfeiture' and 'release' and thereafter consider the context in which these terms have been used and the general tenure of the enabling Act or Law. Forfeiture has been defined in the Law Lexicon by P. Ramanatha Aiyar *inter-alia* as the "divestiture of specific property without compensation in consequence of some default or act forbidden by law". Mitigation is reduction in punishment or penalty. Release *inter - alia* is construed as discharge of an existing obligation or right of action by the person, in whom the obligation or right is vested to the person against whom it exists. Therefore applying these definitions to the phrase to "mitigate a forfeiture" it could be interpreted to mean a reduction in the amount in respect of which a forceiture has been imposed and it would necessarily follow that this sort of in-

stance would cover items or goods which are of a divisible nature. For example bales of cloth, bags of lentils, currency etc., and not in the case of vehicles and machniery, which are not divisible visible in nature.

In this instant case after an inquiry an order was made by the inquring officer of Customs on 24. 03.1997 forfeiting the foreign currency amounting to Japanese Yen 7,755,000 under Section 12, 44 and 107A (2) and also imposed a penalty of Rs. 1,000,000.00 which penalty had been paid by the Petitioner. Thereafter the Petitioner had given notice lodging his claim to the currency under Section 154 of the Customs Ordinance to the 1st Respondent; however he was informed by the 1st Respondent that he was out of time. As provided by Section 154 unless the person from whom such goods shall have been seized, or the owner of them, or some person authorized by him, shall within one month from the date of seizure of the same, give notice in writing to the Collector that he intends to enter a claim to the goods seized and proceedings for the recovery of the goods are instituted in the proper Courts within 30 days from the date of notice the goods seized shall be deemed to be forfeited and it shall be dealt with as goods seized as forfeited. Once the goods become seized as forfeited under this Ordinance the goods become state property. Specific provisions are laid down to release goods that are seized as forfeited under Section 164. On the other hand the Collector under Section 163 could only mitigate punishments and he has no authority to release goods that are seized as foreited. The title and position of the goods seized as forefeited are with the state and this property cannot be a subject matter of mitigation. Therefore the decision of the 1st Respondent communicated by his letter of 20th September, 1999 P3 stating that a sum of Japanese Yen 5 million would be released out of the sum of 7,775,000 was ultra vires the powers of the Director General of Customs vested under Section 163. Hence the decision communicated by the letter P3 is a nullity. The letter of 28th of September, 1999 P4 by which the 1st Respondent informed the Petitioner that "he has ordered the release of a portion of the Japanese currency forfeited is on misreading the Law in connection with it. Hence

please treat the order made to release Japanese Yen 5,000,000 to you as cancelled" is not a decision of the 1st Respondent but a communication informing the correct position. Hence this communication is not amenable to writ jurisdiction. A writ of mandamus cannot be issued to enforce the order marked P3 as it is a nullity. For these reasons this Court dismisses this application without coasts.

Imam — I agree.

Application dismissed

DR. GAJAWEERA
VS
AIR MASHALL G.D. PERERA AND OTHERS

COURT OF APPEAL,
SRIPAVAN, J.
BASNAYAKE, J.,
CA 1416/2004,
JUNE 3, 2005

Writ of Certiorari - Mandamus-Promotion not recommended-Sri Lanka Air Force-Consideration of a requirement non-existent at the time of enlisting-validity ? - Reasonableness ? - Legitimate expectation - Are decisions affecting such legitimate expectation subject to judicial review ?

The petitioner who is a Medical Doctor from a foreign Medical Institute, was provisionally registered as a Medical Practitioner in 1993. She joined the Sri Lanka Air Force as a Medical Officer-in the rank of Flight Lieutenant. The minimum qualifications required were MBBS or equivalent and provisional or full registration with the Sri Lanka Medical Council.

She became entitled to be promoted to the rank of Squadron Leader after 5 years and the only examination required to be passed was the Officers

Promotion Examination B, which she passed. However, she was told to pass the Act 16 Examination to be promoted.

The petitioner contends that to consider a requirement non-existent at the time of enlisting is unreasonable and arbitrary.

HELD

(i) Up to 1997 overseas Medical Graduates obtained their provisional registration before completing Act 16 Examination. From 1997 Act, 16 Examination was made compulsory for the provisional registration.

(ii) The petitioner passed out as a Medical Doctor in 1992, and was provisionally registered in 1993 and had also successfully completed her internship and had further received her post intern appointment, before joining the Sri Lanka Air Force.

(iii) The petitioner had a legitimate expectation of being promoted without having to pass Act 16 examination as the only examination that is required for promotion is the officers examination B, which the petitioner has successfully completed.

(iv) The advertisement called for applications from either or both the provisionally/fully registered doctors, nowhere in the advertisement did it mention of any requirement of having to pass the Act 16 examination.

(v) Prior to 1997 Doctors without Act 16 were taken to the Department of Health and were entitled to their grade promotions and salary increments as per the Medical Officers with full registration.

Per Eric Basnayake, J

" In the field of Public Law individuals may not have strictly enforceable rights but they may have legitimate expectations, such expectations may stem either from a promise or representation made by a public body. Decisions affecting such legitimate expectations are subject to judicial review.

APPLICATION for a writ of certiorari/ Mandamus