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Another defence of the defendant is that the statement of accounts marked "A" annexed to the plaint showing the claim of the plaintiff amounting to Rs. 10,518,434.69. is not admissible as it is a computer print out and the plaintiff has not taken steps to produce the same as required in terms of the Evidence Ordinance (Amendment) Act, No. 14 of 1995. In the written submissions filed, the learned President's Counsel submitted that the plaintiff has not filed an affidavit in terms of the Evidence (Special Provisions) Act, No. 34 of 1997 as to the admissibility of the computer print out marked "A".

In terms of Section 90(c) of the Evidence Ordinance the only way of proving entries in a banker's book is by either producing the originals or certified copies of the entries thereon. The learned counsel for the plaintiff in his written submissions brought to the notice of Court that in each page of the said statement of account marked "A" the same officer of the plaintiff-bank who has deposed to the affidavit filed with the plaint has certified that the statements contained in the said accounts are correct and are those taken from the books maintained by the plaintiff bank in the ordinary course of banking business. In terms of section 6 of the Evidence Ordinance (Amendment) No. 14 of 1995, the plaintiff is entitled to produce computer print-outs if they are accompanied by an affidavit of a person occupying a responsible position in relation to the operation of the relevant machine. The learned counsel for the plaintiff states that the plaintiff has in fact filed such an affidavit together with the plaint, deposed by the manager of the relevant "Metro" branch who is the same person who has certified the foot of each page of the statement of account marked "A".

In these circumstances I am of the view that the submissions of the learned President's Counsel about the validity of the statement of account marked "A" is not well-founded.

Another objection of the defendent is that the affidavit filed by the plaintiff does not contain the words that the monies are "lawfully" due to the plaintiff.

There is nothing in section 705(1) of the Civil Procedure Code that the plaintiff shall make an affidavit that the sum which he claims is "lawfully" due to him from the defendant thereon. It only states that he must make an affidavit that the sum which he claims is "justly" due to him from the defendant.

However in the case of *Paindathan* Vs. *Nadar* [2] the Supreme Court held that in an action under chapter LIII of the Civil Procedure Code it is not essential that the plainitiff should actually use the word "justly" in his affidavit in support of the plaint. It was further held that the defendant should not be granted unconditional leave to defend merely because such word was not used.

Another objection taken by the defendant is that the interest claimed by the plaintiff exceeds the capital. In this regard attention is drawn to section 18 of the Debt Recovery (Special Provisions) (Amendment) Act, No. 9 of 1994 which amended section 21 of the principal Act, which reads as follows :

"Notwithstanding anything to the contrary in this Act or in any other law, an institution may recover as interest in an action instituted under this Act, a sum of money in excess of the sum of money claimed as principal, in such action."

In any event, the defendant's lawyers by their letter dated 12.08.2003 marked "F15" admitted that the defendant has obtained Rs. 6 million from the plaintiff-bank. Admittedly, the defendant has not repaid the said sum of Rs. 6 million. It is to be noted that the full amount claimed by the plaintiff is Rs. 10,518,434.69. Accordingly, the interest component is well below the capital sum of Rs. 6 million.

It is clear from the documents annexed to the plaint and the documents annexed to the petition filed by the defendant in support of this application for leave to appeal and especially the letter dated 12.08.2003 marked "F15", that the defendant has obtained banking facilities to the extent of Rs. 6 million. It appears that the defendant has not repaid this money to the plaintiff. Even the interest on the said capital sum of Rs. 6 million has not been paid. Therefore there is no doubt that the defendant has not repaid the capital sum of Rs. 6 million obtained from the plaintiff-bank. By the letter dated 12.08.2003 marked "F15" the defendant through his lawyers whilst admitting that he borrowed Rs. 6 million, requested the plaintiff to reduce the rates of interest charged by the plaintiff-bank.

Accordingly there is an admission by the defendant that the amount mentioned in the plaint is due to the plaintiff, and he had appealed to the

bank to reduce the rates of interest charged. In this situation when the documents, especially the document marked "F15" indicate that the defendant had acknowledged the capital sum borrowed from the plaintiff-bank and when he only disputes the computation of interest, and in these circumstances it is not obnoxious to the section 6(2)(c) of the Debt Recovery (Special Provisions) Act to order the defendant to furnish security for leave to appear and defend.

It is to be observed that whilst the defendant admitting that he borrowed Rs. 6 million from the plaintiff and that he has not repaid the said sum and interest thereon, he is now relying on technical defences to obtain leave to appear and defend unconditionally.

It is to be observed that the learned Judge has made order granting the defendant leave to appear and defend upon furnishing security in a sum of Rs. 3.5 million which is 1/3rd of the amount claimed by the plaintiff. As stated above, the defendant has admitted that the bank granted him Rs. 6 million, which sum has not been repaid by him. The section 6(2) of the Debt Recovery (Special Provisions) Act provides for the affidavit of the defendant to deal specifically with the plaintiff's claim on its merits. In the instant case the defendant has relied on technical objections and not revealed his defence, if he has any, to the claim made by the plaintiff. He has taken refuge mostly on the technical objections set out in his affidavit. The defendant has not set up any plausible defence relating to a triable issue.

In the case of People's Bank V. Lanka Queen INT'L Private Ltd [3]. it was held that the amended section 6(2) (amended by Act, No. 4 of 1994) does not permit unconditional leave to defend the claim. The minimum requirement according to section 6(2)(c) is the furnishing of security.

In the aforesaid case Justice De Silva has made a comprehensive analysis of section 6(2) as amended by Act No. 9 of 1994. De Silva, J. held that the amended section 6(2) does not permit unconditional leave to defend the claim, the minimum requirement according to section 6(2)(c) is for furnishing of security.

De Silva, J. referring to section 6(2) made the following observation at pages 237-238.

"This section does not permit unconditional leave to defend the case as the defendant-respondent has requested from the District Court. The minimum requirement according to subsection (c) is for the furnishing of security.

If the defendant satisfies (a) and (b) above then the defendant should be given an opportunity of being heard. The court will have to decide on one of the three matters specified in the above section. They are:

(a) The Court may order the defendant to pay into court the sum mentioned in the decree Nisi. Thus, even where the requirements as stated above are complied with, the court has the power and the authority to order the defendant to pay the full sum mentioned in the dectee Nisi before permitting the defendant to appear and defend.

(b) Alternative to (a) above, the court can order the defendant to furnish security which, in the opinion of the court is reasonable and sufficient to satisty the decree NIsi in the event it being made absolute. The difference between this provision and the (a) above is that instead of paying the full sum mentioned in the decree Nisi, it will be sufficient to the defendant to furnish security, such as banker's draft, and then defend the action.

(c) the third alternative is where the court is satistied on the contents of the affidavit filed, that they disclose a defence which is prima facie sustainable and on such terms as to security ; framing of issues or otherwise permit the defendant to defend the action. Thus, it is imperative that before the court acts on section 6(2)(c) it has to be satisfied ;

i. with the contents of the affidavit filed by the defenant ;

ii. that the contents disclose a defence which is prima facie sustainable; AND

iii. determine the amount of security to be furnished by the defendant, and permit framing and recording of issues or otherwise as the court thinks fit.

In the case of National Development Bank Vs. Chrys Tea (Pvt) Ltd. and another[4] this Court held that ;

(i) Under Section 6(2)(a) or 6(2)(b) the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree nisi.

(ii) Section 6(2)(c) is the only section which permits the Court discretion to order security which would be a lesser sum than the sum mentioned in the decree *nisi.*

In the instant case, it is my considered view that the defendant's affidavit does not disclose a sustainable defence to grant leave to appear and defend the action. Furthermore, I am bound by the judgements in the aforesaid cases of *People's Bank V. Lanka Queen INT'L Private Ltd.(Supra)* and *National Development Bank* Vs. **C***hrys Tea (Pvt.) Ltd. and another.(Supra)*

This Court therefore sees no reason to interfere with the order of the learned Additional District Judge dated 27.7.2004. The application for leave to appeal is accordingly dismissed with costs fixed at Rs. 50000 payable by the defendant to the plaintiff.

Application dismissed.

RODRIGO
VS.
THE FINANCE CO. LTD AND ANOTHER

COURT OF APPEAL
SOMAWANSA, J(P/CA) AND
WIMALACHANDRA, J.
CALA 1/2005
D.C. NEGOMBO 2626/SPL

Civl Procedure Code, Sections 37 and 384 - Registration of Documents Ordinance - Sections 32 and 33 - Caveat - Cancellation of Inquiry - Application to add new parties - material documents not tendered to Court of Appeal? - Applicability of Rule 3(1)(a) - Court of Appeal (Appellate Procedure) Rules 1990-Failure to explain why documents were not tendered - fatal?

The Registrar of Lands registered a caveat at the instance of the Petitioner in respect of the land in question. The Court acting under Section 384 of the Code fixed the matter for Inquiry. The Petitioner thereafter sought to add 2 parties which application was rejected by the District Judge on leave being sought.

HELD:

(i) The copies of the Petition and affidavit filed by the Petitioner by which he sought to add new parties and sought other reliefs, such as cancellation of the deed are necessary documents.

(ii) The omission to tender same is fatal.

(iii) The Petitioner has to comply with Rule 3(1)a of the Court of Appeal (Appellate Procedure) Rules 1990.

(iv) The failure to explain the reasons as to why the documents were not tendered or to cure the default in terms of the said Rule is fatal to an application.

(v) Whether a document is a material document or not would be decided by the Appellate Court and it is not for the parties to decide.

(vi) If certified copies of the Petition and Affidavit could not have been obtained in time, it was the duty of the Petitioner to mention this fact to Court and obtain Courts permission.

APPLICATION for leave to Appeal from an Order of the District Court of Negombo.

Cases Referred to :

1. *S. M . P. Mohideen* vs. *Sigiri Weaving Mills Ltd.*, Cala 243/01, D. C. Colombo, Case No. 35768/MS, CAM 23.08.01

2. *Seylan Bank* vs. *Lanka Milk Foods (CWE) Ltd.*, - CA 697/96 - D. C. Colombo 12820/M - CAM 22.09.90

Petitioner in person.

Romesh de Silva P. C., with Hiran de Alwis for the 1st Respondent.

Anil Silva with Nandana Perera for 3rd Respondent.

cur adv vult

July 7, 2005.

WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the District Judge of Negombo dated 16.12.2004.

Upon a caveat being received under section 32 of the Registration of Documents Ordinance from the respondent-petitioner(petitioner) affecting the land described in the caveat, which admittedly, belongs to the 1st petitioner-respondent (1st respondent), the Registrar registered the caveat in the manner provided by the said Ordinance.

Thereafter the 1st respondent filed an application in the District Court of Negombo under section 33 of the said Ordinance for an order for the cancellation of the said caveat and for damages. The District Court commenced the inquiry under chapter XXIV of the Civil Procedure Code, which is the summary procedure, and issued and Order *Nisi* under section 377 of the Code to take effect in the event of the petitioner not showing cause on the appointed day for that purpose. The petitioner filed objections in terms of section 384 of the Code. The Court fixed the matter for inquiry. The petitioner then filed an application in the Court of Appeal complaining that when the matter was taken for inquiry the learned Judge without proceeding with the inquiry, had directed the parties to file written submissions. The Court of Appeal made order on 04.06.2004 directing the District Judge to hold the inquiry in terms of section 384 of the Civil Procedure Code and any other provisions of law applicable to the inquiry. The learned District Judge,upon the receipt of the aforesaid direction from the Court of Appeal, fixed the matter for inquiry in terms of section 384 of the Code.

The proceedings of the District Court dated 25.11.2004 marked "RP10" shows that the petitioner filed an application in the District Court to add new parties and for an order to set aside the deed in question and other ancillary reliefs. However, the petitioner has not annexed the petition and affidavit by which he sought to add parties and set aside the deed, in addition to other reliefs prayed for, from the District Court. The order dated 16.12.2004 made by the learned District Judge is with regard to that application. In that order the learned Judge has stated thus:

> "මෙම නඩුව කේවියට තහනම අවලංගු කිරීම පිළිබඳව නඩුවකි."……
>
> "මේ අනුව මා පළමුවන වගඋත්තරකරු විසින් සඳහන් කර ඇති තැනැත්තන් මැදිහත් කිරීමට කර ඇති ඉල්ලීම ප්‍රතික්ෂේප කරමි. දැනටමත් 3 සහ 4 වග උත්තරකරුවන් වශයෙන් මෙම නඩුව මැදිහත් කර ඇති තැනැත්තන් මෙම නඩුවෙන් මුදා හැරීමට නියෝග කරමි."

It is against this order the petitioner has filed this application for leave to appeal.

Thereafter the learned Judge fixed the matter for inquiry with regard to the application made by the 1st petitioner-respondent for the cancellation of the said caveat and for damages.

It is crystal clear that the impugned order dated 16.12.2004 made by the learned Judge was on an application made by the petitioner seeking to add the 3rd and 4th respondents as parties and also to set aside the deed. Copies of the petition and affidavit filed by the petitioner, by which he sought to add new parties and sought other relief such as cancellation of the deed, are necessary documents to understand the impunged order made by the learned Judge. The omission to tender necessary documents with the petition is fatal to the application made by the petitioner to this Court. The petitioner has failed to comply with the mandatory provisions of Rule 3(1)a of the Court of Appeal (Appellate Procedure) Rules 1990.

Rule 3(1)(a) reads as follows:

> **"Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application for duly certified copies thereof in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave to the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application."**

Rule 3(1)(a) is identified to the first part of Rule 46 of the Supreme Court Rules 1978 published in the Gazette Extraordinary No. 9/10 of 08.11.1978. The first part of Rule 46 reads as follows:

> **"Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition and affidavit in support of the averments set ourt in the petition**

and shall be accompanied by originals of documents material to the case or duly cetified copies thereof, in the form of exhibits"

It was held in an unreported case of *S. M. P. Mohideen Vs. Sigiri Weaving Mills Ltd.*,[1] that the Rule 3(1)(a) of the Court of Apeal (Appellate Procedure) Rules, which is analogous to Rule 46 of the Supreme Court Rules of 1978, apply to every application to the Court of Appeal and as stated earlier non compliance is fatal to the application.

The petitioner has not explained as to why he failed to furnish the aforesaid documents. In the case of Seylan Bank Ltd., Vs. Lanka Milk Foods (C. W. E.) Limited [2] it was held that the failture to explain the reasons as to why the documents were not tendered or to cure the default in terms of Rule 3(1)(a) is fatal to an application.

Whether an application should be rejected for the failure to comply with a rule of the Appellate Court rules depends mainly on whether the relevant document is a material document. Whether a document is a material document or not, would be decided by the Appellate Court and it is not for the parties to decide. In the instant case the application made by the petitioner by way of petition to add parties and to set aside deeds is a material document and in my view without it, this Court is unable to understand the order made by the learned Judge. If certified copies of the petition and affidavit could not have been obtained in time, it was the duty of the petitioner to mention that fact to Court and obtain Court's permission to tender them later. The petitioner has failed to do so. Merely filing some documents without the material documents does not amount to compliance with Rule 3(1)(a). Hence on this ground alone the petitioner's application for leave to appeal should be dismissed. It is also to be noted that the petitioner has failed to annex a copy of the petition filed by the first respondent in its application made under section 33 of the Registraton of Documents Ordinance, which is a relevant document.

The scope of the inquiry in respect of the application made by the 1st respondent under section 33 of the Registration of Documents Ordinance is solely concerned with the cancellation of the caveat registered at the instant of the petitioner. The learned Judge in his order correctly held that an inquiry should be conducted in respect of the application made by the

1st respondent to set aside the caveat, which was registered under section 32 of the Registration of Documents Ordinance, and refused the petitioner's application to add parties. I cannot see any illegality in the order made by the learned District Judge.

For these reasons, we see no reason to interfere with the impugned order made by the learned District Judge dated 16.12.2004. Accordingly, leave to appeal is refused and the petitioner's application is dismissed without costs.

ANDREW SOMAWANSA, J. (P/CA) — I agree.

Application dismissed.

VASANA TRADING LANKA (PVT) LTD.
VS
MINISTER OF FINANCE AND PLANNING AND OTHERS

COURT OF APPEAL
SRIPAVAN, J.
BASNAYAKE, J.
CA 2144/04
June 16, 2006,
AUGUST 26, 2005

Customs Ordinance - amended by Act, No. 2 of 2003-Excise Duty (Sp. Pro.) Act, No. 13 of 1989 - Validity of an order not gazetted - Can the order published in the Gazette operate retrospectively - quashing a document not before Court- Is it permitted? Can a relief different to that prayed be granted? Ceiling on Housing Property Law - S 17 (1)

The petitioner seeks to quash the orders revising the depreciation table and the excise duty payable on imported used motor vehicles commencing from 15.10.2004. These orders were issued on 14.10.2004 but the gazette notification is dated 20.05.2005 and it was contended that on 15.10.2004 no gazette notification in terms of Act, No. 2 of 2003 was in operation in relation to the said order.

The petitioner further sought to challenge the order made by the Minister in terms of s.3 of Act, No. 13 of 1989, on the ground that when the impugned order was put into operation there was no gazette notification publishing the said order.

HELD

(i) Considering the language in Art 10 - Schedule E-Act, No. 2 of 2003 the Ministers' order shall come into operation of the date on which it is published in the gazette. The said gazette would not apply to vehicles imported on a date prior to 20.10.2004, as a reasonable inference could be drawn that the notification in the gazette was published after 20.10.2004. There was no gazette notification in operation in relation to the impugned order on 15.10.2004.

(ii) In terms of s3 of Act, No. 13 of 1989 the order made by the Minister shall come into force on the date of its publication in the Gazette or on such later date as may be specified in the said order. A perusal of the gazette dated 28.05.2004 shows that the order shall take effect with effect from 19.05.2004. The said order will operate with effect only from 20.05.2004.

(iii) The order published in the gazette cannot operate retrospectively for the reason that it has to come into force on a later date.

per Sripavan, J.

> "Though the petitioner moves to quash the said gazette notification by way of a Writ of Certiorari, I do not think that I should do so, I can only invalidate the gazette notification in so far as it affects the petitioner's rights, for the avoidance of doubts. I hold that the said notification does not apply to articles manufactured/produced or imported into Sri Lanka prior to 20.05.2004.

HELD FURTHER

(4) The petitioner's application to quash gazette notification 1362/12 which is yet to be published cannot be granted, as Court cannot and will not quash a document that is not before Court.

(5) The reliefs sought in the counter objections cannot be granted as the petitioner cannot set up a new case in his counter objections which was not the subject matter in his original petition.

APPLICATION for a Writ of Certiorari

Cases referred to :

1. *Johnson vs. Sargant and Sons - 1918-KB Vol. 1* - at 101
2. *Sirisena vs. Doreen de Silva and Others - 1998-3 Sri LR 199*
3. Nilia Silva vs. Commissioner of National Housing and Another - 1999-1 Sri LR 291
4. Sriyani Perera Roopasinghe vs. Minister of Agriculture and Lands - CA 1123/98 CAM 1.4.2003.

M. K. Deekiriwewa for petitioner.
Ms. Farzana Jameel, S. S. C., with M. R. Ameen, SC, for the respondents.

cur. adv. vult

October, 21 2005

SRIPAVAN, J.

The petitioner filed three petitions dated 4th November 2004, 22nd November 2004 and 29th November 2004. However, notice was issued on the petition dated 4th November, 2004. When the application was taken up for hearing, the learned counsel submitted that the petitioner was seeking reliefs only in terms of the petition was seeking dated 4th November 2004. dated 04th November, 2004.

The petitioner in paragraph 9 of the petition states that the first and the second respondents purporting to act under the Customs Ordinance and Excise Duty (Special Provisions) Act, No. 13 of 1989 have issued orders revising the Depreciation Table and the Excise Duty payable on imported used motor vehicles with immediate effect commencing from 15th October, 2004. These orders are marked X2 and X3 and the corresponding gazette notifications are marked X4 dated 14th October, 2004 and X5 dated 20th May, 2005 respectively. The petitioner challenges the aforesaid orders and the corresponding gazette notifications on the basis that no such gazette notifications were in fact published on the said date as stipulated in such orders.

The order of the Minister revising the Depreciation Table marked X2 and the relevant gazette notification marked X4 were challenged on the ground that at the time the order X2 was put into operation, namely, on 15th October 2004, no gazette notification was in operation in relation to the said order.

It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. In terms of Art 10 of Schedule "E" of the Customs (Amendment) Act, No. 2 of 2003, such an obligation is imposed on the subject only when the Minister publishes the order in the gazette fixing the minimum values for goods. In the case of *Johnson Vs. Sargant and Sons*[1] the date on which a statutory order made by the Food Controller was considered. An order made by the Food Controller under the Defence of the Realm Regulation was dated 16th May 1917, but was not made known to the parties to the

action or to the General Public till 17th May. The court held that the order came into operation only when it became known, namely on 17th May. Thus, it is clear that statutes which impose pecuniary burdens are subject to the rule of strict construction.

A similar approach was expressed by his Lordship G. P. S. de Silva C. J. (as he then was) in the case of *Sirisena vs. Doreen de Silva and Others*[2] where the Minister signed the vesting order on 12th October, 1976. However, the said order was not published in the gazette as expressly required by the provisions of Sec. 17(1) of the Ceiling on Housing Property Law. The court observed that there was no valid order "vesting" the premises in the respondent - as such no rights could flow from the purported order signed by the Minister on 12th October, 1976. (Also *vide Nilia Silva vs. Commissioner for National Housing and another*[3].

Considering the language used in Art 10 of Schedule "E" namely the expression **"by order published in the gazette fix.....minimum values for any goods and the duties on those goods"**, I hold that the Minister's order shall come into operation the date on which it was published in the gazette. The court should be alert to see that the powers conferred by statute are not exceeded or abused. However, a person charged with customs duty by a statutory instrument may have a defence available to him, if he can show that at the time of importation, the gazette notification had not been published.

The second respondent in paragraph 8 of his affidavit dated 7th December, 2004 states that the impugned order was signed by the Hon. Minister on 14th October, 2004 and the notice in respect of the Depreciation Table was also signed on the same day, namely on 14th October, 2004. It would appear that the Ministry of Finance received a draft and after proof reading, the draft was handed back to the Printing Department on 20th November, 2004. Therefore, a reasonable inference could be drawn that the notification was published in the Gazette after 20th October, 2004. Hence, I hold that the said gazette would not apply to vehicles imported on a date prior to 20th October, 2004.

The ground on which the petitioner challenges the order made by the Minister in terms of Sec. 3 of the Excise (Special Provisions) Act, No. 13 of 1989 and marked X3 is set out in paragraph 12 of the Petition. Counsel argued that when the impugned order was put into operation there was no

gazette notification publishing the said order. In terms of Sec. 3 (4) of the said Act, the order made by the Minister shall come into force on the date of its publication in the gazette or on such later date as may be specified in such order. A perusal of the said gazette dated 20th May, 2004 marked X5 shows that the order shall take effect with effect from 19th May, 2004. The order published in the gazette cannot operate retrospectively for the reason that it has to come into force on a **later date** (emphasis added) as stated in Sec. 3 (4). Therefore, I hold that the said order will operate with effect from 20th May, 2004.

The petitioner moves to quash the said gazette notifications by way of a writ of certiorari. I do not think that I should do so. I can only invalidate the gazette notifications in so far as it affects the petitioner's rights. For the avoidance of any doubt I hold that the said notification marked X5 does not apply to Articles manufactured/produced or imported into Sri Lanka prior to 20th May, 2004.

The petitioner also seeks to quash a gazette notification number 1362/12 which according to him is yet to be published (*vide* paragraph "d" of the prayer to the petition). This court cannot and will not quash a document that is not before it. Hence, the relief sought in terms of paragraph "d" of the prayer to the petition is refused. The petitioner sought further reliefs in his counter objection dated 14th December, 2004. The court is of the view that the petitioner cannot set up a new case in his counter objections which was not the subject matter in his original petition dated 4th November, 2004. It is not open to a petitioner in an application for writ of certiorari and mandamus to present a case not set out in the petition or obtain reliefs on a basis not averred int he petition. In the case of *Sriyani Perara Roopasinghe vs. Minister of Agriculture and Lands*[1] - this court remarked that *"a relief different to that prayed for cannot be granted by court unless the petition is amended and the respondents are given an opportunity to file objections to the amended petition."* In view of the foregoing, the reliefs sought in the petitioner's counter objections are also refused.

Subject to the observations made as aforesaid, the petitioner's application is dismissed. There will be no costs.

Eric Basnayake, J. - I agree.

Application dismissed.

The impugned gazette notification in so far as it affects the petitioners rights are invalidated.

SENEVIRATNE
VS'
HERATH AND ANOTHER

COURT OF APPEAL
WIJAYARATNE, J.
CA 423/03 (Rev.)
D. C. Kuliyapitiya No. 11813/L
OCTOBER 11, 2004

Civil Procedure Code - Section 93 (2) - amendment of Pleadings - after 10 days of trial - Circumstances - when could court grant relief ? - Question of presumption ? - Could it be considered at the stage of amendment of the Plaint?

The Plaintiff - Petitioner instituted action on 18.11.97 after several postponements of the trial, on the 10th date of trial the Plaintiff Petitioner in person moved to amend the Plaint. The Defendants objected to same, and the trial Judge refused the application, on the ground of laches. The plaintiff moved in revision.

Held

(i) It is apparent that the Plaintiff-Petitioner had explained his delay as all registered Attorneys at Law had withdrawn from the case, in view of the fact that the 2nd defendant is a colleague in practice. It is beyond argument that the Plaintiff Petitioner was driven to this situation by several Attorneys at Law who having accepted the brief from the Petitioner but have later declined to appear.

(ii) It is in these circumstances that the Plaintiff was compelled to ultimately seek to amend the Plaint himself after 10 days of trial fixed. None of the Attorneys at Law have proceeded to take any steps worthwhile.

The circumstances of withdrawal of the Attorney - at Law is a circumstance the District Judge should have considered.

per Wijayaratne J

" The presence of such circumstances even in view of the provisions of subsections 1 and 2 of Section 93 warrant the amendment being allowed"

(iii) changing the scope of action and that provisions relating to presumption barred the inclusion or addition of a new land-need not be considered at the stage of the amendment of the Plaint.

APPLICATION in Revision from an Order of the District Judge of Kuliapitiya

Cases referred to :

1. *Hatton National Bank Ltd.*, vs *Whittal Baustead Ltd., 1978/79* - 2 Sri LR 25

2. *Mackinnon Mackenzie & Co. of Ceylon Ltd.*, vs *Grindlays Bank 1986 2 CALR 279*

S. A. D. S. Suraweera with Dushantha Epitawela for petitioner
M. C. Jayaratne with *Ms. Sobha Adhikari* for 1st and 2nd respondents.

July 4, 2005 *cur adv vult*

Wijayarathe, J.

This is an application for the revision of the order dated 21.12.2002 (P3a) made by the learned District Judge of Kuliyapitiya dismissing the application of the plaintiff-prtitioner to amend the plaint. The plaintiff-petitioner instituted the relevant action by his plaint dated 18.11.1997 and after due procedure, the case came up for trial on 09.09.98 and on 20.01.99 when the case came up for trial, the action was dismissed due to non-attendance of the plaintiff-petitioner. However the case restored to the roll of pending cases by order dated 24.05.2000, has come up for trial on the days before the plaintiff-petitioner in person moved to amend the plaint. The Several postponements of trial was granted on account of the Attorney-at-Law for plaintiff-petitioner moving to be released from the case on personal grounds of not agreeing to appear against the 2nd defendant-respondent a fellow practitioner of law.

However the amendment was objected to by the 1st and 2nd respondents on grounds of laches and the amendment being likely to change the scope of the action as it proposed to bring in new land. The learned District Judge having considered the application and the objection refused the application to amend on grounds of laches when plaintiff-petitioner presented the same on the 10th date of trial without any reason for delay being adduced.

Upon the perusal of the order it appears that the learned District Judged has considered vide ***Hatton National Bank Ltd. vs. Whittal Baustead Ltd***[1], *(1978/79) 2 SLR 25, Makinon Mackenzie & Co. of Ceylon Ltd. Vs. Grindlays Bank Ltd*[2].

The amendment proposed to describe in a separate schedule the lot 2 already referred to in the original plaint. The amendment will serve the purpose of the determination of the real question raised through-out the plaint and will help effectually adjudicate upon the dispute between parties. The learned District Judge considered only the matter of delay but failed to consider other grounds urged by the defendant-respondents. They urged that amendment proposed to bring in new land, lot 2, changed the scope of the action.

The parties who moved this Court to dispose of the matter by way of written submissions already tendered by the parties have also urged that bringing in 2nd land namely lot 2 after 4 years was barred by the provision of the Prescription Ordinance.

It is apparent on the draft amended plaint that the plaintiff-petitioner explained his delay as all registered Attorneys-at-Law. withdrawing in view of 2nd defendant being their colleague in practice. This is a fact borne out by the record of the case itself. The learned District Judge should have seen the explanation and considered whether it was reasonable explanation. It is beyond argument that the plaintiff-petitioner was driven to this situation by several of Attorneys-at-Law who having accepted the brief from him have later decline to appear. It is in those circumstances that the plaintiff was compelled to ultimately seek to amend the plaint himself after ten days of trial fixed. It is also evident on record that none of those AALs have proceeded to take any step worthwhile in the prosecution of the plaintiff-petitioner's case and the number of dates of trial increased only with their withdrawals. It is the considered view of the supreme Court that it is the right of a litigant to have the services of a lawyer in presenting his case to a Court of Law. In such situation the circumstances of withdrawal of the AALs is a circumstance the learned District Judge should have considered.

The presence of such circumstances even in view of the provisions of sub sections 1 and 2 of section 93 warrants the amendment being allowed.

The ground the learned District Judge did not consider, that amendment proposed to being in new land, ie ; lot 2, change the scope of the action and provisions relating to prescription barred the inclusion or addition of new land need to be considered at least at this stage. Perusal of the original plaint dated 18.11.1997 in paragraphs 4, 5, 6, 7 and 8 setting out the facts disclosing the cause of action has already included lot 2 in plan No. 702 referred to therein as relevant land to the cause of action. Therefore addition of a schedule morefully describing lot 2 cannot in law be considered as bringing in new land or addition of cause of action that would changed the scope of the action. For the same reason there cannot be a question of prescription that the Court could have considered at the stage of amendment of the plaint, though the defendant - respondents rights to raise such a plea is not affected by acceptance of the amendment.

The circumstances of the case of the plaintiff-petitioner being abandoned by several of AALs who initially agreed with him to appear for him and the circumstances of the learned District Judge not having considered all material grounds urged, provides, in my view, exceptional circumstances for the intervention of this Court in the exercise of its revisionary jurisdiction.

Accordingly the order of learned District Judge dated 21.12.2002 refusing the amendment of plaint is revised and set aside and the application for the amendment of the plaint is allowed. The learned District Judge of Kuliyapitiya is directed to accept the amended plaint as per draft dated 21.01.2002, follow due procedures and proceed to trial according to law.

Application for revision allowed with costs.

Application allowed.

KARUNADASA
VS.
ABEYWICKRAMA AND OTHERS

COURT OF APPEAL
SOMAWANSA, J(P/CA) AND
WIMALACHANDRA, J.
CALA 477/2004
DC MATARA HCP 213
JULY 11, 2005.

Habeas Corpus application- Two minor children-interim order made regarding access - Divorce action pending - application to vary the order - Should this application be made in the divorce action? - Rules 3 (1) (a), 3(1)(b), 3(1)(15)- Court of Appeal Appellate Procedure Rules 1990 - Application for leave to appeal - Civil Procedure Code - S371,S757(1), S758 - Judicature Act No. 2 of 1978, S 24 (3) S29.- Duplicity of litigation.

The 1st plaintiff-petitioner (husband) sought in the Habeas Corpus application in the District Court in respect of his two children, and obtained access to his two children. Thereafter an application was made by the petitioner to have the order varied. This was refused by the District Court. It was contended that as there is a separate divorce action between the parties; the respondent should have moved Court in the divorce case, rather than causing duplicity of litigation.

HELD

(i) A divorce action is not a bar to an application for Habeas Corpus.

(ii) If the purported application is made in term of S24(3) of the Judicature Act, provisions contained in S29 provides the procedure. There is no mandatory requirement to follow the provisions of S 375 of the Civil Procedure Code.

(iii) The learned District Judge has come to a correct finding that there is no material placed before him to show that there is a change of status quo.

(iv) Rule 3(1)(a) and (b) of the Court of Apeal(Appellate Procedure) will not and cannot apply to an application for leave to appeal and further in terms of S757 and S758 of the Civil Procedure Codr no documents need be filed along with the petition and affidavit and the requirement being that the petition should be supported by an affidavit.

Per Somawansa. J(P/CA),

"If the petitioner is to succeed in the application I would hold that the necessary documents to establish the reliefs claimed should and must be provided or annexed to the petition."

Per Somawansa. J(P/CA),

"The burden is on the party seeking relief to establish his or her case. I am yet to come across any authority where the burden is cast on the Court to call for necessary documents, if court were to adopt this procedure for calling for documents in support of an application for interim relief or for the grant of leave, it would be a procedure hitherto unknown to our legal system and in fact would be a travesty of justice.

HELD FURTHER,

(v) It must be remembered that the systen of Civil Law that prevails in Sri Lanka is confrontational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties.

Per Somawansa.J (P/CA)

"How could the Court decide on the question of law for which purpose leave is granted, can the Court decide this aspect purely on the averments contained in the petition and affidavit. The view that a leave to appeal applicaiton can be decided on the averments contained in the petition and afidavit is totally unacceptable."

APPLICATION for leave to appeal for an order of the District Court of Matara.

Cases referred to :

(1) *Algin* vs. *Kamalawathie* - 73 NLR 429
(2) *M.L.C Caderamanpulle and another* vs. *J. M. C. Caderamenpulle*- 2005 - 1 Sri LR 397 - (not followed)
(3) *Pathmawathie* vs. *Jayasekara* - 1997 - 1 Sri LR 248

Wasana Wickremasena for 1st plaintiff-petitioner.
Petitioner-respondent absent and unrepresented.

October 7, 2005

SOMAWANSA, J (P/CA)

The 1st respondent-petitioner (hereinafter referred to as the petitioner) by his amended petition is seeking leave to appeal from the order of the learned Additional District Judge of Matara dated 06.12.2004 whereby the learned Additional District Judge refused an application made by the petitioner to vary the order dated 02.11.2004 made by the same Additional District Judge and if leave is granted to set aside or quash the aforesaid order dated 06.12.2004, to set aside/quash the entire proceedings in the action instituted in the District Court Matara bearing No. HCP 213 for an interim order and or order for the respondents-respondents (the two children born out of the wedlock) to be admitted to the hostel of Sujatha Vidyalaha, Matara till the conclusion of case No. D7951 and also to stay further proceedings in case No. D. C. Matara HCP 213.

Though on several occasions notices have been issued on the petitioner respondent (hereinafter called the respondent) she was absent and unrepresented but as per the minute dated 10.05.2005 a proxy has been tendered on her behalf by one Miss Irosha Gunasekera, Attorne-at-Law. However at the inquiry neither the respondent nor her registered Attorney-at-Law were present and the petitioner having agreed to tender written submissions has tendered the same.

It is contended by counsel for the peititioner that the petitioner and respondent are husband and wife and an action for divorce a vinculo matrimoni No. D7951 has been instituted in the District Court of Matara and both alleged adultery against each other as one of the courses for divorce in their pleadings in the aforesaid divorce action. He further contends that the respondents-respondents are the two children from the marriage between the petitioner and the respondent and the custody of the respondents-respondents is part and parcel and/or made in and/or incidental of the aforesaid divorce case No. D7951 pending in the District Court of Matara. Though the petitioner in paragraph 1 of his amended petition and paragraph 2 of his affidavit as well as in paragraph 1 of his written submissions states that he has annexed true copies of the pleadings, proceedings and the journal entries of the aforesaid divorce case No. D7951 marked XI which are very relevant to the present application of the petitioner. It appears that he has failed and neglected to annex these

documents to the petition or to tender them subsequently. These proceedings in the divorce case No. D7951 becomes very relevant for the reason that the Additional District Judge in his order dated 02.11.2004 has considered at length and in fact has based his order on the proceedings of the aforesaid case and it is this order dated 02.11.2004 that the petitioner is seeking to vary. In the circumstances the petitioner has failed to place before the Court documents which are very relevant to his application and therefore this Court is unable to look into the merits of this application. It is pertinent to refer to some of the observations made by the learned Additional District Judge in his order dated 02.11.2004. On page 3 last paragraph the learned Additional District Judge States as follows :

> "මේ අවස්ථාවේ විශේෂයෙන් සලකා බැලිය යුතු කාරණයක් වනුයේ මෙම පාර්ශවයන් අතරම පවතින දික්කසාද නඩුව පවරන අවස්ථාව වන විට දරුවන් කවුරුන් භාරයේ සිටීද යන කාරණයයි. 2004.05.17 දිනැති නියෝගය මගින් අධිකරණය මගින් 1 වන වග උත්තරකරුට එනම් එම නඩුවේ විත්තිකරුට දරුවන්ගේ ප්‍රවේශය සෑම පසලොස්වක පෝය දිනයකදීම ලබාදී ඇත. ඊට පෙර විභාග සටහන්වල, කාර්ය සටහන් වල දරුවාගේ භාරකාරත්වය සම්බන්ධයෙන් සටහනක් නැත. මේ අනුව පෙනී යන්නේ අධිකරණය මගින් ලබාදී තිබූ ප්‍රවේශය සම්බන්ධව නියෝගය කඩ කරමින් දරුවා තමා වෙතට ලබාගෙන ඇති බවයි. නඩුවක් පවතිද්දී එහි නියෝගයට පටහැනිව ක්‍රියා කිරීම වරදකි. නඩුව පැවරීමට පෙර දරුවා තමා සමග සිටි බව වග උත්තරකරු කරන ප්‍රකාශය ඔහුගේම ප්‍රකාශයෙන් හැර වෙනත් ආකාරයකින් තහවුරු වීමක් නැත. එසේ වුවද ඩී. 7951 නඩුවේ කාර්ය සටහන් සහ විභාග සටහන් නඩුව පවතින අවස්ථාවේ දී දරුවන් කවුරුන් සමග සිටීද යන්න පිළිබඳව හොඳම සාක්ෂියයි. ඩී. 7951 දරන නඩුව පවතින අවස්ථාවේ දී දරුවන් 1 වන වග උත්තරකරු සමග සිටියා නම් ඒ බව ඔප්පු කිරීමට ඔහු විසින් යම් ලේඛණයක් හෝ සාක්ෂියක් ඉදිරිපත් කළ යුතුව තිබුණි. නමුත් එවැන්නක් නොකිරීමෙන් පෙනී යන්නේ ඒ වන විට දරුවන් පෙත්සම්කාරියගේ භාරයේ සිටි බවයි. එබැවින් අධිකරණ නියෝගය කඩ කිරීමෙන් පෙත්සම්කරු දරුවන් තමාගේ භාරයට ගෙන ඇති බවට නිගමනය කරමි."

Also at page 4

> "මීට පෙර ඩී. 7951 නඩුවේ 1 වන වගඋත්තරකරුට ලබා දුන් ප්‍රවේශයම මෙම නඩුවේ ද ලබා දීම සුදුසු බව නිගමනය කරමි. සෑම මසකම පසලොස්වක පෝය දින ප. ව. 2.00 - 4.00 ත් අතර කාලය තුල මාතර

බෝධිය අසලදී දරුවන් බලා ගැනීමට 1වන වග උත්තරකරුට ප්‍රවේශය නිම් කරමි."

The petitioner also goes on to say that on 06.12.2004 he made an application to Court to vary the aforesaid order made on 02.11.2004 marked X since the respondents-respondents have re-iterated their desire to join with him subsequent to the aforesaid order. Though it is stated in paragraph 8 of the petition as well as in paragrah 8 of the written submissions that a true copy of the application is marked X5. I am unable to trace such an appication marked X5. However the proceedings dated 06.12.2004 indicates such an application has been made and whether it was in writing or not is not clear. Proceedings indicate that counsel for the petitioner did make certain oral submissions and counsel for the respondent also made oral submissions after which the learned Additional District Judge has made his order rejecting the application to vary his previous order made on 02.11.2004 for good reasons as indicated by him. Furthermore it appears from the order on 06.12.2004 certain documents have been tendered more specifically affidavits by the respondents-respondents. The learned Additional District Judge has rejected this affidavit. Here again I must say the petitioner for reasons best known to him has not tendered this document to this Court for cosideration. As for the failure to tender necessary documents I would give my observations later.

It is contended by counsel for the petitioner that as there is a separate divorce action pending between the parties in which custody of the respondents-respondents is part and parcel thereof and the respondent should have moved Court in the said divorce case rather than causing duplicity of litigation by making an independent and separate application thereby causing grave and irreparable loss and damage to the petitioner and on this ground leave to proceed should be granted. I am not inclined to agree with this view for the reason that a divorce action was not a bar to an application for habeas corpus.

In the case *Algin vs. Kamalawathie* [1] the facts were:

Petitioner obtained a decree for divorce and, during the pendency of the appeal in the divorce action, filed the present application for habeas corpus against his wife for the custody of his children. In the divorce action he

had not sought an order for the custody of the children and the Court made no order on the application of the wife for their custody, because the decree for divorce was entered in the absence of the wife who failed to appear on the trial date.

It was held:

"That the divorce action was not a bar to the application for habeas corpus".

Counsel also submits that the there is non compliance with the provisions of Section 375 of the Civil Procedure Code which reads as follows:

> "If the application is instituted in the course of, or as incidental to, a pending action, whether of regular or summary procedure, the petition shall be headed with a reference to its number in the court, and the names of the parties thereto, and shall be filed as part of the record of such action, and all proceedings taken and orders made on such petition shall be duly entered in the journal required to be kept by section 92".

This again is a matter that has no bearing on the petitioner's application for leave to appeal. In any event even if the purported application under reference is made in terms of Section 24(3) of the Judicature Act No. 2 of 1978 provisions contained in Section 29 of the said Judicature Act provides for the procedure. The aforesaid two sections reads as follows:

> "Section 24(3) : An application for the custody of a minor child or of the spouse of any marriage alleged to be kept in wrongful or illegal custody by any parent or by the other spouse or guardian or relative of such minor child or spouse shall be heard or determined by the Family Court; and such court shall have full power and jurisdiction to hear and determine the same and make such orders both interim and final as the justice of the case shall require."
>
> "Section 29 : All proceedings in a Family Court shall be instituted and conducted as expeditiously as possible in accordance with such as may be applicable thereto and, if there be no such law, in accordance with the provisions relating to summary procedure in the Civil Procedure Code."

Thus there is no mandatory requirement to follow the provisions of Section 375 of the Civil Procedure Code.

The petitioner also has tendered documents marked Y1A to Y1F. These documents too cannot have any impact on the impugned order for on the one hand they were not placed before the learned District Judge when the petitioner supported his application and in any event most of them are recent origin and are placed before this Court to show that the learned District Judge was bias when making the impugned order.

On an examination of the impugned order dated 06.12.2004, I would say the learned District Judge has considered all the material placed before him in arriving at his finding. It is to be seen that he has correctly observed that much reliance cannot be placed on the affidavit sworn by the respondents-respondents who are minors. The learned District Judge goes on to say that in any event the respondents-respondents were questioned in open Court 5 times as to their perference with whom they would prefer to live with. He further says that he himself would have observed the respondents-respondents said anything in answer if they did as alleged by the petitioner. The allegation of the petitioner is that the respondents-respondents did answer. In the circumstances this Court is called upon to decide who is uttering a falsehood. Is it the learned District Judge or is it the petitioner? With no other material to support either of them and the petitioner being at a distinct advantage position of providing such evidence has failed and neglected to do so. In the circumstances I am compelled to accept the statement of the learned District Judge. It appears that the learned District Judge has come to correct finding that there is no material placed before him to show that there is a change of status quo I have no reason to disagree with him.

Before I conclude there is the matter of non production of relevant documents by the petitioner on which I would like to make certain observations. In the case of M. L. C. Caderamenpulle and another vs. J.M. C. Caderamanpulle [2] Gamini Ameratunga, J. having considered a series of cases has come to the following conclusion on the applicability of Rules 3(1)(a), 3(1)(b) and 3(15) of the Rules of Court of Appeal (Appellate Procedure) Rules 1990.

> "I therefore hold that Rule 3(1)(a) and (b) of the Court of Appeal (Appellate Procedure) Rules of 1990 are not applicable to leave to appeal applicaitons filed in terms of

section 757(1) of the Civil Procedure Code. In consequence I uphold the submission of the learned counsel for the petitioner that Rule 3(1) (a) and (b) of the Court of Appeal (Appellate Procedure) Rules are not applicable to leave to appeal applications."

The preliminary objection raised in that application as narrated in the judgement is as follows:

"This is an application for leave to appeal. The learned counsel for the respondent raised a preliminary objection in limine to this leave to appeal application on the basis that the petitioner has not complied with Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules of 1990 by his failure to annex to his petition, duly certified copies of some of the documents tendered along with his application."

Thereafter he has considered several judgements dealing with this question and has finally come to the conclusion that -

"As the rules presently stand the Court has no power to dismiss a leave to appeal application on the basis that necessary documents have not been filed. If the Court is of opinion that a party seeking interim relief should have filed documents necessary for the Court to peruse before granting interim relief, the Court may either refuse to grant interim relief or may in its discretion direct the petitioner to furnish copies of the necessary documents. But the court has no power to dismiss a leave to appeal application in limine on the petitioner's failure to produce copies of documents".

It appears that Ameratunga,J. has taken the view that a leave to appeal applciation can be decided on the averments contained in the petition and affidavit is unacceptable.

As this order has been made in another division of this Court I would say with due respet to Amaratunga, J. that I totally disagree with him that there is no requirement to annex any documents to an application for leave to appeal other thatn the affidavit of the petitioner and the Court has no power to dismiss a leave to appeal application on the basis that necessary documents have not been filed.

While I would agree with him that Rule 3(1)(a) and (b) of the Court of Appeal (Appellate Procedure) will not and cannot apply to an application for leave to appeal and further in terms of Sections 757 and 758 of the Civil Procedure Code no documents need be filed along with the petition and affidavit and the requirement being that the petition should be supported by an affidavit. However if the petitioner is to succeed in his appication,I would hold that the necessary documents to establish the relief claimed by the petitioner should and must be provided or annexed to the petition.It must always be remembered that the system of civil law that prevails in our country is confrontational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties. Thus the burden is on the party seeking relief to establish his or her case. I am yet to come across any authority where the burden is cast on the Court to call for necessary documents. If Court were to adopt this procedure of calling for documents in support of an application for interim relief or for the grant of leave, it would be a procedure hitherto unknown to our legal system and in effect would be travesty of justice.

As Amaratunga, J says in that judgment this can be a lacuna in the law but that lacuna does not confer any additional privileges or for that matter any privilege on the petitioner to solely depent for leave to appeal or interim relief on the averments in his petition and affidavit not even annexing the impugned order.I am at a loss as to how the Court could decide on the question of law for which purpose leave is granted can the Court decide this aspect of the matter purely on the averments contained in the petition and affidavit? I think not I would proceed to say that if this procedure is adopted anyone could aver anything in the petition and the affidavit which has no bearing to the action in the original Court and obtain leave which would bring in a chain of reactions including stay of proceedings in the original Court. The situation becomes worse if the respondent is absent and unreprented. The Court is called upon to assist the petitioner by requiring him to produce the relevant documents so that the Court could grant him the relief prayed for by him. If documents so tendered are not sufficient the Court is obliged to call for more documents. In such a situation where does justice stand.

If notice issued on the respondent is not served on the respondent or prevented from being served on the respondent is the Court meeting our

justice by assiting the petitioner requesting him to produce documents to support his case?

In the case of Pathmawathie vs Jayasekera [3] it was held:

> "It must always be remembered by Judges that the system of civil law that prevails in our country is confrontrational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties.
>
> Our civil law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make a finding as he pleases may be on what he thinks is right or wrong, moral or immoral or what should be the correct situation. The adjudicator or Judge is duty bound to determine the dispute presented to him and his jurisdiction is circumscribed by that dispute and no more".

I would say these are matters that need to be considered before one says that interim relief or leave to appeal could be supported by a petition and affidavit when the documents mentioned in the petition and affidavit are not available to Court for perusal and examination. For the foregoing reasons, with due respect I have no hesitation to differ from the view expressed by Ameratunga, J in the aforesaid case. I was compelled to express the aforesaid observation for one of the reasons for disallowing the application of the petitioner in the instant application is non production of the relevant documents.

For the aforesaid reasons, leave to appeal is rejected and the application is dismissed. In all the circumstances of the case, I make no order as to costs.

WIMALACHANDRA, J. — I agree.

Application dismissed.