THE
Sri Lanka Law Reports

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

[2005] 2 SRI L. R. - Part 12

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THENUWARA
VS
SIMO NONA AND OTHERS

COURT OF APPEAL,
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SRI SKANDARAJAH. J,
CALA 501/2002,
D.C. COLOMBO 19129/L,
FEBRUARY 07,14, 2005.

Civil Procedure Code - S. 93 (2) - Amendment of Pleadings - Delay - Fraud - New S. 93 (2) Material Change in scope of action-Different and inconsistent character.

The 1st to 3rd plaintiffs-respondents instituted action against the defendant-appellant on the basis that the defendant-appellant who is the widow of the 1st plaintiff's son was a licensee of the premises and she wrongfully continues in occupation after termination of the licence. The defendant-appellant in her answer dated 08.11.2002 claimed compensation for bona fide improvement and jus retentionis pending payment of same.

On the 2nd date of trial, the defendant-appellant moved to amend the answer by pleading alleged fraud in the matter of the deed said to be executed in favour of the 1st plaintiff by her deceased husband who was the father in law of the defendant-appellant. The position of the defendant-appellant was that she came to know of the fraud on 13.09.2000. The plaintiff objected to the amendment, which objection was upheld by the District Judge.

HELD:

(i) Amendment of the answer based on facts or grounds known to the defendant-appellant prior to the filing of the original answer cannot in law be allowed.

(ii) The defendant-appellant has proposed in the amended answer to plead a promise by the 2nd plaintiff to transfer the premises in suit to her by way of dowry which position she has not taken up in her original answer, and she cannot be reasonably expected to say that such a promise was given after her having filed the original answer in this case.

(iii) The defendant-appellant through amendment of her answer, attempts to convert the character of her answer to a different and inconsistent character.

(iv) Such amendment cannot be allowed by Court. The Court using its discretion judicially cannot hold that neither the alleged complaint of fraud known to her from the year 2000 nor the so called promise to transfer the premises in suit as dowry were matters that came to her knowledge only after her filing the original answer.

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

Cases referred to

1. Audiappu *vs.* Indian Overseas Bank 1995 2 Sri LR 131.
2. *Hatton National Bank Ltd. Vs. Whittal Baustead Ltd.,* 1978-79 2 Sri LR 257.
3. *Mackinon Mackenzie and Co. Ceylon Lts.,* vs. *Grindlays Bank Ltd.* - 1986 2 Sri LR 272.
4. *Senanayake vs. Anthoniusze* - 69 NLR 225.

Kuvera de Zoysa for defendant-appellant.

Saman Dharmapala for 1st to 3rd plaintiff-respondents.

Cur. adv. vult

July 4, 2005.

WIJEYARATNE, J.

The 1st to 3rd plaintiff-respondents instituted the relevant action against the defendant-appellant seeking declaration of title to the premises in suit, for ejectment of the defendant-appellant and for recovery of damages in a lump sum of Rs. 700,000 and continuing damages in a sum of Rs. 200/- per day. The action was instituted on the basis that the defendant-appellant who is the widow of the 1st plaintiff's son was a licensee of the premises and she wrongfully continues in occupation after termination of her license. The defendant-appellant in her answer claimed compensation for

bona fide improvements in a sum of Rs. 6,300,000/- and *jus retentionis* pending payment of the same. The 1st-3rd plaintiff-respondents in their replication denied liability to pay any compensation and reiterating their stance of the plaint, joined issue with the defendant-appellant.

The trial on the first day was postponed and on the 2nd date fixed for trial, the defendant-appellant moved to amend her answer by pleading alleged fraud in the matter of the deed said to be executed in favour of the 1st plaintiff by her deceased husband Daniel who was the father-in-law of the defendant-appellant. The plaintiffs objected to the amendment being allowed on grounds of laches as provided in section 93(2) of the Civil Procedure Code. The defendant-appellant argued that she came to know of the fraud on a complaint by a son of the 1st plaintiff herself on 13.09.2000 and hence there was no delay on her part. It is to be noted that the original answer of the defendant-appellant is dated 08.11.2002. The defendant-appellants' own statement indicated that much before her original answer was filed she was aware of this allegation of fraud levelled against the 1st plaintiff-respondent. Then she cannot be heard to say that this is new material she became aware of after the filing of her answer. There is no delay for the defendant-appellant to explain to the satisfaction of the Court.

In the case of **Audiappu vs. Indian Overseas Bank** (1) it was held.

> **" the amendments contemplated by section 93(2) are those that are necessitated due to unforeseen circumstances, and not those that could have been foreseen with reasonable diligence."**

Similar view was taken in the case of *Charles vs. Samarasinghe* to the effect that amendment of the plaint arose unexpectedly and as the amendment did not cause prejudice to the defendant, it should be allowed.

In view of the above decisions, the amendment of the answer based on facts or grounds known to the defendant-appellant prior to the filing of the original answer cannot in law be allowed.

However the learned counsel for the defendant-appellant relied on the decisions of **Hatton National Bank Ltd *vs.* Whittal Bausted Ltd** (2) and **Mackinon Makenzie and Co. Ceylon Ltd *vs.* Grindlays Bank Ltd** (3)

and submits the amendment is necessary in order to effectually adjudicate on the dispute between the parties.

Perusal of the original answer and the proposed amendment of the same, discloses the defendant-appellants prayer for the same relief without any change. However, the defendant-appellant has proposed in paragraphs 6.11 of the amended answer to plead a promise by the 2nd plaintiff to transfer the premises in suit to her by way of dowry, which position she has not taken up in her original answer ; and she cannot be reasonably expected to say that such a promise was given after her having filed the original answer in this case. The defendant-appellant through amendment of her answer, attempt to convert the character of her answer to a different and inconsistent character.

Senanayake vs. Anthoniusze,[4] the rule is that such amendment should not be allowed by Court.

Although the learned District Judge has not adverted to such rules set up by decisions of the Supreme Court and Court of Appeal, what the learned District Judge considered was whether the defendant appellant has explained the delay on her part in giving new material in favour of amendment of answer to the satisfaction of the Court. The Court using its discretion judiciously cannot hold that neither the alleged complaint of fraud was known to her from the year 2000 nor the so called promise to transfer the premises in suit as dowry were matters that came to defendant's knowledge only after her filing the original answer. The learned District Judge has correct and duly considered the relevant matters in terms of the provisions of section 93 (2) of the Civil Procedure Code.

I see no reason to interfere with the same.

The application is dismissed with costs fixed at Rs. 5,000/=

Sriskandarajah, j. I agree.

Application dismissed.

MAJOR MALLIKARACHCHI
VS.
LT. GENERAL BALAGALLA
AND OTHERS

COURT OF APPEAL,
SRSKANDARAJAH, J.,
CA WRIT 537/2003,
JULY 30, 2003,
FEBRUARY 16, 2005,
MARCH 16,2005.

Army Act - Section 40 - Court of Inquiry - Misappropriation of Unit rationing and unit funds - Constitution of the Court of Inquiry - opportunity not given to cross examine - Natural Justice - Summary Trial - Found guilty Principle of Double jeopardy.

A Court of Inquiry inquired into the allegation against the petitioner for misappropriation of Unit rationing and unit funds, misappropriation and misuse of military property.

On the findings of the Court of Inquiry, the 1st respondent had directed that the petitioner to be disciplinary dealt with for the offences committed by him, In accordance with this direction he was summarily dealt with by the 6th respondent. The 1st respondent had thereafter decided to withdraw the commissions of the petitioner and to recover the total amount misappropriated.

The petitioner sought to quash the said orders on the grounds that—

(1) the Court of Inquiry was not property constituted, in that, as the alleged sum misappropriated was in excess of Rs.500,000 a civil officer was not nominated to the Court of Inquiry.
(2) that the inquiry was concluded in his absence, on some days.
(3) that, he has been punished twice by the Court of Inquiry and the 6th respondent on the same charges - contrary to the accepted legal principles of double jeopardy.

HELD:

(1) The petitioner was charged for loss amounting to Rs. 593,813.26, out of the total losses in relation to welfare account, simple canteen account and officers mess account are not money belonging to service or state or they are not kept in the custody of the service/state therefore these amounts cannot be considered as losses, defined in the Regulation -

a civilian officer thus need not be appointed to the court of Inquiry, as the loss misappropriation not in excess of Rs,500,000.

(2) The petitioner's absence on the day of re-examining will not in any way prejudice him, as he was provided an opportunity to cross-examine the witness.

(3) The Court of Inquiry is only a fact finding inquiry, and no punitive action is taken by the Court of Inquiry against anyone, the Petitioner was summarily dealt with by the 6th respondent in the summary trial and in the summary trial the petitioner was found guilty -

(4) The petitioner is not tried or punished twice in the summary proceedings and there was violation of the Principles of Double Jeopardy

Application for a writ of Certiorari,
Kalinga Indatissa with *Ranil Samarasooriya* for petitioner.
A. Gnanathasan D. S. G. for 1st respondent.

cur.ad.vult.

April 27, 2005.

Sri Skandarajah. J.

The 2nd Respondent is a Brigadier of the Sri Lanka Army and he functioned as the President of the Court of Inquiry and the 3rd, 4th and 5th Respondents, who are Colonel, Lt. Colonel and Major of the Sri Lanka Army respectively, functioned as members of the Court of Inquiry. The said Court of Inquiry inquired into the allegation against the Petitioner for misappropriation of unit rationing and unit funds, misappropriation and misuse of military property, employment of Army and Civil personnel at the quarters and for possessing unauthorised weapons and ammunitions.

The 6th Respondent is the Colonel of the Regiment of the Gemunu Watch who conducted a Summary Trial into the charges on which the Court of Inquiry referred to above inquired.

The Petitioner submitted that an alleged problem has arisen between 12th March 1997 to 15 th February, 2000 in respect of the misappropriation of unit rationing and unit funds, misappropriation and misuse of military property, employment of Army and Civil personnel at the quarters and for possessing unauthorized weapons and ammunitions of the 7th Gemunu Watch for which he functioned as the commanding officer. The Sri Lanka Army Military Police investigated these allegations and the petitioner was arrested on 18th July, 2000 and he was kept in close arrest for 43 days

and thereafter he was in open arrest for 210 days. After the conclusion of the Military Police investigation Court of inquiry was convened on the 15th November, 2001 P3 to inquire into the said allegations against the Petitioner. The inquiry commenced on the 11th January, 2002 and continued until the 6th May, 2002.

The Petitioner submitted that there was a vital deficiency in the constitution of the said Court of Inquiry. In terms of paragraph 4 (a) of the Special Rules made under No. 2 of Financial Regulation No.102 Relating to Losses of Three Armed Forces issued by the Ministry of Defence P1, a responsible civil officer has to be nominated as a member to a court of inquiry by the Secretary to the Ministry of Defence if the alleged loss or misappropriation is in excess of Rs.500, 000. However, this requirement was not followed in the said inquiry. The Petitioner further submitted that non - observance of the aforesaid rules pertaining to the constitution of the Court of Inquiry makes the inquiry illegal and unlawful from its very inception.

The Respondents submitted that even though the total value of the misappropriation and fraud committed by the Petitioner was in excess of Rs.500,000 such fraud had been committed in relation to individual and separate accounts of the 7th Battalion, Gemunu Watch as such the value of the separate and individual accounts did not exceed Rs.500,000.

The individual and separate accounts and the amount of money misappropriated by the Petitioner are :

A.	Account of the President of Regimental Institute	Rs. 285,833.84
B.	Welfare account	Rs. 44,986.91
C.	Unit canteen account	Rs. 67,315.75
D.	Officers mess account	Rs. 93,926.76
E.	Unit savings account	Rs.101,750.00
		Rs. 593813.26

The Respondents submitted that the above accounts include accounts of commercial nature and they are not public or army funds. Some of these accounts are maintained in order to provide welfare facilities such as canteen facilities for soldiers, Officers' Mess and Welfare Shop. Therefore a civilian officer is not required to be nominated in these circumstances by the Secretary to the Ministry of Defence to serve on the said Court of Inquiry.

The requirement under Regulation 4 (a) to nominate a civilian officer by the Secretary to the Ministry of Defence as a member of the Court of

Inquiry is only in the case where the loss exceeds Rs.500,000. The said Regulation P1 in Regulation 1 defines losses as :

Losses include

(*a*) Physical loss of or damage to Service/ Government Property, including money, stamps, stores, livestock's crops, plants, tickets, etc.

(*b*) Loss or damage to property of monetary value which though not the property of the Service/Government is held in its custody.

(*c*) .....

(*d*) .....

(*e*) .....

(*f*) .....

The Petitioner was charged for loss amounting to Rs. 593,813.26. Out of this total sum the losses in relation to welfare account, canteen account and officers' mess account are not moneys belonging to Service Government or they are not kept in the custody of the Service/Government therefore these amounts cannot be considered as losses defined in the said Regulation. Therefore the Petitioner's submission that a civilian officer should have been nominated by the Secretary to the Ministry of Defence to serve as a member of the Court of Inquiry has no merit in these circumstances. Therefore, this court cannot accept the submissions of the Petitioner that the Court of Inquiry has not been properly constituted.

The Petitioner also submitted that in the Court of Inquiry 28 witnesses and the Petitioner gave evidence. All the witnesses gave evidence affecting the character and military reputation of the Petitioner. In terms of regulation 15(1) of the Army Courts of Inquiry Regulation 1952, an officer should be afforded an opportunity to be present at the Court of inquiry and cross - examine, the witness whenever an inquiry affects the character and military reputation of an officer. The Petitioner submitted that the aforesaid regulation was violated by the Court of Inquiry by not providing the Petitioner an opportunity to cross examine some of the 28 witnesses though their evidence affected the character and the military reputation of the Petitioner. The Petitioner further submitted that he was not even summoned to the Court of Inquiry at the time certain witnesses were called to give evidence. Therefore the Petitioner submitted that the conduct of the 2nd to the 5th Respondent is irregular arbitrary and is a gross violation of the legitimate rights that was afforded to the Petitioner.

In terms of Regulation 15(1) of the Army Court of Inquiry Regulation 1952, an officer or soldiers shall be given an opportunity to cross - examine the witnesses whose evidence is likely to effect the character and military reputation of the said officer or soldier. Out of the 28 witnesses who gave evidence the Petitioner cross - examined 14 witnesses. The proceedings do not indicate at any stage that the Petitioner's request for cross examination was refused. Even though the Petitioner in this application makes a general allegation that he was not provided an opportunity to cross - examine witnesses who gave evidence against him, does not specifically mention the names of witness whose evidence affect his reputation and that he was not given an opportunity to cross - examine those witnesses. The counsel for the Petitioner in his submission brought to the notice of this court that the proceedings of the court of Inquiry dated 14.03.2002 appearing at page 73 shows that the Court of Inquiry conducted it's proceedings in the absence of the Petitioner, which is in violation of the said regulations. The said proceeding dated 14.03.2002 indicates that witness No. 2 Corporal Weerabahu AWIS was recalled and his evidence was recorded. In fact, Corporal Weerabahu AWIS has given his evidence on 11.01.2002 and he was cross - examined by the Petitioner. After the conclusion of the cross examination, the Court of Inquiry questioned this witness and the recording of the evidence of this witness was concluded. Thereafter several other witnesses were called to give evidence on subsequent dates and witness No. 2 Corporal Weerabahu was called on 14.03.2002 for re examination and he was re-examined on that day Petitioners absence on the day of re-examination will not in any way prejudice the Petitioner as he was provided an opportunity to cross - examine that witness after the examination in chief and he is entitled to get the copy of the proceedings to know what that witness has said in re-examination. Under these circumstances, this court is of the view that the Court of Inquiry did not violate the said Regulations.

The Petitioner submitted that the 6th Respondent conducted a Summary Trial in respect of twelve charges based on the allegations of misappropriation of unit rationing and unit funds, misappropriation and misuse of military property, employment of Army and Civil personnel at the quarters and for possessing unauthorised weapons and ammunitions. At the conclusion of the aforesaid Summary Trial the 6th Respondent had also ordered certain punishments to the Petitioner. The Petitioner submitted that these punishments are in addition to the punishments imposed by the Court of inquiry and therefore he has been punished twice for the same charges and it is totally contrary to the accepted legal principles of double jeopardy.

The Court of Inquiry is only a fact-finding body and no punitive action is taken by the Court of Inquiry against anyone. On the findings of the Court of Inquiry, the Commander of the Army had directed that the Petitioner to be disciplinary dealt with for the offence committed by him. In accordance with this direction, he was summarily dealt with by the 6th Respondent under section 40 of the said Act in the Summary Trial. In the Summary Trial, the Petitioner was found guilty and severaly reprimanded for all the charges. Therefore, the Petitioner is not tried or punished twice in these proceedings and this court holds that there is no violation of the principles of double jeopardy.

The observation of the court of Inquiry had been conveyed to the 1st Respondent and the 1st Respondent by his decision dated 15th August, 2002 P4 has decided to withdraw the commission of the petitioner and to recover the total amount that the Petitioner is alleged to have misappropriated. As the Petitioner's contention to set aside the proceedings of the Court of inquiry and the Summary Trial are not accepted by this court for the reasons stated above, there is no ground on which the decisions of the 1st Respondent based on these proceedings could be challenged. Therefore this application is dismissed without costs.

Application dismissed.

TYRON PERERA
VS
ATTORNEY GENERAL

COURT OF APPEAL,
BALAPATABENDI. J.
W. L. R. SILVA. J
CA (PHC) APN 7/2005.
JUNE, 28, 2005

Criminal Procedure Code - S404- Application for Bail pending appeal - Hearing of appeal will take a considerable period of time - Is it a ground? -Are exceptional circumstances necessary - Constitution - Art 12 (1)

The accused made an application for bail under S404. The only ground urged was that the hearing of the appeal will take a considerable period of time.

HELD:

(1) The application under S404 is misconceived. (The State however agreed to treat this matter as an application in Revision)

Held further:

(2) The sentence imposed on the accused is 7 years rigorous imprisonment and the mere fact that the hearing is not likely to take place for some time is itself no ground to enlarge the accused on bail.

(3) Release on bail pending appeal will only be granted on exceptional circumstances - there are no exceptional circumstances.
Per W. L. Ranjith Silva. J.
"A fortnight or a month during 1969 can be compared to a year or two according to the current state of affairs prevailing in our country".

Application for Bail pending appeal.

Cases referred to :

1. Benwell vs. Attorney General - 1988 1 SLL R 1
   (a) In Re Kamal Addararachchi CA (PHC) APN No. 10 of 1995 H. C. 7710/96
2. *Kamal Addararachchi* Vs. State - 2000- 3 Sri LR 393
3. *Queen* Vs. *Cornelis Silva* - 74 NLR 113
4. *Queen* Vs. *Perera* 62 NLR 238
5. *Thomodaram Pillai* Vs. *Attorney General* - CA 141/75
6. *Ranatunga Arachchilage Peter* Vs. A. G. - CA 450/95 CAM 2.8.95
7. *Salahudeen* Vs. A. G. 77 NLR 262

Prince Perera for accused.
Riza Hamza SC for Attorney General.

cur.ad.vult.

July 22, 2005

W. L Ranjith Silva, J.

This application for bail under S. 404 of the Criminal Procedure Code is misconceived. S. 404 cannot be invoked in the exercise of the jurisdiction of this court in an instance of this nature where the refusal of bail pending appeal by the High Court of Colombo by its order dated 16.12.2004 is being challenged. (*Vide* Benwell vs Attorney General at 1)

When this matter came up for inquiry before this Court on the 28.06.2005 Mr. Hamza State Counsel appearing for the Attorney General agreed to treat this application as if it were an application for revision and to proceed with the same.

In this case the accused was convicted for attempted murder on 24.09.2004 for an offence punishable under S 300 of the Penal Code and

was sentenced to 7 years rigorous imprisonment. An application for bail pending appeal was made to the High Court of Colombo on 15.10.2004 after nearly 21 days of the conviction and the Learned High court Judge made order refusing the said application for bail on 16.12.2004. At the time the Accused had been on remand for a period less than three months.

The Petitioner has stated in his petition that he adduced the under mentioned facts in his bail application presented to the High Court. They are as follows.

(A) The petitioner was convicted on 24.09.2004 and since then he is on remand.

(B) He appeared before Court on all dates of hearing

(C) The hearing of the appeal by the Court of Appeal is likely to take a considerable period of time, in addition to the time taken to prepare the appeal brief.

(D) In the event of this appeal being allowed by the Court of Appeal on the basis of the misdirection made on the law by the Learned High Court Judge, it would be unreasonable if the accused were to be on remand for a long period of time.

(E) The petitioner is 34 years of age ; he has two school going children aged 12 and 15 years respectively, and that he is the sole bread winner of his family

(F) He is so poor and is unable to find the money to retain counsel to plead his case in the Court of Appeal.

The Learned High Court Judge refused to grant bail as he was of the view that none of the grounds adduced by the petitioner amounted to exceptional circumstances warranting the grant of bail pending appeal.

On a perusal of the proceedings of 16.12.2004, in the High Court of Colombo I find that the counsel for the petitioner confined himself to making submissions in respect of only item (C) mentioned above that is, that the hearing of the appeal in the Court of Appeal is likely to take a considerable period of time in addition to the time taken to prepare the

appeal briefs. The Learned High Court Judge after hearing the submissions of both parties refused to grant bail on the ground that the petitioner failed to establish exceptional circumstances. In this Court too the Petitioner relied mainly on the same ground alleged in item (C). Now the function of this court acting in revision is to decide as to whether the order made by the Learned High Court Judge was illegal, unreasonable, *ultra vires* or the like in the light of the arguments adduced before, and the material made available, to the Learned High Court Judge. Since this is not a fresh bail application, this court acting in revision cannot and should not unless there are special reasons to do so, consider fresh matters or arguments based on additional grounds touching the facts of the case, which were not presented or adduced before the Learned High Court Judge, in deciding whether the order made by the Learned High Court Judge was right or wrong, legal or illegal.

Now I shall deal with the issue whether the delay in the preparation of the appeal brief and the fact that the appeal is likely to take a long time could be treated as constituting exceptional circumstances that warrant the grant of bail pending appeal.

In the famous case of Kamal Addararachchi[19] J. A. N. De Silva, J. observed thus "from our experience in this case we note that it will at least take over one year for this appeal to be taken up. We have already fixed appeals up to September and we have to give priority to cases involving death sentences and life imprisonment. In these circumstances we hold that it would be appropriate to enlarge the accused appellant on bail pending appeal".

In that judgement no judicial precedents were cited as to the law as it stood prior to the decision in that case. Yet the order in that case could be justified on the extraordinary circumstances endemic to that case. If one were to peruse the judgement delivered by Hecter Yapa, J. in Kamal *Addararachchi* Vs *The State* [2] it could clearly be seen what these special circumstances are. His Lordship, observed at various stages, in the course of his judgement (Kulathilake, J. agreeing) as follows,

> "No court should try to molly coddle a witness as has happened in this case." (*Vide* page 32 of the judgement)
>
> "Suffice it to state that those factual misdirections have caused serious prejudice to the Accused Appellant.." (Vide page 34 of the judgement)

"therefore by reason of the trial judge misdirecting herself on the law as stated above..." (vide page 36 of the judgement)

Even though the petitioners cannot be legally permitted to pre-empt the main appeal by canvassing the correctness of the judgement and to rely on the weakness of the prosecution case in a bail pending appeal application as the weakness of a case is not a ground to enlarge an accused on bail pending appeal the serious and transparent lapses which deprived the accused of a fair trial enshrined in Article 12(1) of the Constitution I suppose, prompted their Lordships in granting bail as those lapses appearing on the face of the record were manifestly illegal, unreasonable and amounted to a blatant violation of the fundamental rights of the accused in that case.

In Kamal Addararachchi's case, the accused was a popular movie star in Sri Lanka, whose life and future was in this country. He would be completely lost in a foreign country. Therefore it could be safely assumed that he will not dessert this country but would be available to serve the sentence in case has lost his appeal. This fact too I believe would have been in the forefront of their Lordships minds when they decided to grant bail to the accused in that case.

In Queen Vs Cornelis Silva[3] it was held by Weeramanthri J. I quote "Release on bail pending appeal will only be granted on exceptional circumstances. Where the sentence is a long one the mere circumstances that the hearing of the appeal is not likely to take place for a fortnight or a month is of itself no ground for the grant of bail"

A fortnight or month during 1969 can be compared to a year or two according to the current state of affairs prevailing in our country.

In Queen Vs *Perera*[4] it was held that delay likely to ensue in preparation of a brief owing to the production of a large number of exhibits in a case where over 100 witnesses were examined and more than 400 exhibits were produced, was not a reason for the grant of bail.

The court in refusing bail reiterated the principle that the grant of bail by the Court of Criminal Appeal was an exceptional and unusual course.

In granting bail pending appeal the overriding consideration should be whether the accused will present himself to serve the sentence imposed on him if the appeal is dismissed. In[5] Thamodaran Pillai's case it was held that one aspect to be considered in a bail pending appeal case is that whether the accused will be available to serve the sentence if he is granted bail. In that case the sentence imposed one the accused was on of 7 years rigorous imprisonment. In *Ranatunga Arachchilage Peter* Vs. *A. G.*[6] it was held referring to *Salahudeen* Vs. A. G[7] that when an accused is convicted of culpable homicide not amounting to murder and sentenced to 3 years rigorous imprisonment, that should not be considered as an exceptional circumstance to grant bail. In *Queen Vs Cornelis Silva* (supra) where the accused was convicted of attempted murder and sentenced to 4 years rigorous imprisonment was held to be a sentence long enough not to grant bail. In *Ranatunga Arachchilage Peter Vs. A. G. (supra)* the fact that the appeal will take a long time, the fact that the accused is the sole bread winner, the fact that the accused had been on remand for a long period of time, were not considered as forming exceptional circumstances. Even the fact that the conditions of the bail bond have not been violated cannot be taken as constituting exceptional circumstances.

In this case the sentence imposed on the accused is 7 years rigorous imprisonment and the mere fact that the hearing isn't likely to take place for some time is of itself is no ground to enlarge the accused on bail. The other reasons relied on by the petitioner as forming exceptional circumstances scarcely bear examination.

For the reasons adumbrated, I am of the view that the Learned High Court Judge was quite correct when he refused to grant bail pending appeal as there were no exceptional circumstances adduced before him warranting the release of the accused on bail pending appeal.

Balapatabandi, J.

I agree only on the point that there are no exceptional circumstances averred by the Petitioner, in his petition to grant bail pending appeal.

Application dismissed.

SORIS
VS
OFFICE IN CHARGE - CRIMINAL INVESTIGATIONS DEPARTMENT

COURT OF APPEAL,
ABEYRATNE J,
IMAM J,
CA (PHC) APN 185/2004
HC (REV) BADULLA 57/04
M. C. BANDARAWELA 36415
JANUARY 26, 2005
MARCH 1, 2005

Debt Recovery (Sp. Pro) Act. No. 2 of 1990 - as amended by No. 9 of 1994- Section 2 (1) (2) Section 25 (1) (6), S 30 (a) Scheduled Institution ? - Lending Institutions - Co-operative Society - is it a Schedule Institution ? - Cheques issued for the society being dishonoured due to lack of funds - Applicability of the provisions of the Debt Recovery Law ? - What is a Debt ?

On a complaint made by the General Manager of the Co-operative Society the Criminal Investigations Department commenced investigations, with regard to the allegation that the Petitioner had cheated the Society in a sum of Rs. 5.4 Million. The basis of the complaint was that the cheques issued by the Petitioner for the purchase of seed potatoes from the Society were dishonoured for lack of funds. The 'B' Report filed alleges that the petitioner had committed an offence under Section 25 (1)(a) of the Debt Recovery Act. The Petitioner objected to the proceedings on the ground that, the Society is not a scheduled institution under the Debt Recovery Act. This was over-ruled by learned Magistrate, and in the Revision Application filed in the High Court, Court refused to issue Notice.

HELD:

(i) The Debt Recovery (Sp. Pro) Act 2 of 1990, is comprised of five parts, where parts 1-4 relate to transactions of a civil nature by and between the lending institutions and part 5 deals with the criminal liability attached to the money transactions between the lending institutions and a person or body of persons.

(ii) A lending institution is defined in Section 30 of the Act and the Udalapalatha society does not fall within the interpretation of lending institution ; reference to the words lending institution and institution refer to one and the same.

(iii) It is manifestly clear that the word "Debt" is used in relation to a lending institution and related to transactions in the course of bank-

ing, lending and financial or other allied business activities. The word debt cannot be construed to any debt.

APPLICATION in Revision from an Order of the High Court of Bandarawela.

Case referred to :

1. C. N. Mackie and Co. vs Translanka Investment ltd., 1995 2 Sri LR 6

H. G. Hussain with Ms. A. M. K. Sepali for Accused Petitioner Petitioner.
Buvenaka Aluvihare S. S. C., with Achala Wenagappuli S. C., for the Respondent Respondents.

Cur. adv. vult

March 30, 2005

IMAM, J.

This revision application has been made by the Accused-Petitioner-Petitioner (hereinafter referred to as the Petitioner) to set aside the order of the Learned High Court Judge of Badulla dated 14.06.2004, amongst other reliefs, sought for. The facts of this case are briefly as follows. On a complaint made by the General Manager of the Udapalatha Multi-purpose Co-operative Society (hereinafter referred to as the MPCS), the Criminal Investigation Department commenced investigations with regard to the allegation that the petitioner had cheated the MPCS in a sum of approximately Rs. 5.4 million. The basis of the complaint was that cheques issued by the Petitioner for the purchase of seed potatoes from the MPCS were dishonoured for lack of funds. Consequently the CID filed a 'B' report against the petitioner in the Magistrate's Court of Bandarawela alleging that he had committed an offence under section 25(1)(a) of the Debt Recovery (Special provisions) Act, No. 2 of 1990 as amended by Act No. 09 of 1994.

Initially counsel who appeared for the petitioner among other grounds raised an objection that the charge cannot be maintained, as the court had no jurisdiction to hear the case as the MPCS is not a scheduled Institution as described in section 30 of Act, No. 02 of 1990. Although the

Learned Magistrate made an order on 23.10.2003 to the prosecution to file an amended charge, he nevertheless on 05.03.2004 subsequent to an application made by the prosecution cancelled his earlier order, thereby disallowing the initial objection raised by Petitioner's counsel, and fixed the matter for Trial. The Petitioner aggrieved by this order, preferred a revision application to the High Court of Badulla. The Learned High Court Judge of Badulla by his order dated 14.06.2004 refused to issue Notice, and dismissed the application. The petitioner aggrieved by this order of the learned High Court Judge tendered this revision application to this court.

Both counsel invited this court to make an order with regard to the applicability of section 25(1)(a) of the Debt Recovery Act, No. 02 of 1990. It was submitted on behalf of the petitioner that the aforesaid section deals with debts in relation to the institutions referred to in section 30 of Act, No. 02 of 1990. However learned Senior State Counsel appearing for the respondents submitted that the relevant section cannot be narrowly construed, but has to be examined independently, from the other provisions of the aforesaid Act. Section 25(1)(a) of the said Act refers to "Any person who (a) draws a cheque knowing that there are no funds or not sufficient funds in the bank to honour such cheque or ....." The Learned High Court Judge in his order referred to this section and further held that the type of person who receives the cheque (payee) is immaterial for a prosecution in terms of the section. Counsel for the petitioner submitted in this Court that section 25 can only be invoked where the cheque concerned was drawn in favour of a "Scheduled Institution" within the meaning of the Act, and that the objective of the legislature was to streamline the procedure with regard to the recovery of debts by "lending institutions" and thus any transaction which does not involve a lending institution is outside the parameters of the Act.

Learned Senior State Counsel who appeared for the respondents did not agree with this view.

It is clear on a perusal of section 25(1)(a) and (b) that no reference is made to "lending Institutions" nor to "Recovery of Debts", but refers to a situation where "a person draws a cheque (a) Knowingly without or insufficient funds to meet the cheque and thereby causes the same to be

dishonoured or (b) countermand a cheque with a dishonest intention ....."

Bindra on Interpretation of Statutes (9th edition, p 38) states The "Construction of the Statute cannot be limited by its title. The true nature of the law is to be determined not by the name given to it or by its form , but by its substance. Where the language of the enactment is clear, its construction cannot be affected in any way by the consideration of the title of the Act." Thus section 25 of the Act is clearly not ambiguous.

In the case of *C. W. Machie and Co.* vs *Translanka Investment Ltd.*[1] *Ranaraja. J.* in reference to certain dishonoured cheques issued by the respondent, observed that section 25 of the Act makes such conduct on the part of the drawer an offence. It is noted that neither party in this case is a lending institution.

However on perusal of the Debt Recovery (Special Provisions) Act, No. 02 of 1990 section 2(1) Part 1 which refers to institution of Action, states that "A Lending institution (hereinafter referred to as the institution" may subject to the provisions of sub-section (2) recover debt due to it by an action instituted in terms of the procedure laid down by this Act, in the District Court....." Section 2(2) states that 'No action shall be instituted by an institution in terms of the procedure laid down by this Act for the recovery of any loan or debt as amended by Act No. 09 of 1994....." Section 4(1) states that "The Institution suing shall on presenting the plaint file an affidavit to the effect that the sum claimed is justly due to the institution from the defendant and shall in addition produce to the Court the instrument, agreement or document sued upon or relied on by the institution" Thus from the institution of action onwards under the aforesaid Act, certain procedures are set out which have to be fulfilled for the relief obtained. Moreover the charge sheet presented inthe Magistrate's Court against the Petitioner specifically refers to section 25(1)(a) of the Debt Recovery (Special Provisions) Act No. 02 of 1990 as amended by Act No. 09 of 1994. Hence the procedures of the aforesaid Act have to be followed. The Debt recovery (Special Provisions) Act, No. 02 of 1990 is comprised of five parts where parts 1 to 4 relate to transactions of a civil nature by and between the lending institutions, and part 5 deals with the criminal liability attached to the money transactions between the said lending institution, and a person or body of persons. A lending institution is defined in section 30 of the aforesaid Act, and the "Udapalatha MPCS' does not fall within

the interpretation of Lending Institution. Furthermore the reference to the words Lending Institution and institution refer to one and the same. It is manifestly clear that the word 'Debt' is used in relation to a lending Institution and related to transactions in the course of banking, lending, and financial or other allied business activities. Hence the word debt cannot be construed to any debt. The terms "Any Person" is described in detail in Stroud' s Judicial Dictionery.

For the aforesaid reasons this Court permits the revision application and sets aside the order of the Learned High Court Judge of Badulla dated 14.06.2004, in Application No. 57/2004. Furthermore the Petitioner is permitted to issue notice on the Respondents, and is entitled to the reliefs sought for in the prayer to the Petition presented to this Court.

Abeyratne, J. I agree.

Application dismissed.

DENNISE PERERA
VS
BAUR & COMPANY LTD.

COURT OF APPEAL,
SOMAWANSA, J. (P/CA)
WIMALACHANDRA J.
C. A. L. A. 60/2005
D. C. COLOMBO 7222/Spl.
June, 17, 2005

Civil Procedure Code - S. 217, S. 662, S. 664 - Mandatory Injunction - jurisdiction of trial Court to grant same ? - Judicature Act - S 54 - Constitution - Article 143.

The Plaintiff-appellant instituted action to prevent the defendant-respondents from refusing to recommend to the authorities of the Sri Lanka Police and Sri Lanka Navy for the issue of entry passes required by the plaintiff-appellant and

for the vehicles to enter Baurs building situated at Upper Chatham Street Colombo, to obtain and provide such passes to the plaintiff-appellant. In the first instance the plaintiff-appellant sought an enjoining order which was refused by Court, and the plaintiff-petitioner sought leave to appeal.

HELD:

Per Somawansa, J. (P/CA)

"Though the District Judge refused an enjoining order to be issued ex-parte, he had issued notice of interim injuction and summons on the respondent, however, before the inquiry into the application for interim injuction could be taken up which in effect would have given the defendant-respondent an opportunity to be heard the plaintiff-appellant has thought it fit to canvass the District Judge's order -in the circumstances I would say that this is a premature application which should be rejected in limine."

(1) The plaintiff-appellant's right to occupy the premises stands terminated and the defendant-respondent has not done any extraordinary act of recent origin to frustrate any rights of the plaintiff-appellant either before or after he instituted this action.

(2) As the plaintiff-appellant in his plaint does not ask for a declaration that he be declared the tenant of premises, he has no legal basis to pray for the enjoining order;

Per Somawansa, J. (P/CA)

"I am not inclined to agree that either the decision in ***Peiris vs. Perera*** [1]or ***Tudor vs. Anulawathie***[2] or the provisions contained in S 217, 662, 664, 54 of the Judicature Act or Article 143 of the Constitution would be of any help to the issue of mandatory injunctions for the reason that such an injunction of an aforementioned nature can be issued only at the final determination of the action."

Quarere

Could the District Court grant a mandatory injunction ?

Application for leave to appeal from an order of the District Court of Colombo.

Cases referred to

1. *Peiris vs. Perera* - 2002 - 2 Sri LR 128 - (distinguished)
2. *Tudor vs. Anulawathie* - 1999 - 3 Sri LR 235 (distinguished)
3. *Puranik vs. Travotal India Pvt. Ltd.* - CA 518/93- CAM 27.7.93 (followed). SC Special No. 54/2005

P. Nagendran P. C. with Prof. H. M. Zafrullah, Anura Meddegoda and B. Jayasinghe for plaintiff-appellant-appellant.

K. N. Choksy, P. C, with V. K. Choksy for defendant -respondent-respondent.

Cur, adv, vult

June 17, 2005

SOMAWANSA, J. (P/CA)

This is a leave to appeal application filed against the order of the learned District Judge of Colombo dated 14.02.2005 refusing the application of the plaintiff-applicant-appellant for the issue of an enjoining order as prayed for and directing summons and notice of interim injunction to be issued on the defendant-respondent-respondent. The said order is marked 'c'. In pith and substance the plaintiff-applicant-appellant instituted the instant action to prevent the defendant-respondent-respondent from refusing to recommend to the Authorities of the Sri Lanka Police and Sri Lanka Navy for the issue of entry passes required by the plaintiff-applicant-appellant his servants, agents and for the vehicle to enter Baur's building situated at Upper Chatham Street, Fort, Colombo 01, to obtain and provide such passes to the plaintiff-applicant-appellant.

On the day on which this application was listed for support Mr. K. N. Choksy, P. C., appeared for the defendant-respondent-respondent and both parties agreed to resolve the matter of granting interim relief as well as the granting of leave to appeal by way of written submisions. Accordingly both parties have tendered their written submissions and also further submissions in reply.

It appears that the plaintiff-applicant-appellant had made an application for enjoining orders ex-parte and he had also moved for issue of interim injunctions and permanent injunctions claiming the same relief sought in the enjoining orders which are clearly mandatory orders which would compel the defendant-respondent-respondent to do certain acts which I would say could have far reaching consequences without the defendant-respondent-respondent being heard. The reliefs prayed for by the Plaintiff applicant appellant are as follows :

a. grant and issue a declaration that the plaintiff is entitled-

(*a*) to be recommended by the Defendant to the Staff Security Officer of the Sri Lanka Navy for the issuance of entry pass required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01 and

(*b*) that the Defendant is obliged to obtain and provide such passes to the Plaintiff.

b. grant and issue a declaration that Plaintiff and his servants and agents are entitled-

(*a*) to be recommended by the Defendant to the Authorities of the Sri Lanka Police for the issuance of entry passes required by the Plaintiff, his servants and agents and

(*b*) That the Defendant is obliged to obtain / provide passes for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01,

c. issue an enjoining order restraining the Defendants from refusing to recommend to the Staff Security Officer of the Sri Lanka Navy for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

d. issue an enjoining order restraining the Defendant from refusing to recommend to the Authorities of the Sri Lanka Police for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

e. issue an interim injuction restraining the Defendant from refusing to recommend to the Staff Security Officer of the Sri Lanka Navy for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

f. issue an interim injunction restraining the Defendant from refusing to recommend to the authorities of the Sri Lanka Police for the issuance of

entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

g. issue a permanent injunction restraining the Defendant from refusing to recommend to Staff Security Officer of the Sri Lanka Navy for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

h. issue a permanent injunction restraining the Defendant from refusing to recommend to the Authorities of the Sri Lanka Police for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01 and refusing to obtain and provide such passes to the Plaintiff.

i. for costs, and

j. such other and further relief that Your Honour's Court shall seem meet.

It is to be seen that the enjoining orders prayed for in paragraphs 'c' and 'd' to the prayer of the plaint are clearly not orders which are restrictive in nature but mandatory in nature and prayers 'c' and 'd' as prayed for in the petition for leave to appeal are in fact identical in nature and if granted would tantamount to the issuance of the final relief as prayed for by the plaintiff-applicant-appellant in the District Court.

It is contended by counsel for the plaintiff-applicant-appellant that the failure on the part of the defendant-respondent-respondent to renew and issue the Naval and Police security passes which should have enabled the plaintiff-applicant-appellant to enter the premises in suit and to park his vehicle is clearly an attempt by the defendant -respondent-respondent to compel the plaintiff-applicant-appellant to vacate the premises and to take up occupation under a new contract of tenancy of the alternative flat offered by the defendant-respondent-respondent and that if he vacates and takes up occupation of the new flat, he would be fully caught up in the trap of the defendant-respondent-respondent as the premises would have been let after 01.01.1980 and would be excepted premises in terms of the provisions of the amending Rent Act, No. 26 of 2002.

It is to be seen that the defendant-respondent-respondent by letter dated 21.09.2004 had given the plaintiff-applicant-appellant notice to quit and

vacate the premises in suit. The said notice marked X7 also terminated the right to occupy the staff quarters and garage. On the other hand, the plaintiff-applicant-appellant claims that the tenancy of the premises is governed by the Rent Act, No. 07 of 1972 and hence the notice to quit is invalid and his tenancy still continues. On this basis the plaintiff-applicant-appellant claims enjoining orders restraining the defendant-respondent-respondent from refusing to recommend to the Navy and the Police for the issue of passes to the plaintiff-applicant-appellant and further restraining the defendant-respondent-respondent from refusing to obtain and provide such passes to the plaintiff-applicant-appellant. In other words, the plaintiff-applicant-appellant is seeking enjoining orders from Court to compel the defendant-respondent-respondent to make recommendation to the Navy and Police and also to obtain and make available to the plaintiff-applicant-appellant the passes in question which are in effect orders of mandatory nature. It is the contention of counsel for the defendant-respondent-respondent that enjoining orders of such nature cannot be issued. In reply counsel for the plaintiff-applicant-appellant submits that the aforesaid argument is without any foundation whatsoever and that our Courts have repeatedly pointed out that they have the power to issue mandatory orders. For this proposition of law he cited the decision in *Peiris* vs *Perera*[1] I have no bone to pick with that decision. However on a perusal of the judgment of that case shows that the dispute in that case was in respect of ownership of land and the defendant had recently erected a wall with the object of preventing the plaintiff having access to the land pending final determination of the action. The learned District Judge had come to a finding that the plaintiff had established a *prima facie* case establishing the title to the land and therefore was entitled to have access to the land pending the final determination of the action. The only way in which this access could be granted pending the final determination of the case was by directing the demolition of the wall recently erected deliberately to prevent the plaintiff from entering the land. This was considered by Court as a peculiar circumstance and ordered the demolition of the obstructing wall. The Court also emphasized that it is only in very rare circumstances that such order would be made. In that case the plaintiff had established a *prima facie* right and that some peculiar circumstance had been brought about by the defendant's conduct.

In the instant action the defendant-respondent-respondent has not done any act of recent origin to frustrate any right of the plaintiff. The plaintiff-applicant-appellant instituted action in the District Court of Colombo on 26.01.2005. It is the plaintiff-applicant-appellant's own pleadings in his

plaint as per paragraph 15 of the plaint marked A that the defendant-respondent-respondent did not give any pass to the plaintiff-applicant-appellant as from 31.10.2004. In the circumstances, it is apparent when the plaintiff-applicant-appellant instituted his action 26.01.2005 he did not possess a pass from the Commander of the Navy. It is contended by counsel for the plaintiff-applicant-appellant that though requested the defendant-respondent-respondent has refused to obtain such passes thereafter on behalf of the plaintiff-applicant-appellant.

It is strange that the plaintiff-applicant-appellant in his plaint does not ask for a declaration that he be declared the tenant of the premises. In the circumstances, I would hold that the plaintiff-applicant-appellant has no legal basis to pray for the interim relief of an enjoining order. In paragraphs 17, 18 of the petition the plaintiff-applicant-appellant states that he forwarded letter dated 01.10.2004 together with Cheque No. 844404 for Rs. 25,875 being rent and charges for the flat in question for the months of October, November and December 2004 marked XII. The defendant-respondent-respondent had acknowledged the receipt of the said sum as damages payable without prejudice to the defendant-respondent-respondent's notice to quit. I am unable to accept the position of the counsel for the plaintiff-applicant-appellant that the said sum of money is the rent paid for the aforesaid months for in fact as alleged by the defendant-respondent-respondent the plaintiff-applicant-appellant's right to occupy had been terminated by notice dated 31.10.2004 marked X7. These matters are yet to be decided at the trial instituted by the defendant-respondent-respondent and not in the action instituted by the plaintiff-applicant-appellant.

It is to be noted that the plaintiff had in *Peiris* vs. *Perera (supra)* established a *prima facie* right or title to the land and that some extraordinary or peculiar circumstance had been brought into existence by the defendant's conduct. In the instant action plaintiff-applicant-appellant's right to occupy the premises stands terminated and the defendant-respondent-respondent has not done any extraordinary act of recent origin to frustrate any rights of the plaintiff-applicant-appellant either before or after he instituted this action. In this context, I would hold that the decision in *Peiris* vs *Perera* (supra) has no application or relevance to the instant action.

In further support of the contention of the plaintiff-applicant-appellant the decision in *Tudor* vs. *Anulawathie* [2] is cited which considered an application under section 662 of the Civil Procedure Code and a decision under Primary Courts Procedure Act which has no relevance to the issue

at hand. I am not impressed with the submission and the decisions and authorities cited by the plaintiff-applicant-appellant. I am also unable to agree with the submission that authorities cited by the plaintiff-applicant-appellant is buttressed by reliance on section 217 of the Civil Procedure Code which the counsel suggest should be read with sections 662 and 664 of the Civil Procedure Code together with section 54 of the Judicature Act which confers ample jurisdiction on Court to issue mandatory orders. Considering the facts and circumstances of this action, I am not inclined to agree that either the aforesaid decisions or provisions contained in Sections 217, 662, 664, section 54 of the Judicature Act or Article 143 of the Constitution would be of any help to the issue of mandatory injunctions for the reason that such an injuction of an affirmative nature can be issued only at the final determination of the action. In *Puranik* vs. *Travotal* India (Pvt) Ltd., [3], the plaintiff obtained an interim injuction directing the 2nd defendant to remit certain sums of money to the plaintiff in India. The Court of Appeal held that this was an interim injunction of a mandatory nature which should not be made before final judgment. The same principle should apply to the instant action filed by the plaintiff-applicant-appellant for the only relief sought by the plaintiff-applicant-appellant in the instant action by way of enjoining orders, interim injunctions and the permanent injunctions is the identical relief of orders directing the defendant-respondent-respondent to do an affirmative act of a mandatory nature *viz.* seeking Court orders compelling the defendant-respondent-respondent to make recommendations to the Navy and Police and to obtain and make available to the plaintiff-applicant-appellant the passes in question. Considering the circumstances of this case, I am unable to agree that enjoining orders of such nature could be issued ex-parte.

It is to be noted that though the learned District Judge refused an enjoining order to be issued ex-parte, he had issued notice of interim injuction and summons on the respondent. However, before the inquiry into the application for interim injuction could be taken up which in effect would have given the defendant-respondent-respondent an opportunity to be heard the plaintiff-applicant-appellant has thought it fit to canvass the learned District Judge's order refusing to issue an enjoining order ex-parte by way of leave to appeal. In the circumstances I would say this is a premature application which should be rejected in limine. If we are to entertain this type of application, it would be the opening of floodgates for parties to seek leave to appeal against orders of refusing to grant reliefs on applications made ex-parte in fact the Court in the instant action has

thought it fit to issue notice to the defendant-respondent-respondent and give him a hearing before an order for interim injunction either preventive or mandatory is issued.

In any event, the learned District Judge has carefully considered the facts placed before him and refused the application on the basis that the plaintiff-applicant-appellant has failed to establish a *prima facie* case and no irreparable loss would be caused to the plaintiff-applicant-appellant. In this respect, I would refer to the two documents considered by the learned District Judge *viz* : documents marked X3 and X6. It is to be noted in paragraph 3(u) of the petition dated 01.03.2005 the plaintiff-applicant-appellant says that he frequently has urgent business in Colombo and for this purpose he resides in the flat but *vide* his letter dated 17.05.2004 marked X3 wherein he informs the defendant-respondent-respondent that he rarely comes down to Colombo. Again in document marked X6 dated 06.08.2004 wherein he says :" I have also had to consider the fact that I hardly come down to Colombo now".

It is to be noted that there is no other document which shows the converse. In any event there was no material placed before the learned District Judge or before us to establish that the plaintiff-applicant-appellant would suffer irreparable loss in the event the enjoining order is not granted.

For the foregoing reasons, I have no hesitation in refusing leave to appeal. Accordingly the leave to appeal application of the plaintiff-applicant-appellant will stand dismissed with costs fixed at Rs. 15,000.

Wimalachandra, J.- I agree.

Application dismissed.