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WRIT OF CERTIORARI – Termination of services of a university officer - Lack of sufficient material - Participation of University Council Members at the preliminary inquiry -Validity of termination.

THE MANAGER, BANK OF CEYLON, HATTON
VS
THE SECRETARY, HATTON DICKOYA URBAN COUNCIL

SUPREME COURT.
BANDARANAYAKE, J.
AMARATUNGA J. AND
MARSOOF J.
SC APPEAL 67/2004.
H. C. (CENTRAL PROVINCE).
MAGISTRATE'S COURT (HATTON).
30TH MAY, 13TH JULY AND 30TH SEPTEMBER, 2005.

By laws under Urban Councils Ordinance - Urban Councils Ordinance, sections 164, 165, 165B and 165C - Whether the appellant Bank is liable to pay licence fees separately for money lending and pawn brokering-Meaning of "Banking" under common law and statutes such as the Bank of Ceylon Ordinance and Banking Act, No. 30 of 1988- Existence of doubt regarding the meaning of "Banking" (whether money lending and pawn brokering can be separated) Interpretation of statutes - Doubts in taxing statutes to be resolved in favour of the tax payer - Validity of the Magistrate's order on the appellant Bank to pay licence fees on pawn brokering in addition to payment for money lending.

On the application of the respondent Secretary aforesaid, the Magistrate, Hatton ordered the recovery of Rs.3,375 from the appellant Bank as licence fees for pawn brokering with GST whilst the Bank had already paid Rs. 3000 for money lending for the year 2000 on Document XI.

HELD:

1. Having regard to the common law and statutes such as the Bank of Ceylon Ordinance and the Banking Act, No. 30 of 1988 and the meaning of "Banking", the Bank of Ceylon is carrying on banking business including money lending and pawn-brokering. These two activities cannot be separated.

2. In any event there is a doubt whether money lending and pawn-brokering may be separated. In the circumstances the doubt should be resolved in favour of the Bank being the tax payer. Taxing statutes should be strictly construed in favour of the tax payer.

3. As such, the order of the Magistrate that the appellant is liable to be additionally taxed for pawn-brokering and the order of the High Court affirming that order are invalid and cannot be sustained.

APPEAL from the judgment of the High Court.

Cases referred to :

1. *United Dominions Trust* vs. *Kirwood* (1966) 2 QB 431.
2. *State Saving Bank of Victoria Commissioners* vs. *Per. Mewan Wright and Co.* Ltd. (1915) 19 CLR 459.
3. *Tuck and Sons* vs. *Priester* (1887) 19 QBD 629.

M. K. Muthukumar with *Jinadasa Gamage* for appellant.

S. Mandaleswaran with *P. Peramunagama* for respondent.

Cur.adv. vult.

7 December, 2005.

SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the order of the High Court of the Central Province dated 21.05.2004. By that order the learned High Court Judge had affirmed the judgment of the learned Magistrate of Hatton and dismissed the appeal. The respondent - appellant - appellant (hereinafter referred to as the appellant Bank) appealed against the said order on which this Court granted special leave to appeal.

The facts of this appeal, *albeit* brief, are as follows :

The complainant - respondent - respondent (hereinfter referred to as the respondent), being the Secretary of the Hatton - Dickoya Urban Council, filed a complaint against the appellant Bank in the Magistrate's Court of Hatton to recover the tax due under section 165B(3) of the Urban Councils Ordinance for conducting the business of pawn-brokering. The respondent had claimed in the said complaint that the appellant Bank was liable to pay Rs. 3,000 as the licence fees for pawning business, Rs. 375 as goods and services tax and Rs. 625 being charges for office expenses, totalling to a sum of Rs. 4,000. Learned Magistrate by his order dated 23.01.2001 allowed the respondent's application and imposed a fine of

Rs. 3,375 payable to the respondent Urban Coucil, which order was affirmed by the learned High Court Judge of the Central Province by his order dated 21.05.2004.

Both counsel agreed that the only question that has to be examined in this appeal is whether the respondent is entitled to levy a tax from the appellant Bank separately for the business of pawn brokering carried on by the appellant Bank in Hatton apart from various businesses of banking carried on by the appellant Bank in the said area.

Learned Counsel for the respondent contended that the respondent is entitled to levy a tax under section 165B(1) of the Urban Councils Ordinance for the two businesses carried on by the appellant Bank, namely money lending and pawn brokering set out in item 2 and item 7 of the third Schedule to the Gazette notification dated 14.02.1997, published in terms of the Urban Councils Ordinance. He further contended that the sum of Rs. 3,000 paid by the appellant by document marked XI for the year 2000 was for the business of money lending and that the present claim was for the recovery of the taxes for the business of pawnbrokering in terms of section 165B(3) of the Urban Councils Ordinance.

It is common ground that the appellant Bank is a branch office of the Bank of Ceylon established under the Bank of Ceylon Ordinance No. 53 of 1938 as amended. It is also common ground that the Bank had paid Rs. 3,000 as licence fee for the year 2000 (x). The contention of the respondents is that the said payment of Rs. 3,000 was made by the appellent Bank for carrying on the business of money lending and that a further sum has to be paid in terms of schedule III of the Gazette notification dated 14.02.1997 (P1) published under section 165 of the Urban Councils Ordinance for carrying on the business of pawn-brokering.

The Gazette notification dated 14.02.1997 (P1) refers to the by -laws made by the Urban Council in terms of sections 164, 165, 165B and 165C of the Urban Councils Ordinance. The said by -laws refer to 3 Schedules. The first Schedule deals with the licence duty referred to in section 164 of the Ordinance for the use of the premises for the specific purpose set out therein. The second Schedule refers to the tax imposed and levied on the trade, set out in section 165 of the Ordinance. The third Schedule deals with the tax imposed and levied on the business set out in section 165B of the Ordinance. It is apparent that none of these schedules refer to

banking business. The third Schedule, which deals with the business in the area, has 23 listings, but has not included banking business. However, the third Schedule refers to money lending and pawn-brokering among the other type of business.

Section 5 of the Bank of Ceylon Ordinance makes provision for the said Bank to establish and maintain branches in Sri Lanka or elsewhere. Part I of the first Schedule to the said Ordinance refers to the business, which the Bank is authorized to carry on and transact, subject to the limitations mentioned in Part II of the first Schedule. In fact,section 71of the Bank of Ceylon Ordinance, clearly refers to the scope of its business, which reads as follows :

> "Subject to the provisions of this Ordinance the business which the Bank is authorized to carry on and transact shall be the several kinds of business specified in Part I of the first Schedule subject to the limitations mentioned in Part II thereof."

It is thus evident that the Bank of Ceylon is empowered to carry on and transact business relating to money lending and pawn-brokering. However, it is apparent that none of the provisions in the Money Lending Ordinance, or the Debt Conciliation Ordinance or the Pawnbrokers Ordinance shall apply to such transactions. Sections 68 and 69, which are reproduced below, had quite clearly laid down that such Ordinance has no application to debts which are due to the Bank.

> "Section 68- Nothing in the Money Lending Ordinance or the Debt Conciliation Ordinance shall apply or be deemed to apply to any debt due to the Bank, or to prejudice or affect the rights of the Bank in respect of the recovery of any such debt.
>
> Section 69 - The Pawnbrokers Ordinance shall not apply to the Bank where the Bank carries on the business of a pawnbroker".

The claim made by the respondent was on the basis that the appellant Bank had been carrying on different businesses in terms of the Bank of Ceylon Ordinance. The respondent therefore was of the view that money lending and pawn-brokering are two different business. In fact learned Council for the respondent contended that in terms of the definition given under section 165B of the Urban Council's Ordinance, the financier, money lender

and pawnbroker are regarded as three different entitiies and therefore took up the position that the appellant Bank, being a establishment which carried on money lending as well as pawn-brokering, should pay the relevant taxes for the said businesses separately.

A careful examination of the definition given to the word "takings" under section 165B(b) indicates that the statute has referred to financier, money lender and a pawnbroker not as three different entities, but as a single person. The wording in the aforesaid provision, which is referred to below, clearly shows this position.

> "takings in relation to any business, means the total amount received or receivable from transactions entered into in respect of that business or for services performed in carrying on that business, and includes - (a) in the case of financier, moneylender or pawnbroker the money given out by him as loans, the interest received or receivable by him on such loans, and the sums received by him as fees or other charges in respect of such loans."

What the definition referred to above, explains is that, takings should include the total amount received from the transactions relating to financier, moneylender or the pawnbroker. When one refers to these three items, it is apparent that a modern day Bank would be forced to carry out all these transactions. Moreover, it is to be borne in mind that considering the characterietics of banking takings, in relation to a Bank would undoubtedly include handling deposits as well as make use of such deposits by lending it out at interest or investing it on mortgages etc. This was the view taken by Lord Denning M. R. in *United Dominios Trust* vs. *Kirkwood* (1) where reference was made to the characteristics of banking in the following terms :

> "Seeing that there is no statutory definition of banking, we must do the best we can to find out the usual characteristics which go to make up the business of Banking. In the eighteenth century, before cheque came into common use, the principal characteristics were that the banker accepted the money of the others on the terms that the persons who deposited it could have it back again from the banker when they asked for it, sometimes on demand, at other times on notice, according to the stipulation made at the time of deposit, and meanwhile the

banker was at liberty to make use of the money by lending it out at interest or investing it on mortgage or otherwise (emphasis added)."

A similar view was taken as far back as in 1914, by Issacs, J. in the High Court of Australia in State Savings Bank of Victoria Commissioners v Permewan Wright and Co. Ltd., [2] With regard to the definition of Banking, Issacs, J. thus stated that-

"The essential characteristics of the business of banking... may be described as the collection of money by receiving deposits on loan, repayable when and as expressly or impliedly agreed upon, and the utilisation of the money so collected **by lending it again in such sums as are required** (emphasis added)."

Thus it is apparent that the business of Banking would include the acceptance of deposits of money as well as utilisation of such money so collected by lending them on interest. This position is clearly laid down in the definition given to 'banking business' in Section 86 of the Banking Act, No. 30 of 1988, where it is stated that,

"banking business means the business of receiving funds from the public through the acceptance of money deposits payable upon demand by cheque, draft, order or otherwise, and the use of such funds either in whole or in part for advances, investments or any other operaton either authorized by law or by customary banking practices."

The question that would arise at this juncture is that, if lending is part of the banking business, whether that would include pawning as well. The Pawnbrokers Ordinance, No. 8 of 1893 defines the pawnbroker in wide terms that includes every person who carries on the business of taking goods in pawn. The Encyclopedia Britannica (Vol. 15-pg. 354) refers to pawnbrokering and states that-

"the oldest security device that is common everywhere is the pledge (or pawn). The borrower delivers the goods to be charged to the lender, who keeps them until repayment of the secured loan.... But pawnbrokers continued to operate on a minor scale,

and Banks keep documents of title (such as property deeds) as security."

On an examination of the Pawnbrokers Ordinance it is clear that the Ordinance does not speak of security for loans as only gold article. A pledge is defined as an article pawned with a pawnbroker obviously of value. Thus in simple terms the pledge is the security for the purpose of the money borrowed and when the pledge is with a movable item such as gold, it could not change the nature of the main business of money lending carried out by a Bank.

The tax in question was imposed by the respondent, in terms of section, 165A of the Urban Councils Ordinance. Section 165A reads as follows :

"An Urban Council may by resolution impose and levy annually on every person who.... carries on any business for which no license is necessary under the provisions of this Ordinance ... a tax according to the takings of the business."

As the appellant Bank came under the category that was carrying on a business for "which no licence was necessary", the respondent could impose only a tax. When such tax was imposed, the appellant Bank had duly paid the relevant and assigned amount for which a receipt was issued stating that the amount was paid for the purpose of payment for business licence (වෙළඳ බලපත්‍ර ගාස්තු) . The contention of the respondent is that the Council is entitled to levy a tax from the appellant Bank separately for the business of pawnbrokering carried on by the Bank apart from the various businesses of Banking carried on by the appellant Bank.

It is not disputed that the question at issue is regarding whether the appellant Bank has to pay for separate business licences to carry out business pertaining to money lending as well as for pawnbrokering. It is also not disputed that the appellant Bank has already paid Rs. 3,000 being the payment as conceded by the respondent for business licence. As referred to earlier, section 165A of the Urban Coucils Ordinance states that a business entity would be liable to pay a tax 'according to the takings of the business'. Depending on the 'takings' the amount that has to be paid as tax would be decided. Non payment of such tax would create a pecuniary burden on the person liable to pay such tax in terms of section 165B(3) of the Urban Councils Ordinance.

Referring to such statutes which incur pecuniary burdens, Maxwell is of the view that they should be subject to strict interpretation. It was further stated that (Interpretation of Statutes, 11th Edition, Sweet Maxwell p. g. 278)

> "Statutes which impose pecuniary burdens, also, are subject to the same rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language because of some decree they operate as penalties. The subject is not to be taxed unless the languages of the statute clearly imposes the obligation.
>
> In a Taxing Act one has to merely look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no prescription as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used. **A construction for example, which would have the effect of making a person liable to pay the same tax twice in respect of the same subject matter would not be adopted unless the words were very clear and precise to that effect. In a case of reasonable doubt the construction most beneficial to the subject is to be adopted** (emphasis added)"

In fact Lord Esher, *M. R. InTuck and Sons* vs *Priester* (3) referring to strict construction in construing penal laws, stated that,

> "if there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

On a careful consideration of the issue before us, it is clear that the appellant Bank is carrying on banking business, which includes money lending as well as pawn-brokering. Both money lending and pown-brokering are part and parcel of the banking business of the appellant Bank and pawn-brokering cannot be separated from the money lending business of the appellant Bank. Therefore the respondent could levy a tax on the basis

of the issuance of business licence for the banking businesses of the appellant Bank which in turn would include money lending as well as pawn-brokering carried out by them.

It is common ground that the appellant Bank has already paid money for its business license (XI). In the circumstances there cannot be any basis for the respondent to levy a further tax for the business of pawn-brokering carried out by the appellant Bank.

For the aforementioned reasons I answer the question in the negative. This appeal is accordingly allowed and the order of the learned Magistrade Hatton dated 23.11.2001 and the order of the learned High Court Judge of the Central Province, dated 21.05.2004 are set aside.

I make no order as to costs.

N. G. AMARATUNGA, J. – *I agree.*

SALEEM MARSOOF, J. *I agree.*

Appeal allowed.

JINASENA
VS
UNIVERSITY OF COLOMBO AND OTHERS

SUPREME COURT.
S. N. SILVA, CJ.
DISSANAYAKE, J AND
AMARATUNGA, J.
SC APPEAL 37A./2005.
CA NO. 1329/2000.
15TH SEPTEMBER, 2005.

Writ of Certiorari – Termination of services of a university officer - Lack of sufficient material - Participation of University Council Members at the preliminary inquiry -Validity of termination.

The petitioner was acting Registrar of the University of Colombo, appointed by the University Grants Commission. The Council of the University held a

domestic inquiry against the petitioner and on the basis that the available material established a *prima facie* case, interdicted the petitoner by document P8, served a charge sheet P9, and terminated his services by document P10.

HELD:

1. There was no consideration of the material on which the charge sheet was made. The Attorney-General who was consulted advised that due to insufficiency of material, he was unable to advise on specific charges.

2. The 6th, 7th and 11th respondents, members of the Council were witnesses at the domestic inquiry; hence the termination of services following the charge sheet P9 was *ultra vires* and void for contravention of the rules of natural justice.

3. The Court of Appeal erred in holding that there was no requirement that the charge sheet should be approved by the Council.

4. The petitioner was entitled to a writ of certiorari quashing the documents P8, P9 and P 10, as the Court of Appeal had failed to consider the serious consequences to the petitioner by refusing the writ.

APPEAL from the judgment of the Court of Appeal.

R. Chula Bandara with *Kushani Harasgama* for appellant.

Anil Gunaratne, Deputy Solicitior General for 1st and 3rd to 15th respondents.

Cur.adv.vult.

15th September, 2005.

S. N. SILVA CJ.

This is an appeal from the judgment of the Court of Appeal dated 13.05.2003. The matter was considered at the time special leave to appeal application was supported and the Court granted special leave to appeal on the following three questions :

(*a*) In view of the contention in the 2nd paragraph found in the charge sheet (P9) issued by the 2nd Respondent and in the absence of any minute to support such decision of the Governing Council of the 1st Respondent, did the Court of Appeal err in coming to the

conclusion that there was no requirement for the charge sheet (P9) to be approved by the Governing Council and accordingly the issuance of the charge sheet (P9) by the 2nd Respondent was within the lawful authority and the powers and functions of the 2nd Respondent?

(*b*) Did the Court of Appeal misdirect itself in coming to the conclusion that there was no breach of the rules of natural justice although the 6th, 7th and 11th Respondents who were witnesses were also members of the Council that made the decision set out in P 10?

(*c*) Did the Court of Appeal misdirect itself by considering extraneous matters disregarding serious conquences to the Petitioner?

The Petitioner joined the University of Peradeniya as a Temporary Assistant Lecturer on 28.12.1970 and continued in that capacity till 31.10.1972. On 16.11.1972 he was appointed as Administrative Assistant in the University Registry. On 15.12.1986 he was appointed as Deputy Registrar. Thereafter he has acted on numerous occasions as the Registrar. He was appointed as Deputy Registrar by the University Grants Commission. Whilst serving as Acting Registrar attached to the University of Colombo, the Petitioner was interdicted from service by document P8 dated 09.08.1999. A charge sheet was issued on him on 24.09.1999 (document marked P9) After inquiry his services were terminated on 19.09.2000 (by document P10). The Petitioner has filed the application in the Court of Appeal to quash the said three decisions as contained in documents P8 to P10.

The Petitioner has challenged the validity of documents P8 and P 9 on the basis that although these documents issued by the Vice Chancellor refer to decisions made by the Council of the University, in fact there were no such decisions. The Petitioner has urged this ground belatedly since he was unaware of the absence of any decision until the matter came up at the disciplinary inquiry. It is conceded by the Deputy Solicitor General that the only minute of the Council is document P11. The genuineness of P 11 has been challenged by the Petitioner on the basis that it is not pasted in the Minutes Book of the minutes of the Council and that it was found in the form of two loose sheets. A formal minute of the Council appears in the manner as seen in the document P19 which gives *inter alia* the persons who were present at the meeting including their designations.

P 11 does not contain any such particulars. In any event, the relevant portion of P11 which comes under the heading "Sub Committee Report" records that a report had been sent to the Attorney General who has indicated that there was a *prima facie* case for interdiction. The advice of the Attorney General is contained in the letter dated 05.07.1999 (P12) which only states that the Attorney General is of the view that the evidence discloses irregularities which concern the Petitioner but that he is unable to advise on the specific charges for the reason that the disciplinary rules applicable to the University and the entirety of the evidence has not been made available. It appears that thereafter the advice of the Attorney General has not been sought on the matter. In the circumstances, to say the least, the statement in P 11 that the Attorney General indicated that there is a *prima facie* case which warranted interdiction is not correct.

Furthermore, the document P9 being the charge sheet commences with a paragraph which reads as follows,: "The Council having considered all relevant material and the findings consequent upon investigations, has now decided to issue you with the statement of charges to direct you to show cause why disciplinary action should not be taken against you...", is basically without foundation since even in the disputed minute the Council has not made a decision to frame charges against the Petitioner. It merely records that the Petitioner be placed under interdiction and "that the legal procedure required in this connection should be followed". The Council could not have approved any charges that were not submitted to it.

In the circumstances, we are of the view that the statements in P 9 and P10 as to approval by the Council are not supported by the available material. The Council is the proper disciplinary authority in terms of the second proviso to section 75 of the Universities Act No. 16 of 1970 (A). The Petitioner has adduced evidence to establish that a previous delegation of such disciplinary authority to the Vice Chanceller had been withdrawn by the Council. This evidence is not disputed. In the circumstances, we are of the view that the Petitioner has established that the decisions in P8 and P9 have not flowed from proper authority namely, the Council of the University and as such are *ultra vires* and liable to be quashed by a Writ of Certiorari.

We have next to consider the validity of the termination as contained in document P 10. The termination has in fact been done on a decision of the

Council. The Petitioner challenges the validity of the termination on the ground that three members of the Council who were present at the time the decision was made and in fact took part in that decision were also witnesses at the preliminary and/or the domestic inquiry against the Petitioner. The 6th and 7th Respondents being members of the Council in fact gave evidence at the domestic inquiry. The 4th, 9th and 11 th Respondents who were also members of the Council and took part in the relevant decision had made statements at the preliminary inquiry. The Petitioner has therefore challenged the decision P 10 on the basis that it is *ultra vires* and in contravention of the principles of natural justice since the witnesses themselves have in fact finally been party to the decision to terminate the Petitioner's services. The Court of Appeal has sought to justify such a course of action on the basis that the decision of the Council has been unanimous and that there is no evidence that the 6th, 7th and 11th Respondents in any way influenced that decision to be made against the Petitioner. However, we are of the view that it is unnecessary for the Petitioner to adduce such evidence which would not be within his control, having not been present at the meeting. The decision *perse* is tainted by the fact that persons who were witnesses at the inquiry were finally party to the decision to terminate the services. Accordingly the decision P 10 is liable to be quashed by a Writ of Certiorari on the ground that it is contrary to the principles of natural justice.

For the reasons stated above, we allow the appeal and set aside the judgment of the Court of Appeal dated 13.05.2003, the findings are based on questions (a) and (b) stated above on which leave has been granted. We direct the issue of a Writ of Certiorari as prayed for in paragraph (b), (c), and (d) of the prayer to the petition dated 15.11.2000 filed in the Court of Appeal. There will be no order for costs in the Court of Appeal and in this Court.

N. E. DISSANAYAKE, J. – *I agree.*

N. G. AMARATUNGA, J. – *I agree.*

Appeal Allowed.

SHELL GAS LANKA LTD.
VS
SAMYANG LANKA (PVT) LTD.

COURT OF APPEAL.
SOMAWANSA, J (P/CA) AND.
WIMALACHANDRA, J.
CALA 234/2005.
DC COLOMBO 44032/MR.
AUGUST 26, 2005.

Interim injunction - Acting in breach of a covenant - No likelihood of any defence - Is it contrary to law to grant an injunction if it would give the plaintiff substantial relief claimed by him?

Held:

1. It is permissible to grant interim relief which gave substantially the whole of the relief claimed in the action, in a case where it was plainly seen that there was no defence.

2. Here there is a strong *prima facie* case, in favour of the plaintiff and the balance of convenience too favours the plaintiff and further there is no possible defence available to the defendant and the defendant is acting in breach of a covenant; it is not contrary to law to grant an interim injunction, even if the granting of the interim injunction would give the plaintiff substantial relief claimed by him.

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

Cases referred to :

1. *Jinadasa* vs. *Weerasinghe* 31 NLR 33 at 35K
2. *Richard Perera* vs. *Albert Perera* (1963) 69 NLR 445
3. *Woofard* vs. *Simit* (1970) 1 ALL ER 1091
4. *Dodd* vs. *Amalgamated Marine Workers Union*
5. *Bailley (Malta)* Ltd. vs. *Bailey*
6. *AG* vs. *Stocktoh on Tees Corpn*
7. *Heywood* vs. *BDC Properties Ltd.* (1963) 1 NLR 97
8. *Booker* vs. *James*
9. *Manchester Corporation* vs. *Connoly and others* (1970) Chancery 420

S. *De Silva* for plaintiff - petitioner.

D. P. Wanigasundara for defendant - respondent.

Cur.adv. vult.

September 21, 2005.

L. K. WIMALACHANDRA, J.

This is an application for leave to appeal by the plaintiff petitioner (plaintiff) from the order of the learned Additional District Judge of Colombo dated 03.06.2005.

Briefly, the facts relevant to this application are as follows ;

The plaintiff is in the business of selling liquid petroleum gas (LPG) to consumers and for industrial use and the defendant has been a customer of the plaintiff. On 01.04.1999, the plaintiff and the defendant entered in to a contract (annexed to the petition marked 'c') in which the defendant agreed to purchase LPG from the plaintiff. In terms of the said contract the plaintiff installed a Bulk Gas Vessel and other Equipment at the defendant's premises. The said Gas Vessel and other Equipment installed at the defendant's premises remain the property of the plaintiff. The plaintiff states that in breach of the terms and conditions of the contract marked 'C', the defendent failed to pay for the gas supplied to the defendent and also the rental fee due in connection with the use of the said Bulk Gas Vessel . Hence by letter dated 10.05.2004 marked 'L' the plaintiff terminated the said agreement. In terms of the said agreement marked 'C', it was agreed between the plaintiff and the defendant [clause X (C) (30)] that upon the termination of the said agreement for whatever reason, the customer (defendant) shall permit the Company and its agents, representatives to enter the premises and remove the Bulk Gas Vessel and Equipment and shall pay the Company all costs incurred for such removal. It is the plaintiff's position that although repeated requests were made, the defendant illegally and wrongfully in breach of the terms and conditions of the aforesaid agreement refused the plaintiff to enter the defendant's premises to remove the said Bulk Gas Vessel and Equipment. The plaintiff filed the aforesaid action in the District Court of Colombo *inter alia* for a declaration that the plaintiff is entitled to a sum of Rs. 595,130.16 together with interest thereon

from 10th May 2004 at 24% from the defendant and thereafter on the aggregate amount of the Decree until the date of payment in full, a declaration that the aforesaid Bulk Gas Vessel and Equipment are the property of the plaintiff and a declaration that the defendant and/or its servants and/or agent and/or any persons acting directly or indirectly under the authority of the defendant has no right in law to prevent, obstruct, restrain or in any way interfere with the removal from the defendant's aforesaid premises the said Bulk Gas Vessel and Equipment. The plaintiff also sought an enjoining order and an interim injunction in terms of paragraphs 'd' and 'e' of the prayer to the plaint. Paragraph (e) of the prayer to the plaint reads as follows :

> "Until the matter of the permanent injunction is determined issue an interim injunction against the defendant and/or its servants and/or its agents and/or any persons acting directly or indirectly under its authority from preventing, obstructing, restraining or in any way interfering with the plaintiff and/or its agents and/or any persons acting under its authority from removing from the defendant's aforesaid premises the said Bulk Gas Vessel and Equipment."

With regard to the aforesaid interim injunction prayed for by the plaintiff, an inquiry was held and the learned judge pronounced the order on 03.06.2005 refusing the grant of the interim injunction prayed for in the aforesaid paragraph (e) of the prayer to the plaint. It is against that order the plaintiff has filed this application for leave to appeal.

The plaintiff - petitioner has prayed for interim relief in terms of paragraph (d) of the prayer to the petition. It reads as follows :

> "Make Interim Order pending the final determination of this application against the respondent and/or its servants and/or its agents and/or any persons acting directly or indirectly under its authority from preventing, obstructing, restraining or in any way interfering with the petitioner and/or its agents and/or any persons acting under its authority from removing from the respondent's aforesaid premises the Bulk Gas Vessel and Equipment installed in the Respondent's premises."

The Court directed the plaintiff to support the application for interim relief after notice to the defendant. Accordingly, the notice was issued on the defendant and the matter was taken up on 26.08.2005. The defendant was represented by a counsel. At the inquiry both counsel agreed that the aforesaid Bulk Gas Vessel and Equipment belong to the plaintiff and it was installed at the defendant's premises. They further agreed that the aforesaid agreement has been terminated and that the aforesaid District Court action is pending in the District Court of Colombo. At the inquiry into the application for interim relief, the main submission of the learned counsel for the defendant was that the plaintiff is not entitled to interim relief prayed for in paragraph (d) of the prayer to the petition as the granting of the interim order prayed for in the petition would give the plaintiff substantially the whole of the relief claimed in the petition. The interim relief prayed for in paragraph (d) of the prayer to the petition is the interim injunction prayed for in paragraph (e) of the plaint, which was refused by the learned Additional District Judge.

The question that arises for determination is, can the Court grant the interim relief prayed for in the petition which is the interim injunction prayed for by the plaintiff in paragraph (e) of the prayer to the plaint, which would give the plaintiff substantial relief prayed for in this petition. This is the foremost and sole submission of the learned counsel for the defendant.

It is the general practice that an interim injunction will normally not be granted if the granting will result in a decision of the main question involved. In other words, in deciding whether to grant or refuse the interim injunction the Court must not in effect decide the plaintiff's main relief (vide- *Jinadasa vs Weerasinghe.*[1] However, in the case of *Richard Perera vs. Albert Perera*[2] HNG Fernando, J. (as then he was) held that although the trial judge should not decide the substantive question in considering an application for injunction, some consideration of the substantive question at this early stage is not irrelevant.

The learned counsel for the defendant admitted that the said Bulk Gas Vessel and Equipment belong to the plaintiff. He also admitted that the said agreement entered into between the plaintiff and the defendant has been terminated. As stated above, in terms of the agreement marked 'C', clause X (C) (3) states that upon termination, for whatever reason the Customer (the defendant) shall forthwith permit the Company (the plaintiff)

and its agents or representatives to enter the premises and remove the Bulk Gas Vessel and/or Equipment and any Shell Gas remaining in the vessel and shall pay the Company all costs incurred for such removal. In these circumstances it can be seen that the plaintiff is entitled to remove its Bulk Gas Vessel and Equipment. The interim relief prayed for by the plaintiff is for the removal of the said Bulk Gas Vessel and Equipment installed in the defendant's premises. As stated above, the learned counsel for the defendant admitted unequivocally, the said Bulk Gas Vessel and the equipment belong to the plaintiff and the aforesaid agreement entered into between the parties has been terminated. Hence there is a strong *prima facie* case in favour of the plaintiff and the balance of convenience too favours the plaintiff. I cannot see any possible defence available to the defendant when he admits that the said Bulk Gas Vessel belongs to the plaintiff.

When it appears that there is no defence for the defendant and he is acting in breach of a covenant, it is not contrary to law to grant an interim injunction even if the granting of the interim injunction would give the plaintiff substantial relief claimed by him.

In Woodford Vs. *Smith*[3] Megarry, J. made the following observation at page 1093 ;

"Counsel for the defendant also read me a passage in the Supreme Court Practice 1970, which runs as follows :

"It is not the practice of the Court (except by consent) to grant on an interlocutory application an injunction which will have the practical effect of granting the sole relief claimed (Dodd V. Amalgamated Marine Worker's Union) This does not deter the Court from granting such interlocutory injunction as may be necessary to preserve property to prevent irreparable damage.

When I ventured to assert that this did not represent the law, counsel for the defendants accepted that as being the case. I do not think that there is anything to prevent the court in a proper case from granting on motion substantially all the relief claimed in the action. It is true that in Dodd. V. Amalgamated Marine Worker's Union (supra) it was said in the Court of Appeal that it was not the

'usual practice' or the 'general rule of practice' to grant on motion all the relief claimed in the action. But this language is general rather than absolute, the judgments are very brief, no reasons are given, and there have been later decisions. Thus in *Bailey (Malta) Ltd. Vs. Bailey Denning* MR flatly said that it seemed to him that there was 'no such rule'. In this, he based himself on what Sargant LJ had said in *A- G v Stockton-on-Tees Corpn* where there is what I may call a reasoned demolition of the supposed rule, the basis of which seems to have been an objection to trying the same point twice over. In the Bailey case, (*supra*) Harman LJ referred to the supposed rule as a theory which had in his view 'long been exploded" : see also *Heywood* v *BDC Properties Ltd.*[7] and *Booker V. James.* [8] I have ventured to refer to those authorities (which were not discussed before me, since there was no need) because it is time that the passage in the Supreme Court Practice 1970 which I have read received the firm touch of a revising hand. Plainly in the present case the objection which counsel for the defendants raised but did not press is no obstacle to granting the injunction sought."

In the case of *Manchester Corporation Vs. Connoly and Others*, it was held that there being, on the facts, no likelihood of any defence succeeding at the trial, the Vice Chancellor had been right in exercising his discretion to grant interlocutory relief in the form of the injunction.

At page 428, Lord Diplock made the following observation :

> **"The question argued in the appeal in Heywood's Case was whether it was permissible to grant interlocutory relief which gave substantially the whole of the relief claimed in that action. It was held that in a case where it was plain that there was no defence, it was permissible to do so. In so far as argument, in the present case is based on the ground that the injunction gives substantially the whole of the relief claimed in the action, that case in an answer to that contention"**

The complaint of the plaintiff is that the defendant is wrongfully and unlawfully using the Bulk Gas Vessel to store LPG purchased from other suppliers and this would cause immeasurable and irreparable damage to the plaintiff. The counsel for the defendant admits that the said Bulk Gas Vessel is the property of the plaintiff and he makes no claim to the said property. In the circumstances the granting of the interim relief prayed for

in paragraph (d) of the prayer to the petition will not cause any irremediable loss or damage to the defendant. But on the other-hand refusal to grant the interim relief would cause irremediable harm to the plaintiff. In the circumstances when there is no defence forthcoming from the defendant to the application made by the plaintif, for interim relief in the form of an injunction, I do not see there are reasons on which Court should refuse to grant interim relief.

Admittedly, the Bulk Gas Vessel and Equipment belong to the plaintiff., Where there is clearly no defence to the claim for possession of the said Bulk Gas vessel and Equipment by the defendant an order for possession can be made in favour of the plaintiff as an interim order. Moreover, by granting of the interim relief the Court is not giving the whole of the relief claimed by the plaintiff in the District Court action.

For these reasons the interim relief is granted as prayed for in paragraph (d) of the prayer to the petition and as a precautionary measure, it is subject to the condition that the said Bulk Gas Vessel and Equipment remain to be the property of the plaintiff and the plaintiff shall keep the said Bulk Gas Vessel in good condition until the conclusion of the trial of this action or until further order is made by this Court. This order will not prevent the plaintiff from using it for any purpose.

Accordingly, I set aside the order made by the learned Additional District Judge of Colombo dated 03.06.2005 and the application for interim relief prayed for in paragraph (d) of the prayer to the petition is granted subject to the aforesaid condition. I make no order as to the costs of this inquiry.

Somawansa, J. (P/CA) – *I agree.*

Application allowed.

ANITEX WASHING PLANTS (PVT) LTD
VS
G. D. S. CHEMICALS (PVT) LTD AND ANOTHER

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
BASNAYAKE, J.
CALA 4/2004 (LG).
D. C. PANADURA - Winding up Application No. 2890/Spl.
MARCH 7, 2005.

Companies Act, No. 17 of 1982 - Winding up - Debts owed - Action instituted by a creditor for winding up - Prescription Ordinance, section 8 - Does the Prescription Ordinance apply?

Winding up proceedings were filed against the respondent petitioner as the respondent petitioner was not able to pay the respondent company a certain debt. Preliminary objection was taken that the petitioner respondent's claim was time-barred. The trial judge overruled the objection on the ground that the application to wind up a company was for non-payment of debts and not an action to recover a debt; thus the Prescription Ordinance will not apply. The respondent petitioner sought leave to appeal.

HELD:

(i) The petitioner respondent sought a winding up order, and also sought recovery of his money. A creditor - petitioner does not petition for the satisfaction of seeking the demise of his company debtor but rather in the hope of recovering part at any rate of his debt. Thus the petitioner is seeking to recover a sum.

(ii) No liability could be attached to a prescribed debt. The provisions of the Prescription Ordinance do apply.

PER ERIC BASNAYAKE J.:

It is a starling proposition to suggest that in a due course of administration in a voluntary winding up the liquidator is entitled to pay statute barred creditors.

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

Cases referred to :

1. Re. Karnes Property Co. Ltd.
2. In re. Fleedwood and District Electric Light and Power Syndicate - (1915) I Ch. 486
3. In re Art Reproduction Co. Ltd - 1952 Ch. 89

Shamil Perera with *Lahiru Abeyasekara* for respondent petitioner.
M. Inthikab M. Idroos with *Charuni Gunawardena* for respondent.

Cur.adv. vult.

September 14, 2005.

ERIC BASNAYAKE, J.

In this case winding up proceedings were filed in the District Court of Panadura on 09.07.2003 against the respondent - petitioner (petitioner) in terms of the Companies Act, No. 17 of 1982 and the Winding up Rules 1939 as the petitioner was not able to pay the petitioner - respondent (respondent) a debt amounting to a sum or Rs.234,774.37. The said sum is made up of the goods sold and delivered as per the details given below:

Date	*Amount*
20.12.1999	10,674.37
30.12.1999	86,737.50
05.10.2000	50,625.00
13.01.2000	25,312.50
03.02.2000	61,425.00
Total	234,774.37

When this case was taken up for inquiry in the District Court on 15.09.2004, a preliminary objection was taken that the respondent's claim was time barred and therefore the court has no jurisdiction to entertain the petition. The learned District Judge overruled the said objection on the ground that this being an application to wind up a company for non payment of dues and not an action to recover a debt, the provisions of the Prescription Ordinance has no application.

The petitioner filed this case seeking leave to appeal against the order of the learned District Judge of Panadura, dated 19.01.2004. On 15.09.2004, leave was granted on the following question namely :-

"Whether the Respondent Company is entitled to seek a winding up of the Petitioner Company on the basis of a prescribed debt of the Petitioner Company". Written submissions have been tendered by both parties to resolve this question. The learned counsel for the respondent submits that this is an application filed in terms of the Companies Act, No. 17 of 1982 and not an action as defined by the Civil Procedure Code. The Companies Act refers to an application and not an action. An action has to be either in regular or summary form. An action is defined as proceedings for the prevention or redress of a wrong, and a cause of action is a wrong for the prevention and redress of which an action may be brought."

The learned counsel submits that on the contrary the petitioner has only prayed for a winding up order on a company. Section 8 of the Prescription Ordinance states that "No action shall be maintainable for or in respect of any goods sold and delivered.... unless the same shall be brought within one year after the debt shall have become due". The learned counsel submits that he did not plead a cause of action nor prayed for the recovery of any debt in the prayer and hence the Prescription Ordinance has no application.

The facts in *Re Karnos Property Co Ltd.*[1] cited by the learned counsel for the petitioner is I think to the point. In this case a local authority served a statutory demand on a company for non-payment of rates. The company paid part of the sum due, the balance remaining unpaid representing rates due more than six years before the issue of the petition. The issue before the court was whether the claim for the unpaid rates was time barred under the Limitation Act 1939 and therefore that no debt was due from the company that could constitute the basis for a winding up order.

Mervyn Davies J. having referred to section 2(1) read with section 31(1) of the Limitation Act 1939 said "looking at those enactments it is plain that a petition in the Companies Court is an action within section 2(1). One then asks whether it is an action to recover any sum. One may say that a petition is an action seeking not to recover a sum but to secure the winding up of a company. Certainly the petitioner seeks a winding up order, but as well as the petitioner (who is a creditor) also seeks recovery

of his money or such parts of it as may become his by virtue of a dividend. A creditor petitioner does not petition for the satisfaction of seeking the demise of his company debtor but rather in the hope of recovering part at any rate of his debt by way of dividend. A petition therefore, in my view, seeks to recover a sum".

Again in the case of *In re. Fleetwood and District Electric Light and Power Syndicate* the Court held that it was improper to pay statutory barred creditors when objected to by the shareholders. In this case the question was whether a liquidator having surplus assets available for distribution was at liberty to pay statute barred creditors. Astbury J said "it seems a starling proposition to suggest that in a due course of administation in a voluntary winding - up the liquidator in entitled to pay statute barred creditors".

In the case of *In re. Art Reproduction Co. Ltd, Wynn Parry J* after holding that in a voluntary winding up of a solvent company, statute barred debts cannot be paid unless the contributories consent said "It was contended on behalf of the applicant that, even if both parts of the claim were statute barred, nevertheless there is jurisdiction to authorize the liquidator to pay the claims; and that in the circumstances of this case, the court ought to exercise that jurisdiction. Both the liquidator and the registrar, it is clear, had considerable sympathy for the applicant ; and I do not differ from either of them ; but the question being one of jurisdiction, in the first place, the matter has to be considered strictly".

The learned counsel for the respondent submits that the above cases have no relevance due to the reason that section 31 (1) of the Limitation Act applies to all the proceedings in a court of law whereas there is no such provision in the Prescription Ordinance. I am not in agreement with the above submission. Considering the above authorities it is clear that no liability could be attached to a prescribed debt and therefore that the petitioner should succeed in this application. Hence I set aside the order of the learned District Judge dated 19.01.2004 and dimiss the petition for winding up with costs fixed at Rs. 10,000.

SOMAWANSA J. - I agree

Appeal allowed.

Winding up application dismissed

MADULUWAWE SOBITHA THERO
VS
JOSLIN AND OTHERS

COURT OF APPEAL.
WIMALACHANDRA, J.
CA 1169/2003 (REV.).
DC MTLAVINIA 389/00/P.
DECEMBER 8, 2004.

Partition Law, No. 21 of 1977, sections 5, 12 and 48(4) - Judgment obtained by fraud-Evidence Ordinance, section 44 - Does section 48(3) override section 44 of the Evidence Ordinance? Revision - Applicability - Failure to make a correct section 12 declaration - Fundamental vice in the procedure adopted - Violation of provisions of Partition Law - Miscarriage of justice - Finality of the final decree - Civil Procedure Code, section 403- Abatement.

The petitioner filed action for a declaration of title and ejectment of the plaintiff respondent. This action was abated but later restored. Whilst the said case was pending the plaintiff respondent instituted partition action without making the petitioner, a party, but had made her daughters the only defendants. The land to be partitioned is the same land which was the subject matter in the earlier case. The plaintiff respondent had executed a deed of declaration to claim ownership to the property and relied on this deed to prove her title and final decree was entered on 08.11.2002.

The petitioner moved in revision.

Held:

(1) Section 48(3) of the Partition Law overrides section 44 of the Evidence Ordinance; accordingly even a judgment obtained by fraud or collusion would have the final and conclusive effect provided by section 48(1).

Held further:

(2) It is to be noted that the plaintiff respondent failed to disclose the name of the petitioner who has title to the entire land. The failure to make a correct declaration under section 12(1) of the Partition Law amounts to a procedural irregularity which results in a miscarriage of justice.

(3) Per Wimalachandra , J.

"It is the duty of the plaintiff- respondent's attorney -at-law, after the registration of the *lis pendence* to personally inspect the entries in the Land Registry that relate to the land. The section 12 declaration filed failed to disclose the petitioner's name although his title deed is duly registered. This is a violation of the provisions of the Partition Law and callous disregard of the provisions of the Partition Law which caused a miscarriage of justice and in my view amounts to the fundamental vice".

(4) A person who had right title or interest in the subject matter not being made a party to a partition action is a victim of a miscarriage of justice. He can always invoke the powers of revision and restitution *in integrum.*

(5) If the Court of Appeal fails to invoke its power of revision, grave injustice will result to the petitioner.

(6) Fraud vitiates all proceedings and a judgment obtained by fraud cannot stand.

APPLICATION in revision from an order of the District Court of Mt. Lavinia.

Cases referred to :

1. *Suppramaniam et el* vs. *Erampakurukkal* - 23 NLR 417 at 438
2. *Rustom* vs. *Hapangama and Co.* 1978/79/80 1 Sri LR 352
3. *Somawathie* vs. *Madawala and Others* 1983 2 Sri LR 15
4. *Madina Bee* vs. *Seyed Mohamed* 1965 68 NLR 36 at 38
5. SC Appeal 20/2003 - CALA 28/2000 - D. C. Ratnapura 940/P

Ranjan Suwandaratne for petitioner
H. G. Hussain for 1st - 4th respondents.

Cur.adv. vult.

May 04, 2005.
WIMALACHANDRA, J.

This is an application in revision filed by the petitioner from the judgment and the interlocutory decree dated 26.12.2000 and the final decree entered on 08.11.2002.

The facts of this case as set out in the petition are briefly as follows :

The petitioner, who is the Viharadhipathi of Nagaviharaya Temple, Pagoda, Nugegoda, filed action bearing No. 765/96/L in the District Court of Mount -Lavinia on 31.12.1996 for a declaration of title and ejectment of the plaintiff - respondent from the land described in the schedule to the plaint and to recover damages. The land, which is the subject matter of the aforesaid action, described as a divided portion of the land called Kekunagoda Kurunduwatte bearing assessment No. 162 Thalawathugoda Road, Pitakotte depicted in plan No. 103 dated 02.09.1963 made by the Licensed Surveyor N. G. G. Wijeratne is in extent of 30.75 perches. The petitioner became the owner of the said property by virtue of deed No. 1629 dated 22.10.1977 attested by W. Kaluarachchi N. P. (a certified copy of the deed marked A3 in annexed to the petition). The petitioner states that on several occasions the plaintiff - respondent had entered the said property disputing the petitioner's title to the same. However the petitioner's predecessor in title to the said property from time to time had leased the said property to the plaintiff - respondent's husband, Gangodawilage Abraham Perera. The petitioner has annexed the said lease bonds bearing No. 11491 dated 10.09.1963 attested by H. W. Senanayake N. P., No. 12343 dated 02.10.1964 attested by the same notary and lease bond No. 932 dated 04.04.1976 attested by W. Kaluarachchi N. P. After the petitioner had become the owner he too had leased this property by lease No. 6192 dated 10.02.1987 attested by W. Kaluarachchi, N. P.

As the petitioner failed to take steps in the aforesaid case No. 765/96/ L upon an application made by the-plaintiff - respondent, who was the defendant in that case she moved Court through her Attorney -at- Law for the abatement of that action and consequently the Court made order of abatement of the said action. Thereafter the petitioner made an application under section 403 of the Civil Procedure Code to vacate the said order of abatement and the Court after considering the submissions made by counsel vacated the order of abatement on 06.04.2002. In the meantime whilst the said case was pending, the plaintiff - respondent instituted the partition action No. 389/00/P on 26.02.2000, without making the petitioner

a party. The plaintiff - respondent made her three daughters the only defendants in the said partition action. As such the plaintiff - respondent instituted the said partition action together with her daughters as the only co-owners of the land to be partitioned.

It appears that the plaintiff - respondent instituted the said partition action with the view to defeat the title of the petitioner to the land in question. The land to be partitioned in the partition action is the same land which is the subject matter inthe aforesaid D. C. Mount Lavinia Case No. 765/96/L filed by the petitioner against the plaintiff respondent. It is to be observed that the plaintiff - respondent executed a deed of declaration bearing No. 8504 dated 10.04.1996 attested by Neville Amarasinghe, N. P. to claim ownership to the property which is the subject matter in the aforesaid declaratory action filed by the petitioner. The plaintiff - respondent relied on the said deed of declaration made in 1996 to prove title to her and to her children in the partition action.

In the circumstances, it is crystal clear that the plaintifff respondent filed the said partition action to defeat the petitioner's title to the said property and the plantiff - respondent along with her children filed the said partition action fraudulently and collusively to conceal from Court the petitioner's title to the said land to be partitioned in the partition action. It is settled law that fraud vitiates all proceedings and a judgment obtained by fraud cannot stand. "fraud is not a thing that can stand even when robed in a judgment" (*Suppramaniam et. el Vs. Erampakurai ukal* [1] at 438).

Section 44 of the Evidence Ordinance provides, that

"any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under sections 40, 41, 42,and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion."

However, section 48(3) of the Partition Law overrides section 44 of the Evidence Ordinance. Accordingly, even a judgment obtained by fraud or collusion would have the final and conclusive effect provided by section 48(1).

Nevertheless, the petitioner has filed this application in revision invoking the revisionary jurisdiction of this Court. The petitioner raises an important question as to the finality of the interlocutory and final - decree entered in this partition action in view of a miscarriage of justice and the proceedings tainted due to a fundamental defect which goes to the root of the case. The Supreme Court observed in *Rustom Vs. Hapangama and Co.*[2] that the trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked, the practice has been that these powers will be exercised only if the existence of special circumstances are urged necessitating the indulgence of this Court.

The land described in the plaint filed by the petitioner in the District Court case No : 765/96/L for a declaration of title and ejectment of the plaintiff - respondent is the same land for which the partition action bearing No. 389/00/P has been filed by the plaintiff - respondent. The petitioner has pleaded in the aforesaid District Court case the title deeds to establish his title to the land. The petitioner has pleaded that at one time he had leased the said land to the plaintiff - respondent's husband, Gangodawilage Abraham Perera by deed No. 6192 dated 10.02.1987 attested by W. Kaluarachchi, N. P. In these circumstances the plaintiff - respondent cannot say that she was not aware that the petitioner has claimed ownership to the said land, which is the subject matter of the partition action. Accordingly, the plaintiff - respondent should have included the petitioner as a necessary party in her plaint in terms of section 5 of the Partition Law. In the circumstances, it appears to me that the plaintiff- respondent did not deliberately make the petitioner a party to the partition action. In the District Court case No. 765/96/L, the petitioner is the plaintiff and the plaintiff - respondent is the defendant. That case is still pending. The subject matter in case No. 765/96/L and in the partition action 389/00/P is the same land.

In the circumstances, I am of the view that the petitioner is a victim of a miscarriage of justice. The question that arises is whether the petitioner can invoke the powers of revision and *restitutio in integrum* vested in the Court of Appeal. I find the answer to this question in the celebrated judgment of the Supreme Court in the case of *Somawathie Vs. Madawela* and others[3] Soza, J. delivering the judgment in this case stated as follows at page 23 :

"But although the Act stipulated that decrees under the Partition Act are final and conclusive even where all persons concerned were not parties to the action or there was any omission or defect of procedure or in the proof of title, the Supreme Court continued in the exercise of its powers of revision and restitution in integrum to set aside partition decrees when it found that the proceedings were tainted by what has been called fundamental vice."

In his judgment Justice Soza, J. held the view that a person who had right title or interest in the subject matter not being made a party to a partition action is a victim of a miscarriage of justice. He can always invoke the powers of revision and *restitutio in integrum* vested in the Court of Appeal. In support of his view he cited the following passage from the judgment of Sansoni, J. who delivered the majority decision of *the Divisional Bench in the case of Madina Beebee Vs. Seyed Mohamed* at 38.

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice. It is exercised in some cases by a judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that unles the power is exercised, injustice will result. The Partition Act has not, I conceive, made any changes in this respect and the power can still be exerised in respect of any order or decree of a Lower Court."

At page 30 Justice Soza states as follows :

" The pronouncement of Sansoni, C. J. in regard to the revisionary powers of the Court in Mariam Beebee Vs. Seyed Mohamed (supra) , therefore remain applicable even after the enactment of the Administration of Justice (Amendment) Law No. 25 of 1975 and the Partition Law No. 21 of 1977. The powers of revision and *restitutio integrum* have survived all the legislation that has been enacted upto date. These are extraodinary powers and will be exercised only in a fit case to avert miscarriage of justice. The Immunity given to partition decrees from being assailed on the grounds ommissions and defect of procedure as now broadly defined, and of the failure to make

"persons concerned" parties to the action should not be interpreted as licence to flout the provisions of the Partition Law. The Court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred."

In the instant case as I stated above, the plaintiff - respondent was aware of the deeds which are in favour of the petitioner in respect of the corpus in the partition action filed by the petitioner. Moreover the plaintiff - respondent would have noticed it when a search was made at the Land Registry. It is imperative to make a declaration under section 12(1) of the Partition Law after the partition action is registered as a lis *pendens.* Section 12(1) stipulates that after the registration of the lis *pendens*, the plaintiff must file or cause to be filed in Court a declaration under the hand of an Attorney-at-Law certifying that he personally inspected all the entries relating to the land to be partitioned in the register maintained under the Registration of Documents Ordinance, stating the names of all persons found, upon the inspection of those entries, to be added as necessary parties to the action under section 5 of the Partition Law, No. 21 of 1977. It is to be noted that in the instant case the Attorney -at - Law of the plaintiff - respondent failed to disclose the name of the petitioner who has a title deed for the entire land to be partitioned, which has been duly registered in the Land Registry. (See the chain of deeds produced marked 'A' 3 to 'A6'). The failure to make a correct declaration under section 12(1) of the Partition Law, amounts to a procedural irregulartiy which results in a miscarriage of justice, in that the petitioner who has a title deed duly registered to the entire property, which is the subject matter of the said partition action, was kept out without being made a party. This amounts to what is called a *fundamental vice.* In an unreported Supreme Court case Justice T. B. Weerasuriya made the following observation with regard to the power of revision and *restitution in integrum* of the Court of Appeal.

"The revisionary powers of the Appellate Court, are unaffected although section 48 of the Partition Law invests interlocutory decree entered under the Partition Law with finality. Thus the exercise of powers of revision and *restitutio in intergrum* to set aside a partition decree when it is found that the proceedings were tainted by what has been called a fundamental vice is available to the Appellate Court".

In the instant case, the petitioner was not made a party despite the fact that he had right title and interest in the subject matter. The plaintiff - respondent knew the title deed of the petitioner which is referred to in the plaint filed in the Mount Lavinia D. C. Case No. 765/96/L where the plaintiff - respondent is the defendant.

Moreover, the deed No. 1629 dated 22.10.1977 attested by W. Kaluarachchi , N. P. which is registered in the Land Registry in Folio M 1173/43, would have come to the plaintiff - respondent's notice if she had instructed her Attorney-at-Law to do a search in the Land Registry. It is the duty of the plaintiff - respondent's Attorney-at-Law, after the registration of the *lis pendens*, to personally inspect the entries in the Land Registry that relate to the land. The declaration filed by the plaintif - respondent's Attorney-at -Law failed to disclose the petitioner's name although the deed No. 1629 which is in favour of the petitioner is duly registered. This is a clear violation of the provisions of the Partition Law and callous disregard of the provisions of the Partition Law which caused a miscarriage of justice and in my view amounts to a fundamental vice. In these circumstances, if this Court fails to invoke its power of revision, grave injustice will result to the petitioner.

For these reasons, I am of the strong view that this is a fit case for this Court to intervene in the exercise of its revisionary powers to avert a miscarriage of justice. Accordingly, I set aside all the proceedings in the District Court up to the stage of the plaint and permit the petitioner to intervene in the partition action No. 389/00/P and to file a statement of claim. The petitioner is entitled to recover Rs. 10,500 as costs of this inquiry from the plaintiff - respondent.

Application allowed.

Petitioner permitted to intervene.

ARIYAPALA
VS
SWARNAMALI AND ANOTHER

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CA 238/2004 (REV.).
DC COLOMBO 3533/RE.
JUNE 22, 2005.

Civil Procedure Code, section 325(1), 325(3), 325(4), 326(1), 327 and 329- Resistance to writ-Sections 325(1) and 325(4) applications are two different applications ? - Alternative remedy provided in section 329 - Does revision lie ? Evidence Ordinance, section 101 - Trust Ordinance, section 102 - Burden of proof.

The fiscal was resisted by the claimant, and the judgment - creditor-respondent made an application in terms of section 325(4). The judgment-creditor-respondent's application (s. 325 (I)) was dismissed due to a defect in the petition. The application of the claimant (S. 325(4)) was also dismissed and the court ordered that the judgment creditor be placed in possession. The claimant moved in revision. The judgment creditor-respondent contended that there is an alternative remedy under section 329.

HELD:

1. Section 329 gives an alternative remedy to an aggrieved party. It is the duty of court to carry out effectually the object of the statute.

2. Ordinarily court will not interfere by way of revision, particularly when the law has expressly given an aggrieved party an alternate remedy *except* when non interference will cause a denial of justice or irremediable harm.

3. Petitioners' claim that, the land belonged to the Ruhuna Kataragama Devalaya and it was leased out to him was not established. The burden of proof was on the petitioner (claimant)

4. Applications made in terms of sections 325(1) and 325(4) are two different applications and an application in terms of section 325(4) could be made regardless of an application in terms of section 325(1)

Quarere :

"Could the petitioner take advantage of the dismissal of the respondent's application that was dismissed due to a technical default when in fact the court did not consider the merits of the application."

APPLICATION in revision from an order of the District Court of Colombo.

Cases referred to :

1. *Letchumi* vs. *Perera and Another* (2000) 3 Sri LR 151
2. *Rasheed Ali* vs. *Mohamed Ali* (1981) 1 Sri LR 262
3. *Chinnathamby* vs. *Somasundera Aiyer* (48) NLR 51 at 516

M. U. M. Ali Sabry with *Ernha Kalkidasa* for petitioner.

Mohan Peiris, P. C. with *Widura Ranawaka* for respondent.

Cur.,adv.vult.

November 11, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application to revise and to set aside and/or vacate and/or vary the order of the learned Additional District Judge of Colombo dated 27.01.2004 and to allow the application preferred by the respondent-claimant-petitioner (hereinafter called the claimant) to the District Court of Colombo in terms of Section 325(3) of the Civil Procedure Code.

When the application was taken up for argument both counsel agreed to tender written submissions and they have tendered their written submissions as well as further written submissions by way of reply.

The relevant facts are the judgment-creditor-petitioner-respondent-respondent (hereinafter called the respondent) instituted the instant action against the judgment-debtor-respondent-respondent and obtained judgment to eject him from the premises in suit. Thereafter when the Fiscal went to execute the writ of possession the claimant resisted the execution of the writ. Accordingly the respondent made an application in terms of section 325(1) of the Civil Procedure Code. The claimant too claiming that he is in independent possession of the premises in suit filed a written statement in terms of section 325(4) of the Civil Procedure Code.

The respondent's application in terms of section 325(1) of the Civil Procedure Code was dismissed due to a defect in the petition. Subsequently the claimant's claim in terms of section 325(4) of the Civil Procedure Code was taken up for inquiry and the claimant's claim too was dismissed by the aforesaid order dated 27.01.2004. The learned Additional District Judge having dismissed the claimant's claim proceeded to act in terms of section 326(1) of the Civil Procedure Code and has ordered that the respondent be put in possession of the premises in suit.

It is contended by counsel for the respondent that as there is an alternative remedy provided for in section 329 of the Civil Procedure Code the petitioner cannot have and maintain this action. I must say there is merit in this argument for section 329 of the Civil Procedure Code reads as follows :

> "No appeal shall lie from any order made under section 326 or section 327 or section 328 against any party other than the judgment-debtor. Any such order shall not bar the right of such party to institute an action to establish his right or title to such property".

It would also be pertinent at this stage to refer to section 326(1) of the Civil Procedure Code which reads as follows :

"On the hearing of the matter of the petition and the claim made, if any the court, if satisfied-

(a) that the resistance, obstruction, hindrance or ouster complained of was occasioned by the judgement-debtor or by some person at his instigation or on his behalf;

(b) that the resistance, obstruction, hindrance or ouster complained of was occasioned by a person other than the judgment-debtor, and that the claim of such person to be in possession of the property, whether on his own account or on account of some person other than the judgment-debtor, is frivolous or vexatious;or

(c) that the claim made, if any, has not been established

shall direct the judgment-creditor to be put into or restored to the possession of the property and may, in the case specified in paragraph (a), in addition sentence the judgment-debtor or such other person to imprisonment for a period not exceeding thirty days"

In the case of *Letchumi vs. Perera and Another* [1] it was held :

"S. 329 gives an alternative remedy to an aggrieved party. It is the duty of court to carry out effectually the object of the statute. It must be so construed as to defeat all attempts to do so or avoid doing in a direct or circuitours manner that which has been prohibited or enjoined."

Also in the case of *Rasheed Ali vs. Mohamed Ali* [2] it

was held :

"The powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. Where the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action except when non-interference will cause a denial of justice or irremediable harm".

It is also interesting to consider the observation made by the Additional District Judge as to the documentary evidence produced by the petitioner to establish his case. The petitioner claims that he was in occupation of the land in suit since 1980. However as observed by the learned Additional District Judge documents marked R 2 to R 10 that has been placed before Court by the petitioner are all dated from the year 1988 onwards when the instant action was instituted in 1979 and the judgment delivered in 1981. It is also curious to note that extracts of the electoral lists show that the petitioner's name appears in that list after the year 1995. Considering the aforesaid facts it is to be seen that as the learned Additional District

Judge has observed there is very strong presumption that the petitioner has acted collusively with the judgment-debtor to prevent the respondent from taking possession of the premises in suit.

The petitioner has also led the evidence of the Administrative Officer and Divisional Secretary of the Ruhunu Kataragama Devalaya who testified that Ruhunu Kataragama Devalaya had issued rent receipts to the petitioner and an officer of the Regional Office of the Department of Buddhist Affairs has testified to the fact that in 1988 the Commission has granted permission to the Ruhunu Kataragama Devalaya to lease out the land in suit to the petitioner. However it is to be seen that no document was placed before the learned Additional District Judge to establish the fact that the land in suit belonged to the Ruhunu Kataragama Devalaya.

In the case of *Chinnathamby vs. Somasundera Aiyer* [3] at 516, it was observed :

"Plaintiffs obtained an order under section 102 of the Trusts Ordinance appointing them trustees of a Hindu Temple and vesting the temporalities in them. Thereafter the plainfiffs obtained an order against the 1st defendant for delivery of possession of the temporalities to them. Execution of the order was resisted by certain persons who were not parties to the action and who claimed the right to manage the temple. The plaintiffs thereupon filed a petition under section 325 of the Civil Procedure Code and their petition was numbered as a plaint under section 327. The District Judge dismissed the plaintiffs' claim on the ground that the plaint did not disclose a cause of action".

In any event, Section 101 of the Evidence Ordinance reads as follows :

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustration :-

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B committed the crime.

(b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true.

A must prove the existence of those facts."

For the foregoing reasons I am not impressed at all with the argument of counsel for the petitioner that since the respondent's application has been dismissed the learned District Judge erred when he ordered that the respondent should be restored to possession. Question arises as to whether the petitioner could take advantage of the dismissal of the respondent's application that was dismissed due to a technical default when in fact the Court did not consider the merits of the application. However as for the claim of the petitioner it was decided on merit. One should also not forget the fact that applications made in terms of section 325(1) and section 325(4) of the Civil Procedure Code are two different applications and that an application in terms of section 325(4) could be made regardless of an application in terms of section 325(1).

For the foreging reasons, I have no. hesitation in dismissing this application to revise the order of the learned Additional District Judge dated 27.01.2004. Accordingly the application is dismissed with costs fixed at Rs. 20,000.

Wimalachandra, J.—I agree.

Application dismissed.

MASAHIR
VS
RETURNING OFFICER, KEGALLE DISTRICT AND OTHERS

COURT OF APPEAL
IMAM, J. AND
SRISKANDARAJAH, J.
CA 1298/2003.
JULY 22, 2005.

Local Authorities Elections Ordinance, No. 53 of 1946 – section 65A—Elected candidate resigns-Vacancy—Could a person who was not a candidate be nominated to fill vacancy-Provincial Councils Elections Act - Section 65 compared.

The petitioner contested the elections of the Mawanella Pradeshiya Sabha from the United National Party (UNP). Sixteen candidates were appointed to the Sabhawa; the petitioner was the seventeenth in the list. One candidate elected from the list resigned; the UNP sought to nominate the 3rd respondent who was not a candidate and the 3rd respondent was declared by the 1st respondent elected to the Mawanella Pradeshiya Sabha.

The petitioner contends that, the said nomination is *ultra vires.*

HELD:

1. The power of the Secretary of the UNP in the instant case is restricted to nominate a person from the list of candidates which appears in the relevant nomination paper who has secured some preference at the election.

2. As the 3rd respondent was not a candidate and his name does not appear in the nomination paper of the relevant election the nomination of the 3rd respondent to fill the vacancy created by the resignation of the 4th respondent is *ultra vires.*

APPLICATION for writs in the nature of certiorari/mandamus.

Case referred to :

Centre for Policy Alternatives (Guarantee) Ltd. and Another vs. Dayananda Dissanayake and 3 others 2003 1 Sri LR 277.

Dr. J. de Almeida Gunaratne, P. C. with Kishali Pinto Jayawardane and Maduranga Ratnayake for petitioner. Janak de Silva, State Counsel for 1st-5th respondents.

H. I. M. Azver for 3rd respondent.

Daya Pelpola for 6th respondent.

Cur. adv.vult.

September 19, 2005.

S. SRISKANDARAJAH., J.

The Petitioner contested the elections of the Mawanella Pradeshiya Sabha from the United National Party which was held on 20.03.2003. The results of the said election for the Mawanella Pradeshiya Sabha was declared by the 1st Respondent and according to the said results sixteen candidates were appointed to the Mawanella Pradeshiya Sabha from the list of the United National Party. The Petitioner submitted that he had come seventeenth on the list according to the preference given by the voters, and his name appears immediately below the last candidate who had been elected. The Petitioner also submitted that according to the list the difference in votes between the candidate who had come sixteenth on the list and the Petitioner was negligible. On 15.03.2003 he was informed that one candidate who had been elected to Mawanella Pradeshiya Sabha from the United National Party list namely the 4th Respondent had resigned from his post as member of the Mawanella Pradeshiya Sabha for personal reasons. Consequently a vacancy arose in the Mawanella Pradeshiya Sabha and he had expected that he would be elected as he was the seventeenth on the list of preference obtained by the candidates and immediately below the last to be elected on the list as aforesaid.

On or about the 23rd of May, 2003 the Petitioner submitted that he came to know that the United National Party General Secretary the 2nd Respondent had issued a letter to the 1st Respondent nominating the 3rd Respondent to fill the said vacancy created by the resignation of the 4th Respondent. Consequent to the said nomination by the 2nd Respondent the 1st Respondent declared the 3rd Respondent elected to the Mawanella Pradeshiya Sabha from the Kegalle District (P6).

The Petitioner submitted that the 1st Respondent was obliged in law to reject the said nomination of the 3rd Respondent by the 2nd Respondent by virtue of section 65A of the Local Authorities Election Ordinance No. 53 of 1946 as amended. The said decision of the 1st Respondent and/or the

2nd Respondent has been arrived at without taking into account relevant facts into consideration and the said decision was arrived at through a misconstruction of the aforesaid section of the said Ordinance. The 1st and 2nd Respondents have contravened the principles of natural justice and reasonableness and for these reasons the Petitioner has sought to challenge the order of the 1st Respondent by way of a writ of certiorari to quash the election of the 3rd respondent to the Mawanella Pradeshiya Sabha, a writ of quo warranto declaring that the 3rd Respondent is not lawfully entitled to hold the office of the member of the Mawanella Pradeshiya Sabha and to issue a writ of mandamus directing the 1st Respondent to declare as elected to the said vacancy from the list of the United National Party, the candidate most qualified according to law.

It is common ground that the Petitioner was a candidate from the United National Party and contested at the Mawanella Pradeshiya Sabha Elections on 20.03.2002. According to the preference obtained by the candidates of the United National Party the Petitioner was placed 17th in the preferential list and he was placed immediately below the last candidate who had been elected. The 4th Respondent had resigned from his post as member of the Mawanella Pradeshiya Sabha and the 2nd Respondent nominated the 3rd Respondent who was not a candidate in the aforesaid election to fill the said vacancy created by the 4th Responden's resignation from his post. The 1st Repondent declared the 3rd Respondent elected to the Mawanella Pradeshiya Sabha.

The only question that has to be determined is whether 3rd Respondent who was not a candidate in the Mawanella Pradeshiya Sabha Election could be nominated by the 2nd Respondent to a vacancy that occurred in the Mawanella Pradeshiya Sabha and whether he could be declared elected as a member of the said Pradeshiya Sabha by the 1st Respondent under section 65A of the Local Authorities Elections Ordinance as amended.

Section 65A of the Local Authorities Elections Ordinance as amended in all respect contains similar provisions to the section 65 of the Provincial Councils Elections Act, to nominate a person to fill a vacancy that occurred due to death, resignation or for any other cause. Section 65 of the Provincial Councils Elections Act, was interpreted by the Supreme Court in *Centre for Policy Alternatives (Guarantee) Limited and Another vs. Dayananda Dissanayake and three Others*[1] Fernando J in this judgment held :

"To sum up, section 65(2) is not plain and unambiguous; section 65(3) takes precedence over section 65(2); section 65(3) manifests a legislative intention that vacancies should be filled either by qualified candidates or by election; If section 65(2) is interpreted to mean that the secretary may nominate any person who is qualified at the time of such nomination, that gives rise to an anomaly or inconsistency; the general scheme of the Act, from nomination up to the declaration of the results of the poll is that the electorate should be represented by persons who have contested the election; the fact that the nomination paper is required to have three candidates more than the number of members to be elected and cannot be altered indicates that the nomination paper is the pool from which subsequent vacancies should be filled. Accordingly the wide language of the first limb of section 65(2) must be restrictively interpreted, in the context of section 65(3) as well as the general scheme of the Act and basic democratic principles. I hold that despite the general words used, the secretary's power to nominate is confined to candidates whose names appear in the original nomination paper and who secured some preference at the election."

In view of the interpretation of the provisions of the above section the power of the Secretary of the United National Party in the instant case is restricted to nominate a person from the list of candidates which appears in the relevant nomination paper who has secured some preference at the election. As the 3rd Respondent was not a candidate and as his name does not appear in the nomination paper of the relevant election, the nomination of the 3rd Respondent to fill the vacancy created by the resignation of the 4th Respondent is *ultra vires*. Hence the Court issues a writ of certiorari quashing the election of the 3rd Respondent to the Mawanella Pradeshiya Sabha. The Court directs the 1st Respondent to take steps according to law to fill the vacancy 'occurred' in the Mawanella Pradeshiya Sabha by this order. The application for the writ of certiorari and writ of mandamus is allowed without costs.

IMAM, J.—I agree.

Application allowed.

PREMASIRI AND OTHERS
VS
KUMARASINGHE

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CALA 28/2004.
DC BANDARAWELA 829/L.
JUNE 29, 2005.

Civil Procedure Code, section 121 — Name of witness in the list - Is a party entitled to object to a witness being called on the basis that the witness would give irrelevant and inadmissible evidence ?

HELD:

1. A witness can be called to give evidence if his name has been included in the list.
2. A party cannot object to such a witness being called, merely on the ground that the witness will give irrelevant and inadmissible evidence.
3. The court cannot even with the consent of parties depart from the provisions of law, as to how evidence shall be given by a witness.

Per Wimalachandra, J.

> "A party can only object to a witness giving inadmissible and or /irrelevant evidence ; it is for the Judge to decide whether evidence is inadmissible or irrelevant"

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

Hemasiri Withanachchi for defendant-petitioner.

Sunil F. A. Cooray for plaintiff - respondent.

Cur.,adv.vult.

August 24, 2005.

L. K. WIMALACHANDRA. J.

This is an application for leave to appeal from the order of the District Judge of Bandarawela dated 12.01.2004. By that order the learned District

Judge allowed the plaintiff's application to call Hitihamy Mudiyanselage Premadasa, an engineer of the Road Development Authority as a witness.

The defendant-petitioners (the defendants) objected to the calling of this witness on the ground that his evidence would be irrelevant and inadmissible. The question that arises for determination is whether a party is entitled to object to a witness being called on the basis that the said witness would give irrelevant and inadmissible evidence. Admittedly the said witness was included in the list of witnesses in terms of section 121 of the Civil Procedure Code. A witness can be called to give evidence if his name has been included in such list. A party cannot object to such a witness being called, merely on the ground that the witness will give irrelevant and inadmissible evidence. The Court cannot, even with the consent of parties depart from the provisions of law, as to how evidence should be given by a witness. A party can only object to a witness giving inadmissible and/or irrelevant evidence. It is for the Judge to decide whether that evidence is inadmissible or irrelevant.

The relevant portion of the impugned order marked "Y2" reads as follows :

"මෙම සාක්ෂිකරු සහ ලේඛන 1995 වසරේ ලැයිස්තුගත කොට ඇති අතර එම සාක්ෂි මෙහෙයවීමෙන් පැමිණිලිකරුගේ දකුණු මායිම සම්බන්ධයෙන් තවදුරටත් පැහැදිලි සාක්ෂි ඉදිරිපත්වීමක් මිස විත්තියට අගතියක් සිදුවිය නොහැකි බැවින් විත්තියේ විරෝධතාවය පිළිගැනීම ප්‍රතික්ෂේප කරමි."

It follows that the order made by the learned Judge was correct in allowing the plaintiff to call that witness as his name had been included in the list of witnesses filed in Court in terms of section 121 of the Civil Procedure Code. However, at the time of making this application the examination and re-examination of that witness had been concluded. If the evidence given by the witness is inadmissible, that matter can be taken up in the main appeal.

For these reasons, we are of the view that this is not a fit case to grant leave to appeal. Accordingly, the application for leave to appeal is dismissed with costs fixed at Rs. 10,000.

SOMAWANSA, J.—I agree.

Application dismissed.

ROSHAN
VS
SOMASIRI

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CALA 423/2004.
DC ATTANAGALLA 87/L.
MAY 30, 2005.

Civil Procedure Code, section 763(2) - Judicature Act, section 23 - Writ pending appeal - Substantial question of law - Matters to be considered - Onus on the judgment debtor.

HELD:

1. For the appellate court to consider whether there is a substantial question of law to be decided in appeal, the relevant material has to be made available to court.

2. To consider the question of law urged in appeal the following matters need consideration :

   (i) How strong was the appellant's case - for this purpose the court has to examine the evidence given by and on behalf of the appellant at the trial including the evidence given under cross examination;

   (ii) The trial judge's answer to the issues framed at the trial;

   (iii) The trial judge's reasons for answering the issues in the way he has done - the judgment.

3. It is the onus on the part of the defendant-petitioner to have placed before the District Judge at the inquiry such evidence, material and pleadings on his behalf from which it could be safely inferred that substantial questions of *law* do arise for consideration in appeal - and such material must be made available to the appellate court too.

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

Cases referred to :

(1) *Don Piyasena vs. Mayawathie Jayasinghe (1986) 1 Sri LR 6*
(2) *Grindlays Bank Ltd. vs. Makinnon Mackenzie and Com. (1990) 1 Sri LR 19*
(3) *A. D. H. Perera vs. Gunawardane (1993) 2 Sri LR 27*
(4) *Magilin vs. Illukkumbura (1996) 2 Sri LR 263*
(5) *Mallika vs. Hendavitharana and another (1999) 2 Sri LR 266*
(6) *Saleem vs. Balakumar (1981) 2 SLR 274*
(7) *Ms. K. G. Karunasekera vs. Rev. Kallanchive Chandananda CA 526/99 - D. C. Kurunegala 320/L*

David Weeraratne for petitioner.
Resmi Wimalaratne for respondent.

Cur. adv.vult.

December 09, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application for leave to appeal from the order of the learned District Judge of Attanagalle dated 04.11.2004 allowing the plaintiff-respondent's application for execution of writ pending appeal and if leave is granted to set aside the aforesaid order dated 04.11.2004. The defendant-petitioner also prayed for and supported for an interim order staying the operation of the aforesaid order which was granted and has been extended from time to time.

When this application was taken up for inquiry both counsel agreed to tender written submissions on the question of granting leave and both parties have tendered their written submissions.

The relevant facts are the plaintiff-respondent instituted the instant action for a declaration that he is the lawful lessee of shop No. 3 morefully described in the schedule to the plaint, ejectment of the defendant-petitioner and for damages. The defendant-respondent while denying the aforesaid averments took up the position that he is the tenant of the shop in suit which belongs to the Pradeshiya Sabhawa. At the conclusion of the trial the learned District Judge by his judgment dated 02.10.2003 held with the plainfiff and the defendant-petitioner appealed from the said judgment and thereafter the plaintiff-respondent moved for a writ of execution. At the conclusion of the inquiry into this application the learned District Judge by

his aforesaid order dated 04.11.2004 allowed the application for execution of writ pending appeal. It is from this order that the defendant-petitioner is seeking leave to appeal.

At the inquiry only the defendant-petitioner gave evidence and the basis for his claim for substantial loss that would result if he is ejected is that he being the sole breadwinner of the family would lose his only source of income he has from the business carried on at the premises in suit, and would also interrupt his children's education.

Evidence reveals that the business he carried on at the shop in suit was selling buns, short eats, string hoppers, drinks, tea etc., which he himself admits could be carried on anywhere. He also states that though there is a judgment against him to eject him he did not look for an alternative place. It is interesting to note that other than his admission that he was carrying on business in the premises in suit he does not claim any interest or title to the same. Furthermore it is also interesting to note that no other evidence either oral or documentary has been led before the learned District Judge to establish his ipsi dixit evidence on the question of substantial loss that would be caused to him if he was evicted. On the aforesaid evidence I would say that the learned District Judge has come to a correct finding that no substantial loss would result to the defendant petitioner in the event the writ is executed. Though the learned District Judge did not consider and evaluate the evidence given by the defendant-petitioner in detail nevertheless he has come to a correct finding when he rejected the defendant-petitioner's plea of substantial loss on the basis of non-availability of evidence, to establish such substantial loss resulting in th event the writ of execution is allowed.

In the case of Don Piyasena vs. Mayawathi Jayasuriya[1]

"The provisions of section 23 of the Judicature Act and section 763(2) of the Civil Procedure Code make it clear that unless there is proof of substantial loss that may otherwise result, execution of decree will not be stayed merely on the ground that an appeal has been filed."

Also in the case of *Grindlays Bank Ltd.*, vs. *Mackinnon Mackenzie & Co.*[2]

"If the judgment debtor desires stay of execution pending appeal, he should establish substantial loss. The usual course is to stay proceedings pending an appeal when execution would cause irreparable injury. Mere inconvenience and annoyance is not enough. The damage must be substantial and the defendant must prove it."

In Perera vs. Gunawardena [3]

"As the defendant-respondent had failed to satisfy the court that substantial loss may result unless execution was stayed, the plaintiff was entitled to execution pending appeal. While some consideration of the degree of hardship to the judgment-creditor may perhaps be relevant especially in borderline cases, there is certainly no burden on him to establish comparatively greater hardship as a condition of the grant of execution. The burden is on the judgment-debtor to satisfy the court that the loss would be substantial.

The owner of the business is not entitled to the maximum tenure the law allows. Such a proposition would effectively deny execution pending appeal and introduce a new test under the guise of interpretation.

Mere assertions of the judgment debtor's opinion that serious loss would result, unsupported by averments of fact in regard to the nature of the business, its turnover and profits (or losses), the difficulties and expenses which relocation would occasion and similar matters, are insufficient. The material upon which such assertions were based should have been made available to enable the court to assess the loss, and to determine, in relation, to the judgment debtor, whether such loss was substantial, and also to determine the quantum of security. While generally goodwill does attach to a business, there is no presumption that every business has a goodwill and certainly not as to the extent of the goodwill."

In this respect counsel for the defendant-petitioner has cited two decisions of *Magelin vs. Ilukkumbura*[4] where the facts and circumstances are materially different to that of the instant application. In that case the business being a pharmacy business with a large clientele and in fact the party to be ejected had taken constructive steps in trying to relocate the business. However in the instant action the defendant-petitioner had made no attempt whatsoever to find an alternative place and on his own admission runs a tea boutique which could be carried on anywhere.

He has also cited the case of ***Mallika vs. Hendavitharana and Another***[5] where again facts and circumstances are distinguishable. For in that case the party to be ejected was carrying on a specially localized business of leather trade and it was disclosed that shifting would actually cause severe hardship.

Counsel for the defendant-petitioner also contends that in the petition of appeal filed by the defendant-petitioner out of the 16 grounds of appeal stated therein there are at least 5 questions of law to be decided. Thus counsel citing the decision in *Saleem vs. Balakumar page 274* submits that on the substantial question of law raised in the petition of appeal alone the writ should have been stayed. However, other than filing a copy of the petition of appeal there is no other material to show that this was an issue that was canvassed at the inquiry. In any event, even for this Court to consider this aspect of the matter *viz*: existence of substantial questions of law to be decided in appeal let alone whether the defendant-petitioner could succeed or not the relevant material has to be made available to this Court. However, except for the petition of appeal marked ඵ (1) neither the evidence led at the trial, the judgment, nor the written submissions tendered by the defendant-petitioner have been annexed or tendered to this Court.

The points of law urged are not figments of one's imagination but questions which arose for consideration by the lower Court. In this respect I would refer to the decision of *Mrs. K. G. Karunasekera vs. Rev. Kallanchive Chandananda*[7] wherein the Court observed that to consider the questions of law urged in appeal following matters need consideration :-

(i) How strong was the appellant's case (placed before the original Court as against his opponent's case) at the trial. For this purpose the Court has to examine the evidence given by and on behalf of the appellant at the trial including the evidence given under cross-examination.

(ii) The trial Judge's answers to the issues framed at the trial.

(iii) the trial Judge's reasons for answering the issues in the way he has done-the judgment.

Thus it is the onus on the part of the petitioner to have placed before the learned District Judge at the inquiry such evidence, material and pleadings on his behalf from which it could be safely inferred that substantial questions of law do arise for consideration in appeal and also must make available to this Court too if this Court is called upon to consider whether there are questions of law remaining to be urged and considered at the appeal stage.

In the circumstances, I am not in a position to determine whether there are any substantial questions of law to be decided in the appeal or whether the defendant petitioner would be in a position to succeed in the appeal on the said questions of law.

For the foregoing reasons, I see no basis to interfere with the order made by the learned District Judge. Accordingly leave to appeal is refused with costs fixed at Rs. 10,000.

WIMALACHANDRA, J.—I agree.

Application dismissed.

KUGENDRAN
VS
PREMACHANDRAN AND OTHERS

COURT OF APPEAL
WIJEYARATNE, J.
CA/EP/01/2004.
DISTRICT No. 10 - JAFFNA.
AUGUST 29, 2005.

Parliamentary Elections Act, No. 01 of 1981 sections 92, 98 (c) and 98 (e) - Rules - Non - compliance - Fatal? - Court of Appeal (Appellate Procedure) Rules 1990- Applicability.

The petitioner was a candidate of the Ealam Peoples Democratic Party (EPDP) who was alloted No. 3 in the EPDP list for the Electoral District of Jaffna. The petitioner was not elected.

The petitioner filing an election petition complained that the said election was not conducted in accordance with the principles laid down in section 92 and sought a declaration that the said election is void.

The repondents contended that :-

(*a*) the petitioner has failed to sign the petition ;

(*b*) the petitioner has failed to give notice of the presentation of the petition together with copies thereof within 10 days of presentation to be served on the respondent- Rule 14(1) (a) ;

(*c*) the petitioner failed to give a concise statement of material facts, section 98 (c) ; and sought the dismissal of the election petition *in limine.*

HELD:

(1) The petitioner not signing the petition is material non-compliance and the failure to satisfy the requirement in section 98(e) is fatal.

(2) The petitioner who presented his petition on 27.04.2004 has tendered notice only on 19.05.2004-22 days after the presentation of the petition. Under Rule 14 notice of presentation of the election petition must be served on the respondents within ten days of the presentation of the petition. Failure to do so is fatal.

ELECTION PETITION in respect of Electoral District No. 10 Jaffna - Parliamentary Elections, on preliminary objections raised.

Cases referred to :

1. *Chandrakumar vs. Kiribanda and Others* 1982 2 Sri LR 35
2. *Nathan vs. Chandrananda de Silva,* Commissioner of Elections and Others 1994 2 Sri LR 209
3. *Nanayakkara vs. Kiriella* (deceased) and Others 1985 2 Sri LR 391

Dr. Jayatissa de Costa with *D. Epitawela* for petitioner.

K. Kanag-Iswaran, P. C. with *M. A. Sumanthiran* for 1st - 121st respondents.

Cur. adv. vult.

August 29, 2005.

P. WIJEYARATNE, J.

The Petitioner was a candidate from the Ealam Peoples Democratic Party (EPDP) who was allotted No. 3 in the list of EPDP for the electoral District of Jaffna for the election held on 2nd April, 2004. The 1st to 119th named respondents to this petition were candidates at the said election and the 120th respondent is the returning officer and 121st respondent is the District Secretary Government Agent for the Killinochchi District and 122nd respondent is the Commissioner of Elections. The 1st, 3rd, 4th, 5th, 6th, 7th, 10th 12th and 15th respondents were returned as duly elected. Of the parties that contested such elections Ilangqai Tamil Arasu Kachchi (ITAK) had secured 8 seats at the said election. The Petitioner avers that ITAK was well known to have allegiance to LTTE a terrorist organization. The Petitioner stated that the election of members of Parliament for the electoral District No. 10 Jaffna is void on grounds of non - compliance with provisions of Parliamentary Elections Act, No. 1 of 1981 and other provisions of section 92 of the said Act. As the said election was not conducted in accordance with the principles laid down in such provisions and enumerated such instances under paragraph 9(a) to 9 (h) of his Petition among them were systematic rigging, impersonation by ITAK, general intimidation of voters, corrupt or illegal practices by officials were grounds upon which the petitioner seeks a declaration that the Parliamentary Election for the Electoral District No. 10 Jaffna held on 2nd April, 2004 is void and further declare that the return of 1, 3, 4, 5, 6, 7, 10 and 12 respondents were undue, in terms of provisions of section 92(1) of the Parliamentary Election Act, No. 1 of 1981.

The Petitioner relied on documents marked X 1 to X 6. The Petitioner tendered his petition dated 27th April, 2004 signed by his agent and moved to support the same on 22nd June, 2004. However the petitioner on 19th May, 2004 tendered notices to be issued on respondents and in terms of rule 14 of schedule 4, Court ordered issue of notices on respondents fixing the date of the trial on 22nd June, 2004. On 22.06.2004 1st to 12th respondents represented by their counsel noted their preliminary legal objections which they tendered by way of motion on 13.07.2004. The petitioner by his affidavit dated 20th September, 2004 countered the same. The inquiry into the preliminary objection was agreed to be disposed of by way of written submissions tendered by the respective counsels representing parties.

By way of preliminary objections the 1st to 12th respondents urged that-

(*a*) the Petitioner failed to sign the Petition as required by section 98(e) of the Parliamentary Elections Act, No. 1 of 1981 as amended;

(*b*) the Petitioner has failed to give notice of the presentation of the Petition together with copies thereof within 10 days of presentation to be served on respondents as required by rule 14 (1) (a) of the said Act, No. 1 of 1981;

(*c*) the Petitioner failed to give a concise statement of material facts on which the Petitioner relies "as required by section 98 (c) of the Act, No. 01 of 1981.

The Petitioner countering the same contended that the signing of the Petition by the Petitioner himself was not mandatory but directory only and the requirements denoted by the words "shall" appearing in the section should be determined by the real intention of the legislature which would be ascertained by carefully attending to the whole scope of the Act. He also attempted to draw an analysis with wordings of rule 21(1) of \ Election Petition rules 1981 which permitted an agent to withdraw an election petition. The Petitioner emphasized that his Petition does contain a concise statement of facts relied on by him.

Relying on decisions of previous cases, he argued that a matter of election petition is one in which the whole electorate, not to say the whole country, has an interest and any order disposing of such application should therefore be made from the largest standpoint of the State and an election petition should not be refused without hearing.

The Petitioner also urge that the objections presented without being supported by an affidavit as required by rule 3(7) of the Court of Appeal (Appellate Procedure) Rules 1990 should be rejected *in limine*.

The rules refer to appeals and not to election petitions. However, the requirement of such rules pertains to any averment of facts only and such facts only shall be supported by affidavit. The preliminary objections raised

is on pure matters of law presented by way of motion only and not by way of statement of objections. The counter objection thus is not tenable.

The respective submissions made were in support of respective positions taken up with reference to the decided cases.

I shall proceed first to examine the preliminary objection pertaining to the validity of the Petition on the conceded fact that the same is signed only by the agent and not by the Petitioner. Section 92 (1) of the Parliamentary Elections Act states : The election in respect of any electoral district shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfactory of the Election Judge, namely-

(a) that by reason of general bribery, general treating or general intimidation or other misconduct or other circumstances whether similar to those enumerated before or not a section of electors was prevented from voting for the recognized political party or independent group which it preferred and thereby materially affected the result of the election and such section (e) clearly spells out that the Petition "shall be signed by all the Petitioners."

Rule 4 of the fourth schedule prescribing form also provide for Petitioner's signature and not of the agents.

I am unable to agree with the submission on behalf of the Petitioner that the word appearing in sub section (e) of section 92 is not mandatory on a mere comparison with the provisions of rule 21 because the very absence of provisions in subsection (e) for the agent to sign appear on such comparison to be intentional on the part of the legislature, which only allowed an agent to withdraw a Petition. I therefore hold that the Petitioner not signing the petition is material non-compliance and a failure to satisfy the requirement of sub section (e) of section 98 which is fatal to the application of the Petitioner.

Having held that the Petition of the Petitioner is not in compliance with the requirements of section 98(e),. I shall still consider the matter of the respondents being given notice in terms of rule 14(1). As borne out by the minutes of record the Petitioner who presented his petition dated 27.04.2004 has tendered notice only on 19th May 2004, on a date at least twenty two days after the presentation of the Petition.

In the case of *Chandrakumar* vs. *Kirubaran* and *Others* [1] it was held that : "the 10 days limit, ... prescribed by Rule 14(1) of the Provincial Councils Election Petition Rules for service of notice of presentation of election petition on the respondents is mandatory and applies to every mode of service of notice set out under paragraphs 1(a) and (b) and paragraph 2. The mere delivery of the notice to the registrar within the 10 day limit, ... is not sufficient compliance with Rule 14. The actual service on the respondents must be effected within the time limit specified in paragraph 1 of Rule 14."

This was followed by the decision of *Nathan* vs. *Chandrananda de Silva, Commissioner of Election and Others* [2] where it was held that : Under Rule 14 notice of presentation of an election petition must be served on the Respondents within 10 days of the presentation of the Petition. One of the modes of service prescribed in Rule 14 may be adopted but service of the notice within 10 days is mandatory. Failure to do so is fatal.

The view that actual service of notice together with copies of the Petition, must be effected within ten days was taken in the case of *Nanayakkara vs. Kiriella (deceased) & Other* [3].

Following the decisions referred to above, I hold that non service of notice, together with copies of Petition, on the 1st to 12 respondents within ten days of presentation of the Petition *i.e.* 27th April, 2004 is fatal and the Petition should be refused.

Having held that the Petition presented is not lawful and that within ten days of presentation of such purported petition, notice of the same was not given to the respondents rendering the petition not being capable of proceeded with, it is my view that a scrutiny as to contents of the same being in accordance with the requirement of relevant provisons of law is futile.

Upholding the two preliminary objections of law,. I dismiss the petition in terms of section 92 (1) (b) of the Act *in limine* subject to total punitive costs of rupees. 60,000 to be awarded collectively to 1st to 12th respondents.

Petition dismissed.

RAVINDRAN AND ANOTHER
VS
SOYSA AND ANOTHER

COURT OF APPEAL.
SOMAWANA, J. (P/CA) AND
WIMALACHANDRA, J.,
CALA 80/2004.
DC MT. LAVINIA 1351/00/L.
JULY 22, 2005.

Civil Procedure Code - Sections 75, 75(d) General denial of averments in plaint - Is it a denial contemplated under section 75(d) ?

HELD:

(1) There is no reference either denying or admitting the averments in paragraphs 6/7 of the plaint. Nowhere does the defendant-petitioners in their answer admit averments in paragraphs 2-7, 12 and 17 of the plaint, there is no denial of the averments therein other than a general denial in paragraph 1 in the answer.

(2) Where a defendant does not deny an averment in the plaint - he must be deemed to have admitted that averment.

Per Somawansa, J. :

"Section 75 which deals with the requirements of an answer does not contemplate a general denial of the averments in the plaint but requires a statement admitting or denying the several averments in the plaint."

APPLICATION for Leave to Appeal from an Order of the District Court of Mt. Lavinia.

Cases referred to :

1. *Fernando vs. Samarasekera* - 49 NLR 285.
2. *Lokuhamy vs. Sirimala* - (1892) 1 SCR 326
3. *Fernando* vs. *The Ceylon Tea Company Ltd.* (1894) 3 SLR 35
4. *Mudaly Appuhamy* vs. *Tikerala* (1892) 2 CLR 35

Prinath Fernando for petitioner,
Respondents absent and unrepresented.

Cur. adv. vult.