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CM 7218 – 2,500 (2007/02)

The Petitioner alleges that whenever she attempted to hand in her application for the said Examination, the Registrar refused to accept her application, alleging that part of the course followed by the Petitioner in India was not recognized by the 1st respondent. Howevêr in accordance with (P5) dated 31.07.2004 which is a letter sent by an officer of IMTU to the President of the 1st respondent, it is very explicitly pointed out that although the initial para clinical training of the Petitioner and some other students was held in Guntur, India which was an off-shore teaching centre, the syllabi at IMTU Dar-es-Salaam and Guntur were the same and that the Examinations held in Guntur were conducted by IMTU, Tanzania and certificates issued at Da-res-Salaam, copies of the relevant mark sheets being marked as C. This letter also confirms that the petitioner having successfully completed her para clinical training at Guntur, passed her examinations, and qualified as a Doctor, having been a student of IMTU, Dar-es-Salaam. Furthermore in accordance with (P2), a Degree in Medicine and surgery (MBBS) awarded by IMTU, Dar-es-Salaam, Tanzania has been recognized by the 1st Respondent from the year 1999 onwards, which recognition has not been repealed upto date. The Petitioner sumbits that she informed the Registrar that the teaching centre at Guntur had subsequently been closed down by IMTU Tanzania since May 2002, and that at the said premises a Medical college by the name of Kathuri Medical College had been established. The Petitioner avers that the 1st respondent insisted on inspecting the Guntur centre, although it had ceased to exist.

The 1st Respondent apparently is opposing the application of the Petitioner on the basis that the entire course was not followed by the Petitioner at IMTU, Tanzania. Besides (p2) which recognizes the MBBS degree, Tanzania since September 1999, by virtue of the letter dated 16.09.1999 sent by the 1st Respondent to the Dean of IMTU, recognition was granted to IMTU Medical school unconditionally, and no other material was produced in the objections filed by the Respondents. the 1st Respondent along with the written submissions sought to produce a photocopy of a letter (Y1) dated 20.09.1999, which is said to have been written to the Dean of IMTU College of Medicine by the 1st respondent. This letter however has not been supported by an affidavit, and has not been certified. Although the written submissions tendered by the 1st Respondent aver that it is only the College of Medicine, IMTU Dar-es,Salaam that is recognized by the 1st Respondent, (P2), by referring ro "College of Medicine, International Medical and technological University, Dar-es-salaam, Tanzania", obviously the 1st Respondent would be interested in the College of medicine, as the 1st respondent is the Sri Lanka Medical Council. However in P2 IMTU has been referred to completely, which has not been de-recognized by the 1st Respondent subsequently.

The Petitioner having completed her Medical course obtained her MBBS Degree on 17.04.2004, having obtained a first class in the November 2003

Examination, after years of study at Tanzania and subsequent to pre clinical training at Guntur, which was supervised and examinations conducted by IMTU, Tanzania as Guntur is an of-shore teaching centre. Section 29(1) of the Medical Ordinance, states that "a person shall upon application made in that behalf to the Medical Council be registered as a Medical practitioner" if the conditions in section 29 are fulfilled. Section 29(1)(b)(ii) refers to foreign medical graduates. The Petitioner has obtained her degree by virtue of section 29(2)(b)(iii)(bb) of the Medical Ordinance which is recognized by the Medical Council for the purpose of this section, and hence the 1st Respondent cannot escape from the legal duty cast on it. There is no basis in fact or in law for the 1st Respondent to decline to carry out it's statutory obligation, to permit the Petitioner to sit the 29(1)(iv)(cc) Special Examination of the Medical Ordinance, commonly referred to as the Act 16 Examination.

In the event of the 1st Respondent not being satisfied with the standards maintained at IMTU, an application could have been made under section 19C of the Medical Ordinance to the Minister of Health that the prescribed standards are not being maintained and recommended that such qualification shall not be recognized for the purpose of Registration under this Ordinance which has not been done. Hence the 1st Respondent is legally bound to recognize the Medical degree of IMTU as there has been no de recognition.

Justice A. R. B. Amerasinghe in his book titled "Judicial Conduct, Ethics and responsibilities" at page 284 states thus—

"The function of a Judge is to give effect to the expressed intention of Parliament. If legislation needs amendment, because it results in Justice the democratic processes must be used to bring about the change". This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years.

For the aforesaid reasons this court grants the Petitioner the relief prayed for, and issues a Writ of Mandamus directing the 1st respondent to accept the application of the Petitioner, and admit the Petitioner as a candidate for the Special examination prescribed by the 1st Respondent in terms of section 29(1)(iv)cc of the Medical Ordinance. On an application by Learned President's Counsel for the 2nd Respondent, the 2nd Respondent was discharged from this case and the connected cases. As CA,291/2005,

CA.292/2005 and CA.293/2005 are connected matters and counsel in these cases agreed that the Judgment given in this case would be binding in the other cases, the Petitioners in the aforementioned cases are granted the same relief prayed for, Writs of mandamus are granted as prayed for by the respective Petitioners without cost, and the 1st respondent Council is directed to admit the respective Petitioners as candidates respectively for the Special Act 16 Examination prescribed by the 1st respondent.

SRISKANDARAJAH, J. — I agree.

Application allowed.

FRANCIS
VS.
PREMAWATHY AND ANOTHER

COURT OF APPEAL.
MS. EKANAYAKE, J.
SRISKANDARAJAH, J.
CA 1948/2003 (REV.).
DC GALLE P/11133.
SEPTEMBER 22, 2005.

Civil Procedure Code, sections 754, 754(4), 755(2), 755(2)(b), 759(f) – Notice of appeal not served on respondent – Rejected by District Judge – Validity? Failure – Is it fatal ?

The District Court rejected the notice of appeal on an objection being taken that the notice of appeal was not served on the respondents. The defendant – petitioner moved in revision.

HELD:

(1) One of the imperative requirements of section 755(2) (b) is that a copy of the notice of appeal should be served on the registered Attorney-at-law of the respondent.

(2) By the failure to serve a copy of the notice of appeal on the registered attorney for the plaintiff-respondent neither he nor his client is aware that an appeal is being filed.

(3) Where the notice of appeal is void it is not possible to give relief under section 759(2); to give relief under section 759(2) would lead to laxity and carelessness on the part of the appellants.

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

Cases referred to :

1. *Thambirajah vs. Doral and others* CA 1306/87 CAM 6.9.1996.
2. *Sumanaratne Banda vs. Jayaratne CA (Rev)* 1025/85 CAM 26.6.87
3. *Kiri Banda vs. Ukku Banda* (1986) CALR 191

N.R.M. Daluwatte, P. C. with *Gayathrie* de Silva for 7th defendant-appellant-petitioner.

Daya Guruge for plaintiff-respondent-respondent.

Cur.adv.vult.

November 07, 2005.

SRISKANDARAJAH J.

The 7th defendant petitioner's Attorney-at-Law filed a Notice of Appeal on the 13th of June, 2003 to appeal against the order of learned District Judge delivered on the 2nd of June, 2003 in the District Court Galle Case No. 11133/P. By this order the Learned District Judge has rejected the claim of the 7th defendant petitioner in the land sought to be partitioned in the said case. The Petitioner's Attorney-at-Law with the aforesaid Notice of Appeal filed the receipt for the deposit of Rs. 750 being security and also registered postal article receipts in proof of notice to the Respondents. This fact is borne out by the journal entry No. 33 dated 25.06.2003. Subsequently the Petition of Appeal was filed on 29th July, 2003. According to the proceedings dated 7.7.2003 the plaintiffs-respondent-respondent's Attorney-at-law has brought to the notice of Court that no Notice of Appeal has been served on the Plaintiff or to her Attorney-at-law in terms of section 754(4) of the Civil Procedure Code and he moved that

the Notice of Appeal be rejected. The Attorney-at-law of the 7th defendant petitioner admitted this position and stated that a mistake has occurred in respect of this matter. The learned District Judge after considering the submission made in this regard held on the same day *i.e.* 7.7.2003 that there is no proof of service of Notice of Appeal on the plaintiff and the 7th defendant appellant acted in breach of section 755 (2) (b) of the Civil Procedure Code and hence under section 754, the Court has power to reject the Notice of Appeal and rejected the Notice of Appeal.

The 7th Defendant Petitioner being aggrieved by the aforesaid order of rejection of his Notice of Appeal has filed this Revision Application to revise and set aside the said order dated 7.7.2003. The Petitioner submitted that section 754(4) deals with time limits of filing the Notice of Appeal and in which court it should be presented and who should present it. If the Notice of Appeal is not presented within the prescribed time limit or not fulfilled the aforesaid conditions the Court is empowered to reject the Notice of Appeal. The Petitioner further submitted that section 755(2) deals with additional material that has to accompany the Notice of Appeal. But it does not empower the trial judge to reject the Notice of Appeal for non-fulfillment of the requirements of section 755(2). The Respondent also submitted that the Petitioner is not prejudiced by not giving notice within the 14 days in which the Notice of Appeal has to be filed. He also submitted that the failure to give notice to the Plaintiff is admittedly by a mistake by the Attorney-at-law of the 7th defendant respondent-therefore the court could grant relief under section 759(2) of the Civil Procedure Code. This section is to give relief in case of a mistake, omission or defect made in complying with the procedure except non-compliance with section 754(4).

In *Thambirajah vs. Doral and others* [1] *Wijeratne, J* held :

"I cannot accept the submission that the Notice of Appeal once accepted cannot be rejected.

Section 754(4) of the Civil Procedure Code states-

"The Notice of Appeal shall be presented to the court of first instance for this purpose by the party appellant or his registered attorney within a period of fourteen days from the date when the decree or order appealed

against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of public holidays, and the court to which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the court shall refuse to receive it."

This means that the Notice of Appeal should be dealt with as set out in the succeeding section.

Section 755(1) sets out the particulars which should be contained in the Notice of Appeal.

Section 755(2)(b) lays down that the notice of appeal shall be accompanied by proof of service, on the respondent, or on his registered attorney, of a copy of the Notice of Appeal, in the form of a written acknowledgement of the receipt of such notice or the registered postal receipt in proof of such service.

Thus it is seen that one of the imperative requirements of section 755(2)(b) is that a copy of the notice of appeal should be served on the registered Attorney-at-law of the respondent. This has not been done in this case.

The purpose of this requirement is to apprise the registered Attorney-at-law of the other party (the respondent) that an appeal is being filed and that the first step is being taken by tendering the Notice of Appeal. By the failure to serve a copy of the notice of appeal on the registered Attorney-at-law for the plaintiff-respondent, neither he nor his client is aware that an appeal is being filed.

There was no valid Notice of Appeal as a copy of the notice was not served on the registered Attorney-at-law for the plaintiff-respondent, which is a fundamental requirement. Therefore the learned District Judge has jurisdiction to reject the Notice of Appeal, which has no validity.

In this respect I follow the judgment in *Sumanaratne Bandara vs. Jayaratne* [2] where it was held that where the notice of Appeal was not duly stamped, the District Judge could reject the Notice of Appeal.

Section 759(2) provides that in case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the relevant sections (other than the provisions specifying the period within which any act or thing to be done), the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms that it may deem just.

In the case of *Kiri Banda vs. Ukku Banda* [3] where it was contended that where there has been a mistake, omission or defect on the part of the appellant in complying with the provisions of these sections, this court should grant relief if it should be of opinion that the respondent has not been materially prejudiced, *P. R. P. Perera, J.* stated at 194-

"In my view, if this construction sought to be placed by learned Counsel on section 759(2) is accepted, even where such failure is occasioned by gross negligence or carelessness or neglect on the defaulting party or his registered Attorney, it would result in such conduct being condoned by the court. Further it would render nugatory express mandatory provisions of procedure. I regret I am unable to agree with these submissions."

In my view these observations apply with equal force to the facts of this case. To give relief under section 759(2) would lead to laxity and carelessness on the part of appellants.

In any event where the Notice of Appeal (which is the starting point and the foundation of the appeal procedure) is void, as in this case, it is not possible to give relief under section 759(2) of the Civil Procedure Code."

The above case applies to the instant Application in all force and this court holds that the Notice of Appeal filed by the 7th defendant-appellant-petitioner in the given circumstances is void therefore the Petitioner cannot be given relief under section 759(2) of the Civil Procedure Code. Hence this court upholds the order of the learned District Judge dated 7.7.2003 and dismiss this application with costs fixed at Rs. 5000.

EKANAYAKE, J. — I agree

Application dismissed.

NATIONAL DEVELOPMENT BANK
VS.
RUPASINGHE AND OTHERS

COURT OF APPEAL.
SOMAWANSA, J.(P/CA) AND
WIMALACHANDRA, J.
CALA 21/2004 (LG).
DC MAWANELLA 639/L.
MAY 12, 2005.

National Development Bank of Sri Lanka – Parate execution – Section 53 – Interim injunction issued – Wider than which was sought – Property situated in Mawanella – Resolution passed in Colombo – Cause of action – Where ? – Damages quantified – Injunction available?

The District Judge of Colombo issued an interim injunction against the defendant – petitioner Bank preventing the Bank from taking any further steps in respect of the auction sale of the property; the interim injunction issued has enjoined the defendant-petitioner Bank from transferring the property in terms of section 51.

The defendant – petitioner Bank sought leave to appeal from the said order.

HELD :

(1) The interim injunction issued is much wider than the relief sought by the plaintiff-respondents themselves.

(2) Jurisdiction of court is limited and restricted to what is prayed for and no other relief could be granted by Court if not prayed for.

HELD FURTHER :

(3) Court has not considered that the plaintiff-respondents have quantified the damage and whether an injunction would lie or not has not been considered by the District Judge.

(4) The plaintiffs-respondents are not challenging the manner in which the auction was held. The main dispute was not in respect of the ownership but was in respect of the 1st defendant-petitioner's decision

to proceed with parate execution. the culmination of the 1st defendant-petitioner taking such steps was based on the resolution that was adopted in Colombo at the address of the 1st defendant-petitioner in Colombo.

The cause of action would have accrued at the 1st defendant-petitioner's address in Colombo, District Court of Mawanella has no jurisdiction and accordingly no interim injunction could be issued.

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

Case referred to :

Surangi vs. Rodrigo 2003 3 SRI LR 35

Romesh de Silva, P. C. with *Geethaka Gunawardane* for 1st defendant-petitioner.

Anil Silva with *Ganesh Dharmawardane* for plaintiffs-respondents.

Cur.ad.vult.

July 22, 2005.

ANDREW SOMAWANSA, J. (P/CA)

As per minute dated 31.03.2005 when this application for leave to appeal was taken up both parties agreed to tender written submissions on the question of leave as well as the main matter and parties were directed to tender their written submissions on 12.05.2005. However on 12.05.2005 the plaintiffs-respondents were absent and unrepresented and failed to tender their written submissions even thereafter.

The 1st defendant-petitioner in this leave to appeal application is seeking to set aside the order of the learned District Judge of Mawanella dated 12.01.2004 whereby the Court issued an interim injunction against the 1st defendant-petitioner Bank preventing the 1st defendant-petitioner from transferring the property in terms of section 53 of the NDB Act.

The relevant facts are that the plaintiffs-respondents instituted the instant action in the District Court of Mawanella on 19.08.2003 in order to prevent a parate execution sale taking place on the same date *viz*: 19.08.2003.

The application for interim injunction was supported on 20.08.2003 and the Court issued notice of interim injunction only to be served on the 1st defendant-petitioner. Copy of the notice of interim injunction is marked B which reads as follows:

"මෙහි පහත උපලේඛණයේ සඳහන් මෙම නඩුවට විෂය වස්තුව වූ ඉඩම වෙන්දේසිය පිළිබඳ සියලු ඉදිරි පියවර ගැනීම මෙම නඩුව අවසන් වනතෙක් වළක්වන අතුරු තහනම් නියෝගක් නිකුත් කිරීම පිළිබඳව ඔබ විරුද්ධ වන්නේ නම් වර්ෂ 2003 ක්වූ සැප්තැම්බර් මස 01 දින පෙ. ව. 9.00 ට මෙම අධිකරණය ඉදිරියේ පෙනී සිට එකී විරෝධතා ඉදිරිපත් කරන ලෙසට මෙයින් නියෝග කරනු ලැබේ".

The 1st defendant-petitioner filed his objections and took up the position that the sale had already taken place. The certificate of sale dated 19.08.2003 (on which date the instant action was instituted) was marked D 15. After the conclusion of the inquiry into the application for interim injunction, Court made order allowing an interim injunction and further directed the 1st defendant-petitioner Bank not to take any steps in terms of section 53 of the NDB Act to dispose of or transfer the property.

One of the matters raised by counsel for the 1st defendant-petitioner is that the interim injunction that was issued is much wider than that which was sought for by the plaintiffs-respondents. I would say there is force in this argument. It is to be seen that the interim injunction that was sought by the plaintiffs-respondents was only to prevent the 1st defendant-petitioner Bank from taking any further steps in respect of the auction sale of the property described in the schedule to the plaint. The prayer to the plaint more particularly sub paragraphs ('ඇ', 'ඈ' සහ 'ඊ') of the prayer to the plaint reads as follows :

ඇ. මෙම විෂය වස්තුව ප්‍රසිද්ධ වෙන්දේසියේ විකිණීම තහනම් කෙරෙන සහ වෙන්දේසිය පිළිබඳ ඉදිරි සියලු පියවර ගැනීම තහනම් කරන ඉන්ජන්ෂන් තහනම් නියෝගයක් විත්තිකරුවන්ට එරෙහිව නිකුත් කරන මෙන් ද.

ඈ. මෙම විෂය වස්තුව ප්‍රසිද්ධ වෙන්දේසියේ විකිණීම තහනම් කෙරෙන සහ වෙන්දේසිය පිළිබඳ සියලු ඉදිරි පියවර ගැනීම තහනම් කෙරෙන අතුරු තහනම් නියෝගයක් විත්තිකරුවන්ට එරෙහිව මෙම නඩුව විමසන අවස්ථාව තෙක් නිකුත් කරන මෙන් ද.

ඒ. මෙම විෂය වස්තුව ප්‍රසිද්ධ වෙන්දේසියේ විකිණීම තහනම් කෙරෙන සහ වෙන්දේසිය පිළිබඳ සියලු ඉදිරි පියවර ගැනීම තහනම් කෙරෙන ඉන්ජන්ෂන් තහනම් නියෝග දැන්වීම විත්තිකරුවන් වෙත නිකුත් කරන මෙන් ද.

The interim injunction sought for by the plaintiffs-respondents do not speak of section 53 of the National Development Bank of Sri Lanka Act nor does it speak of transfer of property. The notice of interim injunctions is also in line with paragraph 'ඇ' of the prayer to the plaint. In the circumstances the 1st defendant-petitioner Bank was called upon to show cause only in respect of the interim injunction prayed for by the plaintiffs-respondents. The 1st defendant-petitioner too showed cause only in respect of the interim injunction sought for by the plaintiffs-respondents and notice of which was served on him. However the interim injunction issued as per the order dated 12.01.2004 marked 'H' has enjoined the 1st defendant-petitioner from transferring property in terms of section 53 of the NDB Act. The last sentence of the order reads as follows :

"ඒ අනුව දැනටත් විත්තිකාර බැංකුව විසින් මිලදී ගෙන ඇති මෙම ඉඩම ජාතික සංවර්ධන බැංකු පනතේ 53 වැනි වගන්තිය ප්‍රකාර අත්සතු කිරීම තවතාලමින් විත්තිකරුවන්ට එරෙහිව අතුරු ඉන්ජන්ෂන් තහනමක් නිකුත් කිරීම."

Thus it is to be seen that the interim injunction that has been ultimately issued and the order made by the learned District Judge is much wider than the relief sought by the plaintiffs-respondents themselves. It is settled law that the jurisdiction of Court is limited and restricted to what is prayed for and no other relief could be granted by Court not prayed for.

In the case of *Surangi* vs. *Rodrigo*[1] the facts were :

By her plaint the plaintiff-petitioner claimed a divorce on malicious desertion/constructive malicious desertion. She also averred that a cause of action has accrued to her to recover damages of Rs. 700,000/- by way of permanent alimony. The defendant respondent contended in his answer that, the plaintiff has no right to claim damages. The plaintiff after her evidence was led, raised an issue whether the plaintiff was entitled to permanent alimony in a sum Rs. 700,000/-. This was objected to on the basis that there is no prayer to permanent alimony and no issue had been framed relating to payment of alimony. This was upheld.

On leave been sought :

It was held :

"1. No court is entitled to or has jurisdiction to grant reliefs to a party which are not prayed for in the prayer to the plaint.

2. In the absence of a prayer for alimony, the Court was correct in refusing to allow the petitioner to frame an issue relating to alimony."

Thus it is to be seen that the interim injunction sought for is only to prevent any steps being taken in respect of the auction sale and when the notice of interim injunction was issued the sale had already taken place and the learned district Judge has erred in issuing an interim injunction preventing the 1st defendant-petitioner from taking any steps to auction the property when the sale had already taken place. As Row in his work tiled Law of Injunctions 6th Edition Vol. (1) page 304 states :

"Where events occur after filing of the bill which renders an injunction unnecessary or ineffectual it will ordinarily be refused".

In any event, the learned District Judge has erred in granting an interim injunction which is much wider in scope than what was prayed for and notice that was served on the 1st defendant-petitioner to show cause.

Another matter raised by the counsel for the 1st defendant-petitioner is that the plaintiffs-respondents have quantified their damages and therefore no injunction would lie. It is to be seen that the property mortgaged was to cover a loan of Rs. 3.8 million plus the interest and other charges. The plaintiffs-respondents in any event has as a final relief prayed for damages in a sum of Rs. 10 million as per paragraph 'c' of the prayer to the plaint, three times the loan that was granted by the 1st defendant-petitioner. It appears that the learned District Judge erred in not considering this fact.

It is also contended by counsel for the 1st defendant-petitioner that the learned District Judge erred when he came to a finding that as the property that was sold lies within the jurisdiction of the District Court of Mawanella, the District Court of Mawanella had jurisdiction. Here again as submitted by counsel for the 1st defendant-petitioner the main relief claimed by the plaintiffs-respondents is to prevent the 1st defendant-petitioner Bank from taking steps to effect parate execution of sale of property. The title of the plaintiffs-respondents were never in dispute so was the 1st defendant-

petitioner's rights flowing from the title of the plaintiffs-respondents who mortgaged their rights to the 1st defendant-petitioner. The plaintiffs-respondents are not challenging the manner in which the auction was held.

The learned District Judge in his order has come to a finding that as the property that was sold is situated within the jurisdiction of the District Court of Mawanella, the District Court of Mawanella had jurisdiction. As stated above the main dispute was not in respect of the ownership but was in respect of the 1st defendant-petitioner's decision to proceed with the parate execution. The culmination of the 1st defendant-petitioner taking such steps was based on the resolution that was adopted in Colombo at the address of the 1st defendant-petitioner in Colombo. Thus a cause of action if any would have accrued at the 1st defendant-petitioner's address in Colombo. In the circumstances the District Court of Mawanella had no jurisdiction to hear and determine this action and accordingly no interim injunction could be issued by the Court.

For the foregoing reasons leave to appeal is granted and the order of the learned District Judge dated 12.01.2004 is set aside and the interim injunction will stand dismissed with costs of this application fixed at Rs. 10,000/-.

WIMALACHANDRA, J. — I agree.

Application allowed.
Interim injunction set aside.

NIZAM

vs

NATIONAL DEVELOPMENT BANK

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CA 671/2004 (REV.).
DC COLOMBO 6692/SPL.
SEPTEMBER 16, 2005.

National Development Bank of Sri Lanka No. 2 of 1979, sections 51, 51(2)- Board resolution to sell-public auction - Bought by Bank - Recovery of vacant possession - Non tendering of the original of the alleged certificate of sale - Fatal ?

The petitioner- respondent parate-executed the property in question and at the ensuing public auction the Bank purchased the property, and thereafter filed application in the District Court for the recovery of vacant possession. The respondent-petitioner objected to the grant of the order in favour of the Bank, on the basis that the Bank had failed to comply with section 51(1), as it had failed to tender the original of the alleged cetificate of sale either with the application for delivery of possession of property or at any stage thereafter. The District Court overruled the objection and entered decree *nisi* in favour of the petitioner-respondent and thereafter entered order absolute. The respondent-petitioner moved in revision.

Held:

(1) In order to meet the objection of the respondent-petitioner, the petitioner-respondent Bank should have produced the original certificate of sale.

(2) The defects highlighted in the alleged certificate generates a doubt as to the genuineness of the document and that it is not in the prescribed form - Form B
The purported copy filed is not in conformity with Form B.

(3) The Land Registry extracts produced do not take away the requirement of producing the original certificate of sale.

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

1. *Ikram Mohamed,* PC with *A. T. Shayama Fernando* for respondent-petitioner.

2. *Romesh de Silva,* PC with *Geethaka Gunawardane* for petitioner-respondent.

Cur. adv. vult.

September 16, 2005.

ANDREW SOMAWANSA, J. (P/CA)

The respondent-petitioner by this application is seeking to invoke the revisionary jurisdiction of this Court to set aside the order of the learned District Judge of Colombo dated 09.04.2004 marked A6 and for an order discharging the order *nisi* entered in the instant case and or dismissing the application made by the petitioner-respondent Bank marked A1.

When this matter was taken up for argument both counsel agreed to tender written submissions initially and reserved their rights to make oral submissions thereafter if necessary. However having filed their written submissions both parties invited Court to decide the matter and deliver judgment on the written submissions already tendered.

The relevant facts are as follows : The respondent-petitioner mortgaged his residential premises to the petitioner-respondent Bank by way of preliminary and secondary mortgages for financial facilities obtained in a sum of Rs. 7 million. As there was default in the repayment of the loan the petitioner-respondent Bank passed a resolution to sell the premises by public auction and at the auction, premises in suit were purchased by the petitioner-respondent Bank itself and a certificate of sale bearing no. 413 dated 26.12.2002 is alleged to have been issued in favour of the petitioner-respondent Bank. The petitioner-respondent Bank thereafter filed application in the District Court of Colombo in terms of Section 51 of the National Development Bank of Sri Lanka Act, No. 2 of 1979 as amended for the recovery of vacant possession of the premises by way of summary procedure. Court entered order *nisi* in favour of the petitioner-respondent and the respondent-petitioner filed his objections marked A2 and thereafter amended objections marked A3. Thereafter both parties tendered their written submissions and the learned Additional District Judge of Colombo by his order dated 09.03.2004 marked A over-ruled the objection taken by the respondent-petitioner and made the order *nisi* that has been entered an order absolute. It is from the aforesaid order that the respondent-petitioner has preferred this application for revision.

The thrust of the argument of counsel for the respondent-petitioner in this Court as well as in the original Court was that the petitioner-respondent Bank has failed to comply with the provisions of Section 51(1) of the National Development Bank of Sri Lanka Act, No. 2 of 1979 as amended in that the petitioner-respondent failed to tender the original of the alleged certificate of sale either with the application for delivery of possession of property or at any stage thereafter. The petitioner-respondent in paragraph 4 of their objections filed in this Court admit this fact by saying -

> "The certificate of sale that has been filed in the District Court case was the true copy duly certified by the Notary who attested the same. The original of the said certificate of sale is in the custody of the petitioner-respondent Bank and could be produced at the hearing of this matter".

It is to be noted that right along in the original Court as well as in this Court in their objections that were tendered and also in their written submissions have pin pointed the fact that the alleged certificate of sale has not been produced in Court in terms of secton 51(1) of the National Development Bank of Sri Lanka Act, No. 2 of 1979 and as such the petitioner-respondent in not entitled in law to obtain an order for delivery of possession of property in question. In the circumstances he submits that the impugned order is an order which the learned Additional District Judge was not entitiled in law to make without the original certificate of sale being produced in Court and hence the aforesaid order is contrary to the express provisions of the Act and is an order made without the certificate of sale and should thus necessarily be set aside. I would say there is merit in this submission for in the original Court as well as in this Court the respondent-petitioner raised this objection and it was up to the petitioner-respondent to meet this challenge by producing the original certificate of sale which the petitioner-respondent has failed to do. the averment in the petitioner-respondent's objections in paragraph 4 that the original of the certificate of sale is in the custody of the respondent Bank and could be produced at the hearing of this matter is no averment that could meet the objection of the respondent-petitioner. In order to meet this objection the petitioner-respondent should have produced the original certificate of sale. However the petitioner-respondent has failed to produce the same.

It is useful at this stage to consider the provisions contained in section 51(1) of the aforesaid Act, No. 2 of 1979.

> "The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where that property is situate, and upon production of the certificate of sale issued in respect of that property under section 50, be entitled to obtain an order for delivery of possession of that property".

As submitted by counsel for the respondent-petitioner other defects high lighted in the alleged certificate of sale marked as P3 generates a doubt as to the genuiness of the document marked P3. It is to be seen that the purported seal appearing on the alleged certificate of sale shows that the certificate of sale marked P3 is only a true copy as stated by Attorney-at-Law for the defendant-petitioner-respondent. It is also interesting

to observe that as per the certificate of sale no. 413 marked P3 the attesting Notary is one T. Shihan Anthoneyz. However on top of page 01 of the said certificate of sale his seal has been scored off and Attorney-at-Law and Notary Public Karalliyadda's seal has been placed therein. There is no explanation as to why this was done. It is also contended by counsel for the respondent-petitioner that provisions contained in section 50(3) of the National Development Bank Act has not been complied with as the certificate of sale is not in the form B in the Schedule to the Act which require that the purchase price be mentioned with the words-

> "Which has been duly certified to the Bank in part (or full as the case may be) satisfaction of the sum due as aforesaid'.

Here again it would appear the document marked P3 does not indicate that this requirement has been complied with.

While conceding that the certificate of sale cannot be challenged in a Court of law the question arises as to whether the alleged certificate of sale (a true copy with such anomalies) could be accepted as the certificate of sale. I would answer in the negative in spite of the undertaking given to produce the original. The Land Registry extracts marked P4 does not take away the requirement of producing the original cetificate of sale. In any event, as stated in paragraph 11 of the written submissions of the respondent-petitioner did not or does not seek to invalidate the sale and all what the respondent-petitioner sought to do was to establish that the purported copy of the cetificate of sale filed of record is not in conformity with form B and that the said copy of the certifiate of sale is not a document upon which an order could be obtained for the delivery of possession of the property. Thus it appears that the reasoning of the learned District Judge is erroneous and cannot be permitted to stand.

For the foregoing reasons, I would hold that there are exceptional circumstances for this Court to invoke its extraordinary jurisdiction to allow the instant application for revision of the order of the learned District Judge. Accordingly I would allow the application for revision and set aside the order of the learned District Judge dated 09.04.2004 marked A6 and make order discharging the order *nisi* entered in this case with costs fixed at Rs. 20,000/-.

WIMALACHANDRA, J – I agree.

Application allowed.

JAYARATNE

vs

DIRECTOR GENERAL, CUSTOMS DEPARTMENT AND OTHERS

COURT OF APPEAL.
SRIPAVAN, J. AND
DE ABREW, J.
C. A. 2238/2004.
MARCH 2, APRIL 1, AND MAY 12, 2005.

Writ of certiorari/mandamus - Customs Ordinance, sections 50(d) and 135 - Seizure - Validity? - Import and Export Control Act, No. 19 of 1969 - Importer acting in breach of conditions in lease - Authority given to customs to forfeit goods.

The petitioner- alleging that he is the registered owner of the motor vehicle, bought in good faith and for valuable consideration sought a writ of certiorari, to quash the seizure notice issued under section 135 of the Customs Ordinance.

HELD:

(1) The previous owner of the vehicle in question was one W. One of the conditions subject to which the licences was issued to W. was that the vehicle should not be sold, transferred or otherwise disposed of for a period of five years from the date of registration in Sri Lanka.

(2) The vehicle has been transferred contrary to the conditions subject to which the import licence was issued.

(3) The 1st respondent has the authority to forfeit such goods where the conditions are not complied with-section 50(a) Customs Ordinance.

(4) The seizure notice is not a final determination affecting the rights of parties. The issuance of the seizure notice is not an illegal act or an act which is beyond the authority of the 2nd respondent.

APPLICATION for writ in the nature of certiorari/mandamus.

Case referred to :

Dias vs. *Director General of Customs* (2001) 3 Sri LR. 281.

K. Deekiriwewa for petitioner,

Farzana Jameel, Senior State Counsel for respondents.

Cur. adv. vult.

September 09, 2005

SRIPAVAN, J.

The petitioner alleges that he bought a registered Diesel Mitsubishi Pajero Jeep bearing chassis No. V 46-4044523 in good faith on or about 25.06.2003 for a valuable consideration of Rs. 3.6 Million.

The said jeep was registered in the name of the petitioner as evidenced by the Vehicle Registration Book marked X2. The Learned counsel for the petitioner submitted that the petitioner was served with a seizure notice dated 09.11.2004 issued by the 2nd respondent in terms of section 135 of the Customs Ordinance. It is this notice the petitioner is seeking to quash in these proceedings on the basis that he was a *bona fide* purchaser of the said jeep and even if an offence has been committed, there is no provision under the Customs Ordinance or the Exchange Control Act to deal with such type of situation ; hence any action by the respondents including the seizure was *ultra vires.*

It is manifestly clear from the petitioner's document marked X2 that the previous owner of the vehicle in question was G. N. Wasanthi of No. 18, Mahawewa, Thoduwawa. It is also apparent from the document marked 2R1 that import license was given to the said G. N. Wasanthi by the 3rd respondent to import the said vehicle. The date of issue of the said import license is 03.01.2003, One of the conditions subject to which the license was issued to G. N. Wasanthi was that the vehicle should not be sold, transferred or otherwise disposed of for a period of 05 years from the date of registration in Sri Lanka.

It would appear from the document X2 that the vehicle has been transferred contrary to the conditions subject to which the import license was issued to G. N. Wasanthi.

In terms of section 50(A) of the Customs Ordinance when goods are imported into Sri Lanka under any other law subject to any conditions to be fulfilled after the importation, the 1st respondent has the authority to forfeit such goods where the conditions are not complied with.

Accordingly, the Court is of the view that the 1st respondent has the authority to investigate the manner in which the vehicle in question has been transferred to the petitioner contrary to the conditions laid down in the import license, prior to taking any steps to forfeit the vehicle.

The affidavit filed by the 2nd respondent shows that he had reliable information warranting further probing. As held in *Dias vs. the Director General of Customs*[1] the scheme of the Customs Ordinance recognizes and gives an opportunity to the petitioner from whom the vehicle in question was seized to vindicate himself at a subsequent inquiry.

The Learned Senior State Counsel appearing for the respondents submitted that after importation of the said vehicle the importer acted in breach of the condition of the license based on which the importation was permitted. Further, the Learned Senior State Counsel argued that the details of the vehicle given in column 31 of the Custom's declaration marked 2R5 defer from the exchange copy marked 2R6 submitted to the Registrar of Motor Vehicles.

Accordingly, the Court is satisfied that the 1st respondent is in possession of reliable information warranting further investigation into the matter. The seizure notice issued by the 2nd Respondent is not a final detemination affecting the rights of the petitioner. The Court is also satisfied that the issuance of the said seizure notice is not an illegal act or an act which is beyond the authority of the 2nd respondent. Thus the Court is not inclined to quash the said seizure notice marked X3.

The petitioner also seeks a writ of mandamus to compel the 3rd respondent to validly exercise the powers conferred on him in terms of the import and Export Control Act, No. 01 of 1969. The discretionary remedy of mandamus lies only in case of a breach of any statutory duty by any public authority. The Petition does not disclose a failure of any statutory duties on the part of the 3rd respondent. Thus a writ of Mandamus would not lie against the 3rd respondent.

The petitioner also seeks a writ of prohibition restraining the 1st and 2nd respondents from issuing a fresh seizure notice. A Writ of Prohibition would lie against the said respondents only if there is a total lack of jurisdiction. As observed earlier the 1st and 2nd respondents have acted fairly and reasonably in issuing the impugned seizure notice.

For the aforesiad reasons, the Court does not see any merit in the petitioner's application. The petitioner's application is accordingly dismissed with costs fixed at Rs. 15,000 payable by the petitioner to the respondents in equal shares.

DE ABREW, J. – I agree.

Application dismissed.

RUSHANTHA PERERA

vs

WIJESEKERA

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CALA 110/2005.
DC MATALE 7200/MR.
AUGUST 3, 2005.

Civil Procedure Code, section 93(2) - Amendment of plaint after first date of trial - Circumstances to be taken into consideration - What is the purpose of the Amendment No. 9 of 1991 ?

The plaintiff-petitioner instituted action on a purported cause of action accrued to him on a defamatory statement alleged to have been made by the defendant-respondent. The defendant-respondent specifically took up the position that the action cannot be maintained as the plaintiff-petitioner has failed to properly state the date on which the purported cause of action accrued to him. In his replication the plaintiff-petitioner averred that, he has properly stated the dates on which the causes of action accrued to him. Thereafter the

plaintiff-petitioner sought to amend the plaint on the second date of trial to give the relevant date. The trial judge refused the said application.

HELD:

(1) The provisions applicable to the amendment of pleadings after the first date of trial are the provisions contained in section 93(2) of Act No. 9 of 1991.

Per Somawansa, J. (P/CA) :

"In the instant application for leave the amendments the plaintiff-petitioner is seeking to effect are matters which existed at the time of the plaintiff filing the action and within his knowledge and/or was made aware by the defendant-respondent."

(2) The plaintiff has waived his right to amend the plaint by his averments in his replication.

(3) The amendment introduced by Act, No. 9 of 1991 was clearly intended to prevent the undue postponement of trials.

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

Case referred to :

(1) *Dane* vs. *Abdul Latiff* (1995) 1 Sri LR. 225
(2) *Ceylon Insurance Co. Ltd.* vs. *Nanayakkara* (1999)3 Sri LR 50
(3) *Colombo Shipping Co. Ltd* Vs. *Chiaya Clothing (Pvt) Ltd.* (1995)2 Sri LR 97
(4) *Avudiappan* vs. *Indian Overseas Bank* (1995)2 Sri LR 131
(5) *Kuruppuarachchi* vs. *Andreas* (1996) 2 Sri LR 11
(6) *Ranaweera* vs. *Jinadasa* - SC Application 4/91
(7) *Paramalingam* vs. *Sirisena and Another* (2001)2 Sri LR 239

Upul Ranjan Hewage for plaintiff-petitioner.

C. Wickramanayake for defendant-respondent.

Cur. adv. vult.

November 11, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application seeking leave to appeal from the order of the learned Additional District Judge of Matale dated 10.03.2005 refusing an application made by the plaintiff-petitioner to amend the plaint and if leave is granted to set aside the aforesaid order and allow the application dated 30.11.2004 for amendment of the plaint.

When this application was taken up for inquiry both parties agreed to resolve the entire matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are on 30.11.2004 which was the second date of trial two admissions were recorded and on behalf of the plaintiff-petitioner 10 issues were raised. Thereafter counsel for the plaintiff-petitioner made an application to amend the plaint.

The defendant-respondent objected to this application and parties were directed to tender written submissions. Having considered the written submissions so tendered by both parties the learned Additional District Judge by his aforesaid order dismissed the plaintiff-petitioner's application to amend the plaint. It is from this order that the plaintiff-petitioner has preferred this appeal.

It is contended by counsel for the plaintiff-petitioner that the learned Additional District Judge has erred in law when he made the impugned order for the following reasons :–

(a) Additional District Judge has failed to consider the grave and irremediable injustice that would be caused to the plaintiff-petitioner if the application for amendment was not granted.

(b) He has failed to give any reasons as to whether grave and irremediable injustice would not be caused to the plaintiff-petitioner if his application for amendment was not granted.

(c) That he failed to consider that the amendment sought to be made was to correct a genuine and *bona fide* error in the plaint for the purpose of clarifying the true dispute and by his request to replace the wrong month

with the correct month the plaintiff-petitioner was not trying to convert the action of one character to an action of a different character.

(d) That he erred in law when he came to a finding that it was held in *Gunasekera vs. Abdul Latiff* that an amendment cannot be allowed to correct a clerical error or a typographical error in terms of section 93(2)of the Civil Procedure Code.

(e) That he failed to consider that the real date of alleged cause of action is mentioned in document marked P1 annexed to the plaint and that it is also referred to in paragraph 7 of the plaint and any amendment would only clarify the real dispute.

(f) That he has erred in law inasmuch as he has considered the aspect of delay without first considering whether grave and irremediable injustice would be caused to the plaintiff-petitioner if his application for amendment is refused.

It is interesting to note that the plaintiff-petitioner has instituted this action on a purported cause of action accrued to him on a defamatory statement alleged to have been made by the defendant-respondent as pleaded in paragraph 7 of the plaint which reads as follows :

07. නඩු නිමිත්ත සඳහා

වර්ෂ 2002ක් වූ සැප්තැම්බර් මස 31 වැනි දින පල්ලේපොල ප්‍රාදේශීය සභාවේ මහා සභා රැස්වීම පැවැත්වූ බව පැමිණිලිකරු ප්‍රකාශ කර සිටී. එකී මහා සභා රැස්වීමේදී විත්තිකාර ජේ. එස්. විජේසේකර මහතා පැමිණිලිකරු සම්බන්ධයෙන් පහත ප්‍රකාශය කළ බව පැමිණිලිකරු ප්‍රකාශ කර සිටී.

The defendant-respondent filed answer denying the averments contained in the aforesaid paragraph 7 of the plaint and in paragraph 9 of the answer specifically took up the position that the plaintiff-petitioner cannot maintain this action as presently constituted inasmuch as the plaintiff-petitioner has failed to properly state the date on which the purported cause of action accrued to him. Paragraph 9 of the answer reads as follows :

9. ඉහත කරුණුවලට අගරනිතව මෙම විත්තිකරු ප්‍රකාශ කර සිටිනුයේ පැමිණිලිකරුට නඩු නිමිත්තක් උද්ගතවී ඇත්තේ නම් එසේ උද්ගත වූවායැයි කියනු

ලබන නිමිත්ත උද්ගත වූ දිනයක් පැමිණිල්ලේ නිශ්චය ලෙස දන්වා නොමැති හෙයින් පැමිණිලිකරුට මෙම නඩුව පවරා ඇති ආකාරයෙන් පවරා පවත්වාගෙන යා නොහැකි බවයි.

It appears that thereafter the plaintiff-petitioner disputed the aforesaid position taken by the defendant-respondent and in paragraph 3 of the replication the plaintiff-petitioner further stated that by paragraphs 7 and 11 of the plaint he has separately averred the causes of action and that he has properly stated the dates on which the causes of action accrued to him. Paragraph 3 of the replication reads as follows :

විත්තිකරුගේ උත්තරයේ 9 වන ඡේදයට වැඩිදුරටත් පිලිතුරු දෙමින් පැමිණිලිකරු ගරු අධිකරණයට ගෞරවයෙන් ප්‍රකාශ කර සිටිනුයේ පැමිණිල්ලේ 7 වන සහ 11 වන ඡේදවලින් අදාල නඩු නිමිති වෙන් වෙන්ව විස්තර කර නිවැරදි කාල වකවානු එහි නිශ්චිතව දක්වා ඇති බවයි.

Thus it could be seen that when the defendant-respondent in paragraph 9 of his answer specifically stated that the plaintiff-petitioner has failed to properly state the date on which the purported cause of action accrued to him the plaintiff-petitioner without seeking to amend the plaint so as to give the correct date, in fact disputed the aforesaid position taken by the defendent-respondent and went on to state in his replication that by pargraphs 7 and 11 of the plaint he has stated correctly the dates on which the causes of action accrued to him. Having taken such a stand he now seeks to amend paragraph 7 of the plaint by substituting the words "October 2002" instead of the words "September 2002" found therein.

It is common ground that the plaintiff-petitioner has sought to amend the plaint on the second date of trial and the relevant provisions applicable to the amendment of pleadings after the day first fixed for trial are the provisions contained in Section 93(2) of the Civil Procedure Code which reads as follows :

93. (2) "On or after the day first fixed for the trial of the action and before final judgement, no application for the amendment of any pleadings shall be allowed unless the court is satisfied for reasons to be recorded by the court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches".

Section 93(2) of the Civil Procedure Code has been considered in a number of cases and in the case of *Gunasekera vs. Abdul Latiff*[1] cited by counsel for the plaintiff-petitioner himself it was held :

"Court will grant relief under section 93(2) of the Civil Procedure Code only if the delay can be reasonably explained. The provisions of section 93(2) of the Civil Procedure Code are intended to be used when amendments to pleadings are necessitated by unforeseen circumstances. Further it was held amendment to pleadings on or after the 1st date of trial can be allowed only if the Court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party applying has not been guilty of laches."

Counsel for the plaintiff-petitioner while relying heavily on the aforesaid decision goes onto say that the facts and circumstances of that case *Gunasekera vs. Abdul Latiff (supra)* are entirely different from the instant action. Counsel for the plaintiff-petitioner also cited the decision in *Ceylon Insurance Co. Ltd.*, vs. *Nanayakkara*[2]. The facts were as follows :

The plaintiff-respondent instituted action against the defendant-petitioner claiming a certain sum due on a contract of insurance. The defendant disclaimed liability. Trial commenced on 28.07.95 ; after recording issues, it was postponed for 16.10.95. On this date certain objections were taken and when the trial resumed again on 09.01.97 a trial *de novo* was ordered on 13.05.97. On 07.05.97 the plaintiff sought to amend his pleadings, which was allowed by Court.

It was held in that case :

"1. section 93 (2) prohibits Court from allowing an application for amendment, unless it is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party applying has not been guilty of laches.

The Court is required to record reasons for concluding that both conditions referred to have been satistied.

2. The application to amend by pleading mistake or inadvertence can in no sense be regarded as necessitated by unforeseen circumstances. The plaintiffs' conduct point to one conclusion, viz. that they have acted without

due diligence " this error could have been discovered with reasonable diligence ; the need for the amendment did not arise unexpectedly.

It is contended by counsel for the plaintiff-petitioner that the requirement that the application to amend pleadings on the basis of mistake or inadvertence should have been necessitated by unforeseen circumstances as held in the aforesaid case has introduced a restriction not imposed by legislature.

In the case of *Colombo Shipping Co. Ltd.*, vs. *Chirayu Clothing (Pvt) Ltd.*,[3] it was held :

"Amendments on and after the first date of trial can now be allowed only in very limited circumstances namely, when the court is satisfied that grave and irremediable injustice will be caused, if the amendment is not permitted and the party is not guilty of laches".

Also in the case of *Avudiappan* vs. *Indian Overseas Bank*[4] it was held :

"The amendments contemplated by section 93(2) are those that are necessitated due to unforeseen circumstances. Laches does not mean deliberate delay, it means delay which cannot be reasonably explained. The plaint was filed in July 1988, the amendment was sought in September 1994. No explanation was forthcoming from the respondent for the delay. Such a delay in seeking amendment of pleadings on the 5th day of trial cannot be countenanced."

In the case of *Kuruppuarachchi* vs. *Andreas*[5] wherein the Court considered the effect of the amendment introduced to the Civil Procedure Code by Act No. 9 of 1991 :

"The amendment introduced by Act No. 9 of 1991 was clearly intended to prevent the undue postponement of trials by placing a significant restriction on the power of court to permit amendment of pleadings 'on or after the day first fixed for trial of the action".

The Court further went on to state at page 13 that :

"The relevance of those observations for the present purposes is that they indicate the rationale underlying the amendment introduced by Act No. 9 of 1991. While court earlier "discouraged" amendment of pleadings on the date of trial. Now the court is precluded from allowing such amendments save on the ground postulated in the subsection." (emphasis added)

I would also cite the following decisions :

Ranaweera vs. *Jinadasa*[6]

Per Amerasinghe, J.

"No postponements must be granted or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot otherwise be provided for."

Also in the case of *Paramalingam* vs. *Sirisena and Another*[7] it was held :

"Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent".

In the instant application for leave the amendments the plaintiff-petitioner is seeking to effect are matters which existed at the time of the plaintiff-petitioner filing this action and within his knowledge and/or was made aware by the defendant-respondent. The plaintiff-petitioner now cannot be heard to say that the date on which the purported cause of action accrued to him was another date. In the circumstances, I am unable to see how grave and irremediable injustice would be caused to the plaintiff-petitioner unless the amendment is accepted by Court. It is very clear the plaintiff-petitioner has waived his right to amend the plaint by his averments in his replication. It is apparent that the learned Additional District Judge in a closely considered order has come to a correct finding that the plaintiff-petitoner's own conduct prevents him from amending the pleadings in terms of section 93(2) of the Civil Procedure Code.

In the circumstances, I do not think any further consideration is necessary as to the submissions made by counsel for the plaintiff-petitioner. I have no hesitation in rejecting the application for leave with costs fixed at Rs. 20,000/-.

WIMALACHANDRA J. – I agree.

Application dismissed.