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DIGEST

CONTRACT OF TENANCY – Best test – Best evidence – Proof of payment of rent – Rent receipts – Prima facie proof – Interference with tenants' enjoyment of property by owner / landlord - Termination by illegal methods.

Market Makers (Private) Ltd. vs. D. N. Perera 132

PARTITION LAW, NO. 21 OF 1977 – sections 26(2), 32 and 36(1)(a)-Judgment entered-Partition according to the interlocutory decree-Scheme of Inquiry-Court ordered sale of a Lot-Is it permissible ?

Leelawathie vs. Abeykoon and others 127

WRIT OF CERTIORARI -

(1) Resolution passed to parate execute property - Stamp Duty Act, section 16 - Can the Bank recover anything other than the consideration secured under the Mortgage Bond?

Dayaratne vs. State Mortgage and Investment Bank 138

(1) Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971–Application under sections 5 and 6 – Termination of employees while the application to terminate was pending before the Commissioner - Legality ? Employer terminating the services of the employee without permission from Commissioner of Labour –Could compensation be awarded ? – Difference between a section 5 order and a section 6 order – Termination retrospectively.

Pradeep vs. Skyspan Asia (Pvt) Ltd and Others 121

WRITS OF CERTIORARI AND MANDAMUS –Registration of Documents Ordinance, sections 26(1) and 36(1)(a), 38 –Alienation of Sangika property – Refusal by Registrar to register deed –Alternative remedy not exercised – Maintainability of the application ? – Laches ? – Is it fatal ? Sangika property – Gihi Santhaka property - Distinction

Rev. Maussagolle Dharmarakkitha Thero and Another vs. Registrar of Lands and Others 102

CM 7219-2,500(2007/02)

REV. MAUSSAGOLLE DHARMARAKKITHA THERO AND ANOTHER
vs
REGISTRAR OF LANDS AND OTHERS

COURT OF APPEAL.
SRIPAVAN, J AND.
SISIRA DE ABREW, J.
CA 1152/2004.
MARCH 17, 2005.

Writs of certiorari and mandamus –Registration of Documents Ordinance, sections 26(1) and 36(1)(a), 38 –Alienation of Sangika property – Refusal by Registrar to register deed –Alternative remedy not exercised – Maintainability of the application ? – Laches ? – Is it fatal ? Sangika property – Gihi Santhaka property - Distinction

One N donated the property in question to the 2nd petitioner – priest (P1) : the 2nd petitioner priest donated the said property to the 1st petitioner priest (P4) both deeds were attested by the 3rd respondent; when the 3rd Respondent presented the latter deed (PA) for registration the Registrar acting under section 36(a) of the Registration of Documents Ordinance refused to register the said deed.

The petitioner sought to quash the said decision of the 1st respondent, Registrar of Lands and further sought a writ of mandamus compelling the 1st respondent to register the said deed.

Held :

(1) When N gifted the property by P1 she gifted the property to the 2nd petitioner and the Maha Sanga as Sangika property as per the deed ; as the 2nd petitioner derived his title from deed P1 the respondent Registrar of Lands could refuse to register the said deed under section 36(1)(a). The 1st respondent had reasons to suspect that the person who presented P4 for registration was not a person who was authorized by the Ordinance.

(2) The petitioner had a right of appeal against the decision of the 1st respondent –section 38(1). The petitioners have not used the alternative remedy –it is fatal. The petitioners have slept over their rights for 8 1/2 years.

(3) Sangika dedication is not the only mode of acquisition of property of a temple. A temple could acquire property by the ordinary modes of acquistion without a ceremony conducted according to the Vinaya.

APPLICATION for a writ of certiorari/mandamus,

Cases referred to :

(1) *Gunasekera* vs. *Weerakoon* 73 NLR 262
(2) *Baldwin & Francis Ltd vs. Patent Appeal Tribunal and others* (1959) 2 ALL 433
(3) *Rodrigo* vs. *Municipal Coundil of Galle* 49 NLR 89
(4) *Obeysekera* vs. *Abeysekera and Others* 78-79 2 SLR 220
(5) *Jayaratne* vs. *Assistant Commissioner of Agrarian Services* 1996 2 Sri LR 70
(6) *Sarath Hulangamuwa* vs. *Siriwardane* –Principal, Vishaka Vidyalaya and another 1986 1 Sri LR 275
(7) *Biso Menika* vs. *Cyril Alwis* (1982) 1 Sri LR 368
(8) *Hopman and others* vs. *Minister of Lands and Land Development and others* 1994 2 Sri LR 240
(9) *Regina vs. Aston University Senate* (1969)2 Q 3538 at 555
(10) *Kampane Gunarate Thero vs Mawadawila Pannasena Thero* 1998 2 Sri LR 196
(11) *Ven. Omare Dharmapala Thero vs. Rajapaksage and others* 2004 1 Sri LR 1

Chandraratne for Petitioner,

M. N. Idroos, State Counsel for respondent.

Cur. adv. vult.

May 02, 2005
SISIRA DE ABREW J.

This is an application for writs of certiorari and mandamus. Facts of this case may be summarized as follows :

Baba Nona, by deed No. 3000 dated 15th March 1994 attested by the 3rd respondent marked P1, donated the property described in the said deed to the 2nd Petitioner who was a priest. The 2nd Petitioner by deed No. 3062 dated 01st February 1995 attested by the 3rd Respondent marked P4, donated the said property to the 1st Petitioner. When the 3rd Respondent, the Notary Public, presented P4 for registration the 1st respondent, the Registrar of Lands, Gampaha, acting under section 36(1)(a) of the Registration of Documents Ordnance hereinafter referred to as the ('said Ordinance') refused to register the deed P4. The 1st Respondent

communicated his decision to the 3rd Respondent by his letter dated 06.07.1995 (P8). The Petitioners are now seeking to quash the said decision of the 1st Respondent contained in P8 by way of a writ of certiorari. The petitioners are also seeking a writ of mandamus compelling the 1st Respondent to register the said deed P4 in the relevant registers of the Land Registry of Gampaha.

It is necessary to examine section 36 (1) (a) of the said Ordinance since the 1st Respondent has acted under this section. Section 36(1)(a) of the said Ordinance reads as follows :

"A registrar may, if he thinks fit, refuse to register an instrument,

(a) Where he has reason to suspect that the person presenting the Instrument for registration is not a person who is authorized by this Ordinance to present it for registration, until such person proves his right to present it for registration".

"A person who is authorized by the Ordinance" is described in section 26(1) of the said Ordinance. Section 26(1) of the said Ordinance reads as follows :

"An instrument may be presented for registration by

(a) any person executing the instrument :
(b) any person claiming any interest or benefits thereunder
(c) any person having any interest in or charge on any property affected thereby ; or
(d) the agent of any such person or an Attorney-at-Law or Notary, acting on behalf of any such person."

In the case before us the 2nd Petitioner is the donor and the 1st Petitioner is the donee of the property described in P4. Therefore Petitioners can be categorized as persons described in paragraphs (a), (b) and (c) of section 26(1) of the said Ordinance. When the 3rd Respondent, the Notary Public presented the deed for registration it is clear that he acted on behalf of the 1st and the 2nd Petitioners. This position is very clear when section 26 (1) of the said Ordinance is examined. It is now necessary to consider whether the 1st Respondent had reasons to suspect that the person, who presented the deed marked P4 for registration, was not a person who was authorized by the said Ordinance.

At the hearing of this application, learned Counsel for the Petitioners and the Respondents admitted that Sangika Property cannot be alienated which is the true position. When Baba Nona gifted the property by deed marked P1, she gifted the property to the 2nd Petitioner and Maha Sanga as Sangika Property. This conveyance is written in the deed marked P4. According to deed No. 3062 (P4) the registration of which was refused by the 1st Respondent, the 2nd Petitioner derived title to the property from deed marked P1. According to P1 Baba Nona gifted the property to the 2nd Petitioner and Maha Sanga. Considering these facts, when deed P4 was presented for registration, the 1st Respondent had reasons to believe that this property was Sangika property and as such he (the 1st Respondent) had reasons to suspect that the 3rd respondent who presented P4 for registration, was not a person authorized by this Ordinance.

When the 1st Respondent had reasons to suspect that the 3rd Respondent was not authorized to present P4 for registration ; specially after P8, the letter refusing registration, was sent to the 3rd Respondent, it becomes the duty of the 3rd Respondent who acted on behalf of the 1st and the 2nd Petitioners to prove his right to present deed P4 for registration. There in no evidence before this Court that the 3rd Respondent proved such right.

In view of the above facts, I hold that the refusal by the 1st Respondent to register deed P4 in the relevant registers of the Land Registry, which decision is contained in P8, is correct and the 1st Respondent has acted within the ambit of Law. Therefore the Petition of the Petitioners should fail on this ground alone.

The Petitioners had a right of appeal against the decision of the 1st Respondent contained in P8. This right has been given to them under section 38(1) of the said Ordinance. The learned Counsel for the Petitioners contended that the Petitioners were unaware of the decision made by the 1st Respondent refusing to register the deed P4. The Commissioner of Buddhist Affairs, by his letter dated 16.06.1995 marked P7, informed the 3rd Respondent a copy of which was sent to the 1st Petitioner that transfer of property by deed No. 3062 (P4) could not be approved since the property was Sangika property. The petitioners, in their petition have admitted this position. Therefore it is safe to conclude that the 1st petitioner was aware of the decision of the Commissioner of Buddhist Affairs who is the 2nd respondent. Then it was within the knowledge of the 1st Petitioner that the

1st Respondent was going to refuse the registration of deed P4. For these reasons, I am unable to agree with the above contention of the learned Counsel for the Petitioners.

In view of the above facts it is clear that the Petitioners have not used the right of appeal given to them under section 38 (1) of the said Ordinance. The Petitioners have, therefore, not used the alternative remedy available to them.

In the case of *Gunasekera Vs. Weerakoon*[1] the petitioner applied for writs of certiorari and mandamus to enhance the compensation awarded to him seven months after the impugned decision. Sirimanna J held that the application should be refused because (a) the petitioner was guilty of undue delay in making the application ; and (b) the petitioner had an alternative remedy.

In the House of Lords Case of *Baldwin & Francis Ltd. Vs. Patents Appeal Tribunal and Others*[2] Lord Denning remarked as follows :

> "I am prepared to assume that the appellants are aggrieved, but as they have another remedy open to them, the Court in its discretion, should refuse a certiorari".

In the case of *Rodrigo Vs. The Municipal Council Galle*[3] it was held that the writ of mandamus would not lie for the reason that the petitioner had an equally effective remedy by civil action.

In the case of *Obeysekera Vs. Abeysekera & others*[4] Soza J. stated that "certiorari is a discretionary remedy and will not normally be granted unless and until the plaintiff has exhausted other remedies reasonably available and equally appropriate".

Since the Petitioners have not made use of the alternative remedy available to them, I hold that the Petitioners are not entitled to the relief claimed.

The petition of the Petitioners was first filed in this Court on 20.05.2004. The petitioners, by this application, seek to quash a decision taken in July 1995 (P8). Thus the Petitioners have invoked the jurisdiction of this Court after a lapse of 8 1/2 years. Therefore it is necessary to consider whether

the Petitioners are guilty of undue delay. The 1st Petitioner alleges that the delay in filing this application was due to his studies. He completed his Post Graduate Diploma in 1998 ; and followed a masters degree during 1998 to 2000. From 2000 to 2003 he was engaged in Thripitaka Dharma and meditation. As pointed out earlier when Commissioner of Buddhist Affairs informed him by letter dated 16.06.1995 (P7) that the transfer of property by deed No. 3062 (P4) could not be approved ; it was within his knowledge that the 1st respondent was going to refuse the registration of the deed (P4).

In view of the above facts it is difficult to believe that he was unaware of the decision of the 1st Respondent. On receipt of P7, the 1st Petitioner would have made inquiries from the 3rd Respondent, for that matter I must state here that any ordinary person would have made inquiries from the Notary Public. There is no evidence before this Court that in the year of 1995 he was engaged in studies. Then the question arises why he did not move this Court to quash the decision of the 1st respondent during the latter part of the year 1995. I am unable to agree with the contention that the 1st Petitioner could not come to this Court due to his studies. In my view, the 1st Petitioner has slept over his rights for 8 1/2 years. No evidence whatsoever was placed before this Court to justify the delay on the part of the 2nd Petitioner. For the above reasons, I hold that the Petitioners are guilty of undue delay. In the case of *Jayaweera* Vs. *Assistant Commissioner of Agrarian Services*[5] Jayasuriya J. remarked, "A petitioner who is seeking relief of a writ of certiorari is not entitled to relief as a matter of course, as a matter right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct, delay laches, waiver, submission to jurisdiction–are still valid impediments which stand against the grant of relief". Jayasuriya J. refused the application for writ of certiorari as there was a delay of over 2 1/2 years since making the order challenged.

In the case of *Sarath Hulangamuwa vs. Siriwardena, Principal Visakha Vidyalaya & Others*[6] Petitioner made an application for writs of certiorari and mandamus seeking to quash orders refusing the application of the petitioner to admit his child to Visakha Vidyalaya and for an order directing the respondents to admit the child to the school. The application for writs of certiorari and mandamus was made 10 months after the refusal. Siva Selliah J. observed that there has been undue delay in the making of the application and the Court cannot possibly make an order which manifestly

cannot be carried out as the child will be over aged for the Kindergarten and has already been accommodated at Bishop's College.

In the case of *Gunawardena* Vs. *Weerakoon (supra)* one of the reasons to refuse the application for writ of certiorari and mandamus was the seven months delay. In *Biso Menika* Vs. *Cyril de Alwis*[7] Sharvananda J. held, that "writ of certiorari lies at the discretion of Court and will not be denied if the proceedings were a nullity ; even if there is delay especially where denial of the writ is likely to cause great injustice, it will be issued". It would therefore be seen that delay will not operate as a bar to the issue of writ of certiorari or mandamus if the impugned decision is a nullity. Kulatunga J. in the case of *Hopman and Others Vs. Minister of Lands and Land Development and Others*[8] did not follow the decision in Biso Menika's case *(supra)* and upheld the objection of undue delay since the impugned decision was not a nullity. In this judgment, I have, else where, held that the refusal by the 1st respondent to register the deed P4 (impugned decision) is correct and the 1st respondent had acted within the law. Therefore the decision in Biso Menika's case *(supra)* has no application here. Since the Petitioners are guilty of undue delay the application of the Petitioners should fail on this ground alone.

I have earlier pointed out that the petitioners have slept over their rights. In the case of *Regina vs. Aston University Senate*[9] at 555 Donaldson J (Lord Parker CJ and Blain J agreeing) held that "the prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights." Applying the aforementioned legal principle to the facts of the present case, I hold that the prerogative writs applied for are not available to the petitioners who have slept over their rights.

The learned Counsel for the Petitioners contended that the refusal to register the deed P4 by the 1st Respondent on the purported ground of Sangika property was wrong. He further contended when Baba Nona gifted the property to the 2nd Petitioner no formal ceremony was performed and as such property cannot be defined as Sangika property. It was the contention of the learned Counsel that even if the property was gifted to Maha Sanga if there was no formal ceremony, the property does not become Sangika Property. To strengthen his contention he cited the case of *Kampane Gunaratne Thero* Vs. *Mawadawila Pannasena Thero*[10] where Hon. Chief Justice G. P. S. de Silva held that, "As the deed of dedication had not been accompanied by a solemn ceremony in the presence of 4 or

more monks representing the 'Sarva Sanga' or entire priesthood' as prescribed in vinaya, the temple and it's property did not become Sangika property. The title to the property remains with the State. In other words property remains *Gihi Santhaka*". The above judgment was distinguished by Hon. Justice Bandaranayake in the case of *Ven. Omare Dharmapala Thero Vs. Rajapaksege Peiris and Others*[11] Bandaranayake J at 15 remarked that "offerings to a temple could include a rupee coin put into a till box or offerings such as bed sheets, plates, cups etc. for the use of priests. In each of these instances, the dedication may not be accompanied by a solemn ceremony in the presence of 4 or more priests who represents sarva sanga or entire priesthood with the ceremony of pouring water. Does this mean, purely because of the absence of such a ceremony, the dedication to the temple by a devotee would remain as *gihi santhaka* depriving him of his devotion and acquiring the merits of his benefaction? I do not think so. Such an interpretation would deprive the good intention of a devotee who has no intention of retaining the ownership of what he has already donated to the temple".

As pointed out earlier, Baba Nona by deed P1 donated the property to the 2nd petitioner who was a priest and to Maha Sanga. In the case before us, if the contention of the learned Counsel for the petitioner is to be accepted, we would be depriving Baba Nona from acquiring merits of her benefaction. Can we do it here at these proceedings without having the benefit of reading Baba Nona's evidence ? The answer is clearly 'No'.

In *Omare Dharmapala Thero* Vs *Rajapakshalage Peiris and Others (supra)* Bandaranayake J at 16 further stated that "when this case is examined in the light of aforementioned facts and circumstances, it is clear that there is no material to indicate that at the time the property was purchased on behalf of the temple, there was no such ceremony to dedicate the said property to the sarva sanga according to the vinaya. However sangika dedication is not the only mode of acquisition of property by a temple. A temple could acquire property by the ordinary civil modes of acquisition without a ceremony conducted according to the vinaya as happened in this case".

When the facts of the present case are considered with the aforementioned legal principles in *Omare Dharmapala Thero's Case (supra)*, the contention of the learned Counsel for the Petitioner that when the

property is gifted to Maha Sanga, without a formal ceremony being conducted that it does not become Sangika Property, is untenable.

For the above reasons, I dismiss the application of the petitioners. There will be no costs.

SRIPAVAN, J – I agree.

Application dismissed.

PRADEEP

vs

SKYSPAN ASIA (PVT) LTD AND OTHERS

COURT OF APPEAL
IMAM, J. AND
SRISKANDARAJAH, J.
CA 2045/2003 (WRIT)
MAY 19, 2005

Writ of certiorari – Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971–Application under section 5 and 6 – Termination of employees while the application to terminate was pending before the Commissioner - Legality ? Employer terminating the services of the employee without permission from Commissioner of Labour –Could compensation be awarded ? – Difference between a section 5 order and a section 6 order – termination retrospectively.

The 1st respondent employer made an application seeking permission from the Commissioner to terminate the services of the employees ; while the inquiry was pending the wages of the employee were stopped. The employees complained that their services were terminated without permission of the Commissioner. This was inquired into and after inquiry, the Commissioner after holding that the services of the employees were terminated without consent of the employees and further as the employer had not obtained prior approval of the Commissioner, awarded compensation to the employees.

The petitioners sought to quash the said order and a direction to the Commissioner to make an order under section 6 against the 1st respondent employer.

HELD:

(1) The Commissioner had held that the termination of the employment of the employees is null and void ; if so then the employees are deemed to be in service.

(2) The Commissioner's power under section 6 is to specify a date for the employees to report for work and direct the employer to continue to employ the workmen with effect from that date in the same capacity in which the workmen were employed prior to such termination and to pay the workmen their wages and all other benefits which the workmen would have otherwise received if their services had not been so terminated.

(3) Construction of section 6 read with section 5 does not empower the Commissioner to grant permission to the employer to terminate the services of the employee and to order compensation.

(4) The Commissioner has no reason to order compensation in lieu of ordering the employer to continue to employ the workman.

(5) The 1st respondent had made an application seeking permission to terminate the services of the employees under section 2 (b), and it appears that the Commissioner had amalgamated the section 2 (b) application and the complaint made by the employees under section 6 and had made the impugned order.

HELD FURTHER :

(6) The Commissioner had by the impugned order granted approval to terminate the employment of the workmen petitioners retrospectively which the Commissioner is not empowered to do.

(7) There is no provision in the Act to deal with a situation where the employee has become incapable of assuming duties due to various circumstances at the time of the determination of the Commissioner that the employer had terminated the services of the employee in contravention of the Act.

APPLICATION for writs in the nature of certiorari/mandamus.

Case referred to :

(1) *Eksath Kamkaru Samithiya vs. Commissioner of Labour 2001 2 Sri LR 137 at 142 & 155.*

(2) *Blanka Diamonds (Pvt.) Ltd. vs. Coeme 1996 1 Sri LR 200 at 2005*

(3) *Lanka Multi Moulds (Pvt.) Ltd. vs. Wimalasena, Commissioner of Labour and others 2003 1 Sri LR 143*

S. Sinnathamby with *Jayanthy Ganashamoorthy* for petitioners.
Gomin Dayasiri with *S. Gamage* for 1st respondent.
Sumathi Dharmawardane, State Counsel for 2nd and 3rd respondents.

Cur. adv. vult.

June 22, 2005.
SRISKANDARAJAH, J.

The Petitioners in this application have sought a writ of certiorari to quash the Order of the 3rd Respondent dated 16.07.2003 and a mandamus directing the 3rd Respondent to make an order under section 6 against the 1st Respondent.

The Petitioners and the 4th and 5th Respondents (hereinafter referred to as employees) were employed by the 1st Respondent. The 1st Respondent made an application on 22.11.2002, seeking permission from the Commissioner of Labour to terminate the services of the employees. An inquiry was held by the Deputy Commissioner of Labour Daya Senaratne. While the inquiry was pending, the wages of the employees was stopped by the 1st Respondent from April 2001. The employees complained to the Commissioner of Labour by letter dated 22.05.2001 P2, that their services have been terminated without the permission of the Commissioner in contravention of the provisions of the Termination of Employment of Workmen (Special Provisions) Act. The Deputy Commissioner of Labour proceeded to inquire into the complaint of the employees. The Deputy Commissioner after a protracted inquiry on the aforesaid complaint of the employees made order on 16.07.2003 P11. In his order he has come to the conclusion that the 1st Respondent when terminating the services of the employees had neither obtained written consent of the workmen nor

obtained prior approval of the Commissioner of Labour ; therefore the 1st Respondent violated the provisions of the Termination of Employment of Workmen (Special Provisions) Act. Thereafter he has proceeded to award compensation to the employees calculated on the basis of two-month salary for each completed year of services.

Section 5 of the Termination of Employment of Workmen (Special Provision) Act, provides ; where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever. The Deputy Commissioner in his order P 11 has come to the conclusion that the 1st Respondent (Employer) has terminated the employment of the employees in contravention of the provisions of the said Act. Therefore the termination is illegal, null and void and of no effect whatsoever. If the termination of the employment of the employees is null and void then the employees are deemed to be in service. The Commissioners power under section 6 is to specify a date for the employees to report for work and to direct the employer to continue to employ the workmen, with effect from that date in the same capacity in which the workmen were employed prior to such termination, and to pay the workmen their wages and all other benefits which the workman would have otherwise received if his services had not been so terminated. The construction of section 6 read with section 5 does not empower the Commissioner to grant permission to the employer to terminate the services of the employee and to order for compensation. In *Eksath Kamkaru Samithiya* vs. *Commissioner of Labour*[1] U. de. Z. Gunawardane, J. observed :

"Section 5 renders any termination of employment in contravention of the relevant Act absolutely illegal. And section 6 states that the Commissioner "may order the employer to continue to employ the workmen" in case the termination was in breach of the provisions of the Act. Although the word "may" taken in isolation express permission or liberty, yet that term "may" acquires a compulsory force in circumstances where, a duty devolves on the authority to exercise that power which that authority was permitted or enabled by the statute to exercise"

U. de. Z. Gunawardane, J held :

"The Commissioner will bear in mind, as noted above, that the duty to reinstate the workmen, as are the other duties *i. e.* to pay

"wages and other benefits" imposed upon him under section 6 of the Act, is mandatory and compulsory and that there is no option in the matter"

However, there is no provision in the Act to deal with a situation where the employee has become incapable of assuming duties due to various circumstances at the time of the determination of the Commissioner that the employer had terminated the services of the employee in contravention of the Act. The Courts have interpreted the word "may order" in section 6 in these circumstances empowering the Commissioner to order compensation instead of ordering the employer to continue to employ the workman. In *Blanka Diamonds (Pvt) Ltd.* vs *Coeme*[2] at 2005 Senanayake J observed :

"The Commissioner in terms of section 6 of the T. E. Act has a discretion in view of the word used in section 6. The words used are 'may order' and not 'shall order'. The Legislature in its wisdom had given the Commissioner a discretionary power as each case has to depend on various factors and circumstances. The word 'may order' was considered in an unreported case the *Ceylon Mercantile Union vs Messers Vinitha Limited and the Commissioner of Labour*, decided on 29th March, 1976. Tennakoon, C. J. observed "the words in the section are 'may order' and not 'shall order' the legislature obviously did not contemplate that in every case of Termination of Employment without the permission of the Commissioner of Labour, it would be mandatory on the Commissioner to order re-instatement or continuance of employment upon a complaint being made to him under section 6. " I am bound by the interpretation given by the Bench of three Judges of the Supreme Court. **In the instant case the 1st Respondent was an expatriate and his visa was granted for a specific period.** Therefore, it is my view the circumstances and facts of each case have to be considered on its own merits and the Commissioner in those circumstances considering section 6 exercised his discretion without making an order for continuance of service. Therefore I am of the view that the submission of the learned Counsel for the Petitioner giving a restrictive interpretation to section 6 of the T. E. Act has no merit." (Emphasis added)

Lanka Multi Moulds (Pvt) Ltd. Vs. Wimalasena, Commissioner of Labour and others[3]. In this case the 2nd Respondent (the workman) a British national was employed by the appellant company (the employer) on 01.09.1992 on contract for a period of 3 years. The employer terminated

the employment of the workman with effect from 30.07.1994. On 22.11.1995, the Commissioner ordered re-instatement of the workman with effect from 15.01.1996 with back wages for 17 1/2 months from 30.07.1994 to 15.01.1996 a sum of Rs. 3,533,750. The Court of Appeal affirmed the order that the termination of employment is illegal for want of prior consent of the workmen under section 2(1) (a) of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971. The court quashed the order for re-instatement and reduced back wages to 13 months (The balance period of the contract of three years).

Fernando, J. held in the above case :

"I hold that "may" in section 6 confers a discretion on the Commissioner ; that 'and" must be interpreted disjunctively ; and that **the Commissioner had the power to order payment of wages and benefits for the balance period of the 2nd Respondents contract without making an order for re-instatement.** The Court of Appeal was therefore entitled to order such payments when setting aside the order for re-instatement." (Emphasis added)

In the instant case, the Commissioner has no reason to order for compensation in lieu of ordering the employer to continue to employ the workmen. As the workmen are not incapacitated in any way that deprives the Commissioner to order for continuous employment, the Commissioner should have ordered for continuous employment with wages and other benefits which the workmen would have otherwise received if their services had not been so terminated.

It appears from the proceedings that the 1st Respondent had made an application dated 22.11.2002, seeking permission from the Commissioner of Labour to terminate the services of the employees under section 2 (b) of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971. An inquiry was commenced in respect of this application but in the meantime, the 1st Respondent terminated the services of the workmen. On the complaint of the workmen that their services has been terminated in violation of the said Act, the Commissioner proceeded to inquire into that complaint under section 6 and made the impugned order dated 16.07.2003. In this order he has observed "due to non availability of orders the company has reached a stage of running at a loss. Therefore without re-employing the workmen compensation has to be paid to them". The Commissioner could have arrived at this conclusion when granting permission to terminate the employment of the workmen under section 2(b) of the said Act. Under section 2(b) the Commissioner could grant permission to terminate the services of workmen and the termination would

have to come into effect only after the date of that order (granting permission) and not retrospectively.

It appears that the Commissioner has amalgamated section 2(b) application made by the 1st Respondent on 22.11.2002 and the complaint made by the employees under section 6 on 22.05.2001 and had made an order dated 16.07.2003, P 11. By this order the Commissioner has granted approval to terminate the employment of the workmen (Petitioners) retrospectively which the Commissioner is not empowered to do.

Hence, this court issues a writ of certiorari to quash the order dated 16.07.2003 marked P11 and issues an order of mandamus directing the 2nd and 3rd Respondents to grant permission to the 1st Respondent to terminate the services of the petitioners from a prospective specified date and order the 1st respondent to pay wages and other benefits up to the said date and to pay compensation as determined by the Commissioner in respect of the termination. This Court allows this application with out costs.

IMAM, J. – I agree.

Application allowed.

LEELAWATHIE
VS
ABEYKOON AND OTHERS

COURT OF APPEAL.
EKANAYAKE, J.
SRISKANDARAJAH, J.
CALA 357/2001. (LG)
DC GAMPAHA 748/P.
FEBRUARY 28, 2005.
OCTOBER 28, 2005.

Partition Law, No. 21 of 1977, sections 26(2), 32 and 36(1)(a)-Judgment entered-Partition according to the interlocutory decree-Scheme of Inquiry-Court ordered sale of a Lot-Is it permissible ?

The court entered judgment/decree granting 1/2 share to the plaintiff and the 1st and 2nd defendants and the balance 1/2 share to the 1-6 defendants.

After the scheme inquiry, the court ordered a particular lot in extent 1.885 perches to be sold. It was contended that, as there is no such order to sell in the interlocutory decree/judgment, the District Judge acted without jurisdiction in ordering a sale of the said Lot.

HELD:

(1) Section 36(1) provides that, Court could confirm the scheme of partition with or without modification, and section 36(2) empowers the court to order the sale of any Lot.

(2) When preparing a scheme of partition in conformity with the interlocutory decree the Surveyor has to comply with section 31(2), if a divided portion that is to be allotted to any person is less than the minimum extent required by law for development purposes section 31(2) becomes applicable. Thereafter court as provided under section 36(1) merely acts under sub section (a) and or (b) of section 36(1) and enter the final decree.

(3) It is clear that a court may order sale of any Lot after entering the interlocutory decree provided that the surveyor while returning the commission has reported to court under section 32(1)c that the extent of such lot is less than the minimum extent required by written law relating to the sub division of land for development purposes.

(4) The District Court has without any evidence after an inspection of the corpus drawn certain inferences to the effect that, the Urban Council would not permit to construct a building on the said lot and decided to sell the said lot by public auction–this is wrong.

APPLICATION for Leave to Appeal from the order of the District Court of Gampaha.

Chula Bandara for plaintiff petitioner,

Manohara R. de Silva for 3rd-6th respondents.

Cur. adv. vult.

12th September, 2005.

SRISKANDARAJAH J.

The Petitioner by this Leave to Appeal application has sought to set aside the order of the learned District Judge dated 24.09.2001. Leave was granted by this Court on 07.07.2004 on the question whether the Order of the Learned District Judge directing the sale of Lot 4 shown in the final

Partition Plan which was allocated to the Plaintiff Petitioner without the Plaintiff-Petitioner's consent is correct.

The Plaintiff Petitioner instituted this Partition action to partition a land called Udawelagedara Watta in extent of 21 perches, morefully described in the schedule to the plaint. After trial judgment was delivered on 09.10.2000. According to the judgment the Plaintiff and the 1st and 2nd defendants are entitled to 1/2 share and the balance 1/2 share was allotted to the 3rd to 6th defendant. The interlocutory Decree had been entered on 05.12.2000. A commission was issued to the licensed surveyor who prepared the Preliminary Plan No. 224 to partition the corpus according to the Interlocutory Decree and to submit the scheme of partition along with his report. The scheme of partition as per Plan No. 433 dated 16th March, 2001 was submitted to court on 19th March, 2001. Objections to the scheme of partition were filed and the parties filed their written submissions on their objections. The learned District Judge visited the corpus on 18.09.2001 and the order on the objections to the scheme of partition was delivered on 24th September, 2001. In this order the learned District Judge directed that Lot No. 4 depicted in Plan No. 433 in extent 1.885 perches be sold at a fiscal auction and the Plaintiff had been made entitled to the proceeds of the sale.

The Petitioner submitted that by the subsequent Order made on 24th September, 2001 to sell Lot 4 of the corpus the District Judge had altered his own Judgment dated 9th October, 2000 and the interlocutory decree. In terms of section 26(2) of the Partition Law No. 21 of 1997 the order for sale of any portion of the corpus must be so stated in the interlocutory decree and Judgment and there is no such order in the interlocutory decree. Therefore the Learned District Judge had acted without jurisdiction in ordering the sale of Lot 4 of the corpus.

It was submitted by the Respondents that section 36(1)(a) of the Partition Law provides that the Court could confirm the scheme of partition with or with out modification and section 36(1)(b) empowers the Court to order the sale of any lot. Therefore there is no error in the order of the learned District Judge dated 24th September 2001.

The surveyor when preparing a scheme of partition in conformity with the Interlocutory Decree has to comply with sub section (2) of section 31 of the Partition Law, if a divided portion that is to be allocated to any

person is less than the minimum extent required by law for development purpose.

Section 31(2) provides :

"Whereas any divided portion or portions that are to be allotted to any person under an interlocutory decree are less than the minimum extent required by written law regulating the sub division of land for development purposes, the surveyor shall, so far as is practicable, divide the land in such a manner as would enable the allotment or sale of such portions as one lot"

The surveyor when returning the commission under section 32 among other particulars required to be submitted under this section has to submit the plan of partition prepared by him and a report explaining the manner in which the land has been partitioned with details of parties, their shares and interest. This report should contain a statement drawing the attention of court where any extent of a share is less than the minimum extent required by any written law relating to sub-division of land for development purposes.

After consideration of the scheme of partition as provided under section 36(1), the Court may act under sub section (a) and/or (b) of section 36(1) and enter the final decree of partition.

Section 36(1) : On the date fixed under section 35, or on any later date which the Court may fix for the purpose, the Court may, after summary inquiry :

(a) Confirm with or without modification the scheme of partition proposed by the surveyor and enter final decree of partition accordingly ;

(b) Order the sale of any lot, in accordance with the provisions of this law, at the appraised value of such lot given by the surveyor under section 32, where the Commissioner has reported to court under section 32 that the extent of such lot is less than the minimum extent required by written law relating to the subdivision of land for development purposes and shall enter final decree of partition subject to such alteration as may be rendered necessary by reason of such sale. (2)...

From the above provisions it is clear that a Court may order sale of any lot after entering the interlocutory decree in accordance with the provisions of the Partition Law provided that the surveyor while returning the commission has reported to court under section 32 (1)(c) that the extent of such lot is less than the minimum extent required by written law relating to the sub division of land for development purposes.

In the instant case the surveyor returned the commission on 19.03.2001 and submitted the final scheme of partition but in the report submitted with the scheme of partition he has not made any statement to the effect that any of the lots has an extent which is less than the minimum extent required by any written law relating to sub-division of land for development purposes. The scheme of partition indicated in plan No. 433 dated 16th March, 2001 consist of five Lots out of which Lot 1 and Lot 2 are smaller in extent than Lot 4. The learned District Judge without any evidence after an inspection of the corpus has drawn certain inferences to the effect that the Urban Council would not permit to construct a building on Lot 4 and decided to sell the said Lot by public auction. For the above reasons this Court sets aside the Order of the learned District Judge dated 24th September, 2001 in case No. 748/P District Court of Gampola and directs the Learned District Judge to reconsider the objections to the scheme of partition and make an appropriate order under section 36. The appeal is allowed without costs.

EKANAYAKE, J. — I agree.

Appeal allowed.

MARKET MAKERS (PRIVATE) LTD.
vs.
D. N. PERERA

COURT OF APPEAL
SOMAWANSA, J, (P/CA) AND
WIMALACHANDRA, J.
CALA 169/05 (LG)
DC COLOMBO 727/SPL.
MAY 30, 2005.

Contract of tenancy – Best test – Best evidence – Proof of payment of rent – Rent receipts – Prima facie proof – Interference with tenants' enjoyment of property by owner / landlord - Termination by illegal methods.

The plaintiff-appellant (sub tenant) entered into occupation of the premises in question as the tenant of the defendant-respondent. The defendant-respondent had forcibly threatened the plaintiff's employees and ordered them to vacate the premises and had also disconnected the electricity/water supply in an attempt to evict the plaintiff appellant illegally and unlawfully from the premises in question.

The plaintiff appellant instituted action seeking a declaration that the plaintiff is entitled to occupy the premises in question and for a declaration that the plaintiff is entitled to have electricity/water supply to the premises occupied by the plaintiff. The enjoining order prayed for was refused and only notice of an interim injunction issued on the ground that there was no written agreement between the plaintiff and the defendant with regard to a contract of tenancy. The plaintiff had produced rent receipts which had been signed by the defendant, the defendant's address appears on the rent receipts, showing that the receipts had been issued by the defendant.

HELD:

(1) The best test for establishing tenancy is proof of the payment of rent. The best evidence of the payment of rent is the rent receipts. There is prima facie proof that the plaintiff is the monthly tenant of the defendant. The rent receipts show that the rent had been paid to the defendant The defendant had acknowledged the receipt of payments by signing the rent receipts.

(2) The landlord has a duty not to interfere with the tenant's enjoyment of the property. Even if the plaintiff is the subtenant of the defendant the defendant has no right to interfere with his tenant's enjoyment of the property. He has no right to disconnect the supply of electricity/water,. He must resort to legal methods recognized by law to terminate the tenancy.

APPLICATION for leave to appeal with leave being granted.

Case referred to :

Jayawardane vs. Wanigasekera and Others 1985 1 Sri LR 125

Nihal Fernando, P. C. with *Rohan Dunuwila* for plaintiff appellant.

Faizer Musthapha for defendant-respondent.

Cur.adv.vult.

June 14, 2005.

WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the District Judge of Colombo dated 10.05.2005. By that order the learned Judge refused to grant the enjoining order prayed for, pending the inquiry into the application for an interim injunction.

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

The plaintiff-petitioner (plaintiff) alleged that it entered into occupation of the premises No. 353, R. A. de Mel Mawatha, Colombo 03 as the tenant of the defendant-respondent (defendant) on or about April 2001 and occupied the ground floor of the premises No. 353 and No. 353-1/1, the entirety of the upper floor. The plaintiff stated that it paid Rs. 95,000 as the monthly rent and continued to pay upto 1st April 2005. On 1st April 2005 the defendant with two others had entered the premises occupied by the plaintiff, forcibly threatened the plaintiff's employees and ordered them to vacate the premises. On the same day the defendant had disconnected the electricity and water supply to the area occupied by the plaintiff in an attempt to evict the plaintiff illegally and unlawfully from the said premises. The plaintiff had thereafter

instituted action in the District Court for a declaration that the plaintiff is entitled to occupy the area highlighted in pink in the sketch marked "A" with the plaint of the said premises described in the schedule to the plaint and for a declaration that the plaintiff is entitled to have electricity and water supply to the area occupied by the plaintiff, highlighted in pink in the sketch marked "A". The plaintiff has also sought a permanent injunction in terms of paragraph 'C' of the prayer to the plaint, and an interim injunction and an enjoining order in terms of paragraphs 'd' and 'c' of the prayer to the plaint.

The plaintiff had supported the application before the District Judge, *inter partes*, for an enjoining order pending the inquiry into the application for an interim injunction. The District Judge by order dated 10.05.2005 had refused to issue an enjoining order but issued notice of an interim injunction and summons on the defendant. It is against this order, refusing to issue an enjoining order as prayed for in the plaint, the plaintiff has filed this application for leave to appeal.

The learned District Judge refused to grant an enjoining order mainly on the ground that there was no written agreement between the plaintiff and the defendant, with regard to a contract of tenancy. The plaintiff produced the rent receipts marked 'B1' to 'B9'. The rent receipts had been signed by the defendant and the defendant's address is in the rent receipts, showing that the said rent receipts had been issued by the defendant. [A cheque on account of six months rent from 01.04.2005 to 30.09.2005 had been sent by the plaintiff to the defendant, with a covering letter dated 30.03.2005 (vide-documents marked 'C' and 'C1' annexed to the petition). The defendant had accepted the said cheque as damages].

The learned counsel for the defendant submitted that there is no averment in the plaint as regards to the date of the commencement of the occupation by the plaintiff and also there is no averment that the plaintiff was the monthly tenant of the defendant. In paragraph six of the plaint, the plaintiff states that the plaintiff company entered into an agreement with the defendant to lease the area highlighted in pink in the sketch annexed marked 'A' with the plaint on the following terms. (a) monthly rent to be Rs. 95,000, (b) the plaintiff to receive and pay the electricity bill in full and obtain a reimbursement of 35% of the amounts of the bills from the defendant on account of its usage of electricity, (c) the plaintiff to receive

and pay the water bills in full for the entire building. The Plaintiff produced, annexed to the petition, copies of rent receipts marked 'B1' to 'B10' . On 30/03/2005 the plaintiff had forwarded cheque No. 408668 dated 30.03.2005 of Public Bank with a covering letter to the defendant being the rent for the premises No. 353 and 353 1/1. R.A. De Mel Mawatha, Colombo 03. The amount in the cheque was the rent for six months from April 2005 to September, at the rate of Rs. 95,000 per month for the said premises. It is to be noted that there is an endorsement in the letter marked "C" that the cheque had been received by D. Perera, the defendant. The document marked "C2" is a copy of the relevant page of the bank statement of the plaintiff's current account, which shows that the said cheque had been presented for payment and the defendant had received payment from the plaintiff's bank.

In the case of *Jayawardena* vs. *Wanigasekera and others* Moonamalle J. stated–

> **"The best test for establishing a tenancy is proof of the payment of rent. The best evidence of the payment of rent is the rent receipts."**

In the instant case the plaintiff produced the rent receipts signed by the defendant. In applying the test laid down by Moonamalle, J. in *Jayawardena vs. Wanigasekera and others* there is *prima facie* proof that the plaintiff is the monthly tenant of the defendant.

The learned Counsel for the defendant submitted that the defendant was only a tenant and that the owner of the premises was one Christy in whose name the electricity bills were paid. The learned counsel further submitted that in any event the tenancy was with one Jayaseelan, a former director of the plaintiff company. In answer to this allegation the plaintiff contended that the said Jayaseelan negotiated the tenancy on behalf of the plaintiff-company which is borne out by the letter marked 'J' annexed to the plaint. However these are matters that have to be proved at the trial. It must be noted that there is *prima-facie* proof that the plaintiff is the monthly tenant of the defendant as stated above. The rent receipts produced by the plaintiff show that the rent had been paid to the defendant and the defendant had acknowledged the receipt of payments by signing the rent receipts.

The plaintiff stated that on 01.04.2005 the defendant had wrongfully disconnected the electricity and water supply to the rented premises occupied by the plaintiff bearing assessment No. 353 and 353-1/1. R. A. de Mel Mawatha, Colombo 03. The landlord has no right to interfere with the peaceful occupation of the rented out premises.

H. W. Thambiah in his book "Landlord and Tenant in Ceylon", 1st edition, at page 81 states thus:

> **"The landlord has a duty not to interfere with the tenant's enjoyment of the property."**

The plaintiff stated that he has no contract or agreement with the owner but only with the defendant. In the circumstances the allegation made by the defendant that the plaintiff deliberately failed to disclose the owner of the premises is not a material fact. The non-disclosure of the name of the owner of the premises will not affect the merits of the plaintiff's case as the plaintiff's position is that he obtained the premises in question from the defendant and he paid the rent to the defendant, and not to the owner of the premises.

As regard to the legal position where there is a tenant and a sub-tenant, G. L. Peiris in his book "The Law of Property in Sri Lanka," Volume Two, "Land Lord and Tenant" at page 347 states as follows:

> "Where a tenancy and sub-tenancy are both seen to coexist, the rent under the main tenancy is payable by the tenant to the landlord, while the rent under the sub tenancy is payabe by the sub-tenant to the tenant. The proper view is that each of these co-existing contracts remains in force until it is terminated by due notice or some other manner recognized by law"

In these circumstances, even if the plaintiff is the sub-tenant of the defendant, the defendant has no right to interfere with his tenant's enjoyment of the property. The defendant has no right to disconnect the supply of electricity and water. The defendant must resort to legal methods recognized by law, to terminate the tenancy.

As regards the balance of convenience, if the enjoining order is not granted pending the determination of the application for an injunction, the defendant would resort to evict the plaintiff by means not recognised by law. It appears that the plaintiff has been paying rent to the defendant and has even paid rent in advance for the period of April 2005 to September 2005 as evident by documents marked 'C', 'C1' and 'C2".

On a consideration of the totality of the documentary evidence and the submissions made by the counsel it appears to me that the learned District Judge has arrived at a wrong conclusion that there is no contract of tenancy between the plaintiff and the defendant as there is no written agreement between them. As Justice Moonamalle, pointed out in *Jayawardene* vs. *Wanigasekera (supra)* the best test for establishing a tenancy is proof of the payment of rent. The best evidence of the payment of rent is the rent receipts. In the instant case rent receipts signed by the defendant were produced and there is reference to the payment of rent.

For these reasons, leave to appeal is granted from the order of the learned District Judge dated 10.05.2005 and for the same reasons we allow the appeal and set aside the aforesaid order of the learned District Judge and grant the enjoining order as prayed for in prayer 'e' of the prayer to the plaint. We direct the learned District Judge to inquire into the application for an interim injunction as prayed for in the plaint. The appellant is entitled to recover the costs of this appeal.

Somawansa, J. (P/CA) — *I agree.*

Appeal allowed.
Enjoining order granted.

DAYARATHNE
vs
STATE MORTGAGE AND INVESTMENT BANK

COURT OF APPEAL
SRIPAVAN, J, AND
BASNAYAKE, J.
CA 1417/2004
JULY 1, 2005
AUGUST 1, 2005

Writ of certiorari - Resolution passed to parate execute property - Stamp Duty Act, Section 16 - Can the Bank recover anything other than the consideration secured under the Mortgage Bond?

The petitioner sought a writ of certiorari to quash the resolution on the basis that the Mortgage Bond is stamped only to the value of Rs. 600,000 and the Bank cannot recover anything more than Rs. 600,000 and the sum due as interest on the outstanding loan cannot be recovered.

HELD:

Sections 16 and 17 of the Stamp Duty Act have to be interpreted strictly. It is clear that duty is payable only on the principal amount and not on the interest. The mortgage must be stamped to the value of the principal sum only, and no stamp duty is required to be paid on the interest payable. It is untenable to say no interest could be recovered.

APPLICATION for a writ of certiorari/mandamus.

A. S. K. Senatharachchi for petitioner.

Milinda Gunatilake, State Counsel with *W. K. Perera,* State Counsel for respondents

Cur.adv.vult.

September 14, 2005

BASNAYAKE, J.

The petitioner in this case was awarded a loan of Rs. 600,000 by the respondent bank on the mortgage bond No. 2039 dated 24.12.1997 marked P1. The petitioner states that he paid a sum of Rs. 360,000 by way of interest and principal and defaulted payments. Thereafter the Board of Directors of the Respondent Bank had passed a resolution on 08.12.1999 in terms of the State Mortgage and Investment Bank Act to sell the mortgaged property by public auction (P3) and the petitioner was informed by letter (P4) that the date of the sale was fixed for 10.07.2004. According to this letter the amount due as at 10.07.2004 was Rs. 1,004,566.88. The petitioner is moving to have the resolution quashed by way of a writ of certiorari and is also seeking a writ of mandamus to compel the respondent to accept whatever dues in terms of section 16 of the Stamp Duty Act No. 43 of 1982.

The respondent filed objections along with documents marked R1 to R13 and prayed for a dismissal of the petitioner's application. At the hearing the only argument put forward by the learned counsel for the petitioner was that the bank cannot recover anything other than the consideration secured under the mortgage bond. The learned counsel rests his argument on section 16 of Stamp Duty Act. The learned counsel submits that the mortgage bond is stamped only to the value of Rs. 600,000 and the bank cannot recover anything more than Rs. 600,000 and as such the sum due as interest on the outstanding loan cannot be recovered. To that extent he submits that the resolution is bad in law and is liable to be quashed.

The learned State Counsel submits that in terms of section 17 of the Stamp Duty Act no stamp duty is required to be paid on the interest payable. He submits that section 16 is only a "charging provision" which prescribes that the mortgage must be stamped to the value of the principal sum only.

Sections 16 and 17 of the Stamp Duty Act are as follows :

Section 16

"A bond or mortgage for the payment or repayment of money to be lent, advanced or paid shall be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same stamp duty as on a bond or mortgage for the amount so limited. **Where**

the total amount recoverable is unlimited, the bond or mortgage shall be available for the recovery of such an amount only as is covered by the stamp duty paid on the instrument".

Section 17

"Where interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with stamp duty higher than that with which it would have be chargeable had no mention of interest been made therein" (emphasis added)

The aforesaid two sections have to be interpreted strictly. These sections deal with the imposition of stamp duty on instruments. By looking at the sections it is clear that duty is payable only on the principal amount and not on the interest. Therefore it is untenable to say that no interest can be recovered. Hence this application cannot be maintained and is therefore dismissed with costs fixed at Rs. 10,000

SRIPAVAN J. — *I agree.*

Application dismissed.