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

[2005] 3 SRI L. R. - Part 9

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DIGEST

CIVIL PROCEDURE CODE -

(1) Sections 408 and 839 - Settlement - Application to set aside Settlement - an after thought? - Can a party resile from a settlement? - Circumstances.

Nandawathie vs. Jayatilake and Others 230

(2) Civil Procedure Code, section 839, - Applicability - Relief of ejectment Restoration of possession not prayed for - Can there be a decree for ejectment and restoration?-If evicted can he be restored to possession?

Sopi Nona vs. Karunadasa and Another 237

COURT OF APPEAL– Court of Appeal (Appellate Procedure Rules 1990, 3(a) - 3(2) – Leave to appeal application – Non compliance of Rule 3(d) – Is it fatal? – Civil Procedure Code, sections 754(2), 757, 758 and 159 – Applicablility of the Rules to leave to appeal applications.

De Silva vs. Wettimuny 251

(Contd. in Part 10)

UNIVERSITY GRANTS COMMISSION – University Admissions – Selection of University – On what criteria? – Who determines the administrative district of a candidate for admission? – School candidate and private candidate – Is there a difference?

Mithunraj vs. University Grants Commission and Others 244

Sections 664(1), 664(2) and 756(4) - Enjoining order sought - interim injunction refused - Validity - Application for leave to appeal - Interim order obtained exparte - Validity - Should the same registered attorney at law file the leave to appeal application question - misstatement of the two facts - Does it warrant dissolution of an interim order without going into its merits?-Damages quantified - No injunction interim order should be granted ? - Court of appeal rules 1990 , rule 2 (1)-Interim order ?

Ratnapala vs. Metro Housing Constructions (Pvt) Ltd.

(Continued from Part 7)

CM 7223 – 2,500 (2007/02)

In the case of *Duwearachchi and Another Vs. Vincent Perera and Others* Seneviratne, J. laid down the following guidelines in granting a stay order:

(i) Will the final order be rendered nugatory if the petitioner is successful?

(ii) Where does the balance of convenience lie?

(iii) Will irreparable and irremediable mischief or injury be caused to either party ?

Before I proceed to discuss the applicability of the aforesaid principles to the facts of the present case, I consider it pertinent to consider the equitable considerations. The conduct and the dealings of the parties must be taken into account.

It is to be observed that the impugned order was delivered on 16.03.2005 and this application for leave to appeal was filed on 31.03.2005 and was supported on 01.04.2005 for an interim stay order on the last day before the commencement of the Court vacation, without notice to the defendant. The plaintiff obtained an interim stay order restraining the defendant, its servants and agents from effecting any construction and/or excavation operations in premises bearing assessment Nos.: 49 and 51, 37th Lane, Colombo 06. Thus it will be seen that the plaintiff supported for an interim stay order, 15 days after the delivery of the impugned order without notice to the defendant. It shows that the plaintiff had sufficient time to give notice to the defendant before supporting for an interim stay order.

Moreover the Rules of the Appellate Procedure make it compulsory to give notice to the party concerned before such an application is supported, unless the petitioner comes with a plausible explanation, that the matter is of such urgency that it was not possible to give such notice.

The Rule 2(1) of the Court of Appeal Rules 1990, reads as follows :

2(1) Every application for a stay order, interim injunction or other interim relief (hereinafter referred to as "interim relief") shall be made with notice to the adverse parties or respondents (hereinafter in this rule referred to as 'the

respondents') that the applicant intends to apply for such interim relief ; such notice shall set out the date on which the applicant intends to support such applications, and shall be accompanied by a copy of the application and the documents annexed thereto :

Provided that -

(a) interim relief may be granted although such notice has not been given to some or all of the respondents if the Court is satisfied that there has been no unreasonable delay on the part of the applicant and that the matter is of such urgency that the applicant could not reasonably have given such notices ; and

(b) in such event the order for interim relief shall be for a limited period not exceeding two weeks sufficient to enable such respondents to be given notice of the applications and to be heard in opposition there to on a date to be then fixed.

In these circumstances, the interim order is liable to be set aside. In the plaint, the plaintiff describes the premises which he sought to protect as his residential house (vide - paragraphs 3, 9, 13 and 16 of the plaint). In the petition filed in this Court, in paragraph one the Petitioner described the said premises as a residential premises. However, the assessment extracts, marked "X5" annexed to the statement of objection, show that the said building in the premises No. 11, Pennyquick Road, Wellawatte is a store house. This is confirmed by the Certificate issued by the Grama Niladari of Pamankada West Marked 'X7' annexed to the statement of objections filed by the defendant. The plaintiff has described the building in his premises as a residential house when in fact it is a store house. In granting interim injunctions and interim relief it is settled law that a person who makes an *ex-parte* application to court is under an obligation to make the fullest possible disclosure of all material facts within his knowledge and if he does not do so, then he cannot obtain any advantage which may have already been obtained by him. That is perfectly plain and requires

no authority to justify it. (Row's Law of Injunctions, 6th edition, Volume I page 123). In the instant case, the description of the building in the premises of the plaintiff as a residential house amounts to a misstatement of the true facts, which gives a different picture to his case as presented by him. When the plaintiff gave the impression in the plaint that a residential house has been damaged the Court's sympathy would have definitely tilted in his favour.

In the case of *Hotel Galaxy (Pvt.) Ltd. and Others Vs. Mercantile Hotel Management Ltd.*[4]? said at 36,

> **"Thus a misstatement of the true facts by the plaintiff which put an entirely different complexion on the case as presented by him when the injunction was applied *ex-parte* would amount to a misrepresentation or suppression of material facts warranting its dissolution without going into its merits".**

In the circumstances, on this ground as well, the interim stay order and injunctive relief should be set aside.

One of the grounds that the Court should address its mind to is the question, in whose favour does the balance of convenience lie? It is the duty of the Court to consider the inconvenience and damage that will result to the defendants as well as the benefit that will accrue to the plaintiff by granting an interim stay order. The burden lies upon the plaintiff, as the person applying for the interim order, and injunctive relief, of showing that his inconvenience exceeds that of the defendant.

The plaintiff has estimated the damage caused to his building in a sum of Rs. 10 million as a result of the excavation work of the defendant. For the reasons stated above it appears the excavation work has been completed and the construction of the building has now come up to the ground floor at the time of filing the plaint. The possibility of excavation and the use of heavy machinery are the grounds upon which the plaintiff sought to restrain the defendant from carrying out further construction. It is the defendant's position that the plaintiff is not entitled to the extension of the interim stay order and interim injunction as there is no danger to the plaintiff's property

as the defendant has completed the excavation work and already laid the foundation. The construction and completion of the ground floor slab after erecting necessary pillars has been completed and a retaining wall has already been constructed right around the building site.

If the damage caused to the plaintiff is quantifiable, then no injunction or interim order will usually be granted (*vide - Jinadasa vs. Weerasinghe*[5]) Where the injury is capable of being estimated in money, generally an injunction may not be granted. This principle of law has been stated as follows in Snell's Principles of Equity, 38th edition , at page 640 :

"The 'governing principle' is that if the plaintiff would be adequately compensated by an award of damages if he succeeds at the trial, and the defendant would be able to pay them, no injunction should be granted, however strong the plaintiff's case"

The above principle was applied in the *America Cyananamid Co. vs. Ethicom Ltd.*[6] at 510, where Lord Diplock said ;

"If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however, strong the plaintiff's claim appeared to be at that stage."

In the instant case the plaintiff has estimated damages in a sum of Rs. 10 million. Since the plaintiff has quantified the damages he is not entitled to an interim stay order or interim injunction. Moreover, the defendant has produced an Insurance Policy from Eagle Insurance Co. Ltd., which covers third party loss upto a sum of Rs.10 million. (vide document marked D2 (b) annexed to the defendant's statement of objections). Thus, the defendants has shown its financial capacity to pay such damages. Moreover, the mischief complained of can be fully and adequately compensated by a pecuniary sum. In these circumstances the plaintiff is not entitled to any interim stay order nor an interim injunction.

If the granting of an interim injunction or issue of an interim stay order would have the effect of inflicting serious damage upon the defendant, and especially when the mischief complained of can be adequately

compensated by a pecuniary sum, an injunction will not lie. In the instant case the defendant has established by documentary evidence that if an interim stay order or an interim injunction is granted, immense loss and damage would be caused to the defendant. The defendant states that many prospective buyers of the apartments that are to be constructed have made advance bookings in the proposed multi storey residential complex to be constructed by the defendant. Advance payments have already been made by the prospective buyers (vide 'X15' annexed to the statement of objections of the defendant). The defendant has already made payments for building materials worth millions of rupees as evident by document marked 'X16' annexed to the statement of objections. The defendant has spent large sums of money for excavation work, laying the foundation, building a retaining wall to protect the neighbouring properties, and already constructed the ground floor, apart from spending an equally large amount of money on architects, civil engineers, workers etc. If the stay order or interim injunction is granted a large quantity of building materials already at the work site will go waste and finally will be of no use to the defendant. If the stay order is extended or the interim injunction is granted, apart from the harm, loss, and damage that would be caused to the defendant, it's reputation as a construction company will be affected. In the circumstances if the stay order is extended or an interim injunction is granted irremediable injury would be caused to the defendant.

It seems to me that the learned judge has correctly applied the relevant principles of law to the facts of this case in making his order. The learned judge has correctly held that at the time the plaintiff made the application for injunctive relief, the excavation work had been completed and there was no possibility of causing further damage to the plaintiff's building as alleged by the plaintiff. The documents produced before Court show that the excavation work has been completed. As regards the balance of convenience, the learned judge has correctly assessed the situation. The learned Judge has also held that the plaintiff has quantified the damage caused to him and that it could be open to the plaintiff to lead evidence to prove the damage caused to him at the trial. In any event as the defendant has already taken a policy of insurance for Rs.10 million in respect of damages to third parties, the plaintiff could recover damages in the event he establishes at the trial of any damage being caused to his property. The Court has compared the damage that will be caused to the parties and

upon the evidentiary material placed before Court, the Court has held that a greater damage would be caused to the defendant than to the plaintiff if the interim injunction is granted.

For these reasons, we affirm the order of the learned District judge dated 16.03.2005 and dismiss the plaintiff's application for leave to appeal with costs. The question of the extension of the interim stay order will not arise as the Court has refused the plaintiff's application for leave to appeal.

SOMAWANSA, J. - *I agree.*

Application dismissed.

NANDAWATHIE

VS

JAYATILAKE AND OTHERS

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CA 2174/2003.
DC GALLE 8977/T.
JULY 25, 2005.

Civil Procedure Code, sections 408 and 839 - Settlement - Application to set aside Settlement - an after thought? - Can a party resile from a settlement? - Circumstances.

All parties including the petitioner signed the terms of settlement tendered to Court. The registered attorney - at- law of the petitioner too signed the records. Acting on the terms of the settlement, the parties have paid the fees of the valuer and with the consent of all parties the administrator executed the administrative conveyances. Even the petitioner became entitled to certain lands. Two months later and after the execution of the transfer deeds, the petitioner made an application in terms of section 839 to set aside the settlement, on the grounds that it was arbitrary, illegal, unfair and biased, unjustifiable or fraudulently disproportionate. This application was rejected by the trial judge. The petitioner moved in revision.

HELD:

(1) The signing of the terms of settlement by the petitioner and her registered attorney-at-law would negative all the allegations raised. The petitioner cannot be heard to say that she was unaware or did not understand the terms of settlement.

(2) It appears that this in fact is an after thought. As a general rule, agreement by way of compromise should not be re-opened on the ground of after thought of a party.

Per Somawansa. J (P/CA) :

"It is to be noted that at all times relevant to this settlement the petitioner was represented by her registered attorney-at-law as well as her Counsel, none of them have come to her rescue at least by tendering a written statement corroborating the averments of the petitioner".

(3) Once the terms of settlement as agreed upon are presented to court and notified thereto and recorded by court a party cannot resile from the settlement even though the decree has not yet been entered.

Per Somawansa, J. (P/CA) :

"I am not impressed at all with the submission of counsel for the petitioner that she was totally unaware of the terms of settlement - when court accepted the terms and that she was taken by surprise and due to inadvertence, lack of understanding under pressure and misleading explanation she was compelled to sign."

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

Cases referred to :

1. *Gunasekara vs. Leelawathie* - Sri Kantha Law Reports Vol 5 - page 139
2. *Newton vs. Sinnadurai* - 54 NLR 4
3. *Saranelis vs. Agnes Nona* 1987 2 Sri LR 109
4. *John Keels vs. Kuruppu* 1996 W Sri LR 6
5. *Dassanayake vs. Dassanayake* - 30 NLR 385
6. *Costa vs. Silva* - 22 NLR 478
7. *Sinna Velu vs. Lipton Ltd* - 66 NLR 214
8. *Dayawathie and Others vs. Fernando* 1988 2 Sri LR 314
9. *Lameer vs. Senaratne* 1995 Sri LR 13

J. Palihawadana for petitioner,

Ananda Kasturiarachchi with *K. Pathiraja* for 4th, 5th and 9th respondents.

Rohan Sahabandu with *Gamini Hettiarachchi* for respondent.

Cur. adv. vult.

October 21, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application in revision seeking to revise and set aside the settlement order of the learned District Judge of Galle dated 30.07.2003 and for an order for re-hearing of this action as from the date the proceedings

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

The relevant facts are on 05.02.2003 the learned District Judge made further order that an inquiry is not necessary and that the parties prepare a scheme of allocating property by way of settlement and thereafter upon presenting a list of properties the Court made a further order dated 26.02.2003 marked B that -

(a) all properties shall be subject to sale by public auction and the proceeds shall be distributed among heirs ;

(b) prior to such auction a proper valuation report shall be presented on the next calling date which was 30.07.2003.

On 30.07.2003 parties including the 3A respondent - petitioner - petitioner informed Court that the parties have arrived at a settlement and the signed terms of settlement was tendered to Court signed by parties including the 3A respondent - petitioner -petitioner and her registered Attorney -at -Law. Thereafter it is to be seen that all parties including the 3A respondent - petitioner- petitioner signed the record as well, as evident by the journal entries marked 4D8. In terms of the aforesaid settlement it was agreed by parties to give up the final accounts pursued by them for nine years and to recall the commission for valuation of properties, to transfer the properties as per the settlement by way of administrative conveyances and to terminate the testamentary proceedings.

In terms of the settlement marked A the 3A respondent - petitioner-petitioner on behalf of the heirs of the deceased Herbert Jayatilake was to receive the land morefully described in the first schedule. It appears that parties acting on the terms of the aforesaid settlement have already paid a

sum of Rs. 191,000 as fees of the valuer as evident by 4R10 and 4R11 and with the consent of all parties executed the Administrator's Conveyances marked VR12 to 4R18 and the 3rd respondent - petitioner - petitioner and children who are the heirs of the deceased 3rd respondent Herbert Jayatilake are now the owners of the lands described in the aforesaid Administrative Conveyance marked 4R16.

On 01.10.2003 two months after and after the execution of the aforesaid deeds the 3rd respondent - petitioner - petitioner made an application in terms of section 839 of the Civil Procedure Code to set aside the aforesaid settlement. It was supported on 08.10.2003 and on the same day the learned District Judge refused the application of the 3rd respondent - petitioner - petitioner. The present application challenging the settlement entered on 30.07.2003 and the subsquent order dated 08.10.2003 is tendered to this Court on 12.12.2003. It is to be noted that there is no explanation or reason given for the undue delay in making this revision application.

Counsel for the 3rd respondent - petitioner - petitioner contends that the settlement is arbitrary and illegal, that the terms of settlement are unfair and or biased, unjustifiable and or fraudulently disproportionate, that necessary heirs have not been made parties, that the terms are misleading, unreasonable, causing unjust enrichment in respect of certain heirs, while omitting rights, title and entitlements of certain heirs and are illegal, unlawful and contrary to law and the alleged scheme of settlement does not reflect the intention of all parties.

In this respect counsel for the 3rd respondent - petitioner - petitioner has cited *Gunasekara vs. Leelawathie*[1] *Newton vs. Sinnadurai*[2], *Saranelis vs. Agnes Nona*[3] *John Keels vs. Kuruppu*[4] and *Dassanayake vs. Dassanayake*[5] However I do not think that the decisions of the aforesaid cases are applicable to the instant application.

In the settlement entered into between the parties and as accepted by court, the contesting 3rd respondent - petitioner- petitioner as well as her registered Attorney-at-Law has consented to the terms of settlement by signing the terms of settlement tendered to Court and thereafter by signing the record testifying to the acceptance of the terms of settlement. In the circumstances, I am not impressed at all with the submission of counsel for the 3rd respondent - petitioner - petitioner that she was totally unaware of the terms of settlement when Court accepted the terms and that she was taken by surprise and due to inadvertence, lack of understanding, under pressure and misleading explanation she was compelled to sign. It suffices to say that the signing of the terms of settlement by the 3rd respondent - petitioner - petitioner and her registered Attorney-at-Law and thereafter the 3rd respondent - respondent signing the record accepting the terms of settlement would negative all the allegations raised by counsel for the 3rd respondent - petitioner - petitioner. In the circumstances the 3rd respondent - petitioner - petitioner cannot be heard to say that she was unaware or did not understand the terms of settlement. It appears to me that this fact is an after thought. As it was held in *Costa vs. Silva*[6] as a general rule agreement by way of compromise should not be reopened on the ground of after thought of a party. In any event, it is to be noted that at all times relevant to this settlement the 3rd respondent - petitioner - petitioner was represented by her registered Attorney -at -Law as well as her counsel. None of them have come to her rescue at least by tendering a written statement corroborating the averments of the 3rd respondent petitioner-petitioner. An affidavit by anyone of them would have been much better. Unfortunately none was forth coming.

It was held in *Sinna Veloo vs. Lipton Ltd.*[7];

"When parties to an action enter into a settlement and are represented by their Proctors, they need not be personally present when the settlement is notified to the Court in terms of section 408 of the Civil Procedure Code.

Once the terms of settlement as agreed upon are presented to Court and notified thereto and recorded by Court, a party cannot resile from the settlement even though the decree has not yet been entered."

Also in *Saranelis vs. Agnes Nona (supra)* :

"The general principle that should be followed is that a settlement entered into by the parties and notified to Court in terms of section 408 of the Civil Procedure Code should not be lightly interfered with whether a decree has been entered by Court in pursuance thereof, or not. But in this case the Court had been misled into recording the settlement in regard to a roadway without a plan or even a sketch so that there would be uncertainty about the course of the right of way. Besides the settlement involved the rights of the Municipal Council who was not a party. In these circumstances as the Court was misled, setting aside the settlement using the inherent powers of court under section 839 of the Civil Procedure Code was warranted in the interests of justice."

In the case of *Dayawathie and Peiris vs. Fernando*[8] it was held :

"Notwithstanding the judgment entered in a civil case it is permissible for the parties to enter into a compromise of their rights under the decree".

I would also refer to the decision in *Lameer vs. Senaratne*[9] where it was held :

" (1) When an Attorney - at- Law is given a general authority to settle or compromise a case, client cannot seek to set aside a settlement so entered, more so, when the client himself had signed the record.

(2) There is no affidavit from the Attorney-at-Law affirming that the petitioner was forced into accepting the terms of settlement. Pleadings indicate that the settlement was first suggested on 21.06.1991 and entered only on 13.07.1991.

(3) Court cannot grant relief by way of restitution to a party who has agreed in Court, to sell property at a lesser price with the full knowledge of its true value.

(4) There is no uncertainty as, in this instance the respondent has already deposited the full sum due."

For the foregoing reasons, I have no hesitation in dismissing the instant application for revision. Accordingly the application will stand dismissed with costs fixed at Rs.5000 to be paid by the 3rd respondent - petitioner - petitioner to each of the contesting 4th, 5th, 8th,and 9th respondents - respondents.

WIMALACHANDRA, J. – *I agree.*

Application dismissed.

SOPI NONA
VS
KARUNADASA AND ANOTHER

COURT OF APPEAL.
EKANAYAKE, J.
SRI SKANDARAJAH, J.
CA 201/2001(REV.).
DC EMBILIPTIYA 3091/L.
SEPTEMBER 9, 2005.

Civil Procedure Code, section 839 - Applicability - Relief of ejectment- Restoration of possession not prayed for - Can there be a decree for ejectment and restoration?– If evicted can he be restored to possession?

After an interpartes trial the 1st and 2nd plaintiffs were granted the relief of declaration of title in their favour. There was no prayer for ejectment. However writ was issued by the trial court and the defendent-petitioner-defendent was evicted. The petitioner moved under section 839 and sought an order to restore her to possession which was refused by court.

HELD:

1. By the judgment the reliefs that had been prayed in the prayer to the plaint had been allowed by the trial judge and there had been no relief for ejectment of the defendants and restoration of possession.

2. By allowing the writ of possession the trial judge had given relief to the plaintiffs which was not granted by the judgment and the decree.

3. The trial judge has erred by failing to invoke inherent powers under section 839 and to make order restoring possession when sufficient grounds have existed to make such orders as may be necessary for the ends of justice.

4. There had been no issue on ejectment and restoration of possession by the plantiff.

APPLICATION in revision from an order of the District Judge of Embilipitiya.

Cases referred to :

1. *Leechman Company vs. Rangala Consolidated* 1981 2Sri LR 373

2. *Seneviratne vs. Francis Abeykoon* 1986 2 Sri LR 1

Rohan Sahabandu for defendant–petitioner.

Anuruddha Dharmaratne for plaintiff-respondent

Cur. adv. vult.

November 3, 2005.

CHANDRA EKANAYAKE, J.

The 2nd defendant - petitioner by her petition dated 06.02.2001 (filed with an affidavit) has sought *inter alia* to set aside the judgment dated 10.05.1995 and two orders dated 08.04.1999 and 29.11.2000 and for a dismissal of plantiff's action. However it has to be noted that the impugned judgment bears the date 10.10.1995.

The 1st and 2nd plaintiff - respondent (hereinafter some times referred to as "plaintiffs" by their statement of objections dated 14.09.2001 whilst denying the averments in the petition had prayed for a dismissal of the application of the petitioner mainly on the ground that neither any grounds nor exceptional circumstances which would permit the petitioner to invoke the extraordinary jurisdiction of revision exist.

By the plaint dated 22.09.1987 the 1st and 2nd plaintiffs had averred that as set out in paragraphs 2 and 3 thereof that they had acquired title to the subject matter by deeds and by way of prescription and the defendants came into occupation of the house thereon with leave and license of the plaintiffs. As per paragraph 5 of the plaint it was further averred that from early part of 1987 the 1st and 2nd defendants by virtue of a deed said to have been in their favour in respect of the property morefully described in schedules to the plaint, disputed the ownership of the plaintiffs and thereby continued to be in unlawful occupation of the same.

The 1st and 2nd defendants by their joint answer dated 28.09.1988 whilst denying the averments in the plaint inclusive of the accrual of the cause of action by way of further answer pleaded that they came into possession of the same not on leave and license of the plaintiffs but on the leave and license of one temple, namely Keththarama Temple and moved for a dismissal of the plaintiff's action. Although it is seen from the certified copy of the District Court record that another answer dated

08.07.1989 is filed of record, in the absence of any journal entries to show that same was accepted, what has to be inferred is that the case had proceeded to trial on the original answer. After an *inter parte* trial the learned judge had pronounced the judgment dated 10.10.1995 granting only the relief of declaration of title inplaintiff's favour to the property morefully described in schedule A to the plaint.

It is common ground that appeal bearing C. A. No. 1109/95 had been preferred against the said judgment and same was rejected. Even as per paragraph 13 of the petition the said appeal had been rejected on 15.05.1997 for non - payment of brief fees. Thereafter on return of the original record the writ had been issued by the District Court by its order dated 08.04.1999 (vide journal entry dated 08.04.1999) As per journal entry dated 09.04.1999 the Fiscal had tendered the report after due execution of writ of possession.

Thereafter the present petitioner by a petition dated 22.04.1999 had moved the District Court to restore her to possession of the subject matter and recovery of damages in a sum of Rs. 2 lakhs. The above application had been made under section 839 of the Civil Procedure Code. The Plaintiff - Respondents by their statement of objections dated 27.10.1999 moved for a dismissal of the above petition on the ground that the decree was executed in accordance with the judgment and the decree entered in the case and further they averred that they had a right for recovery of possession of the property described in schedule B to the plaint. After inquiry the learned Trial Judge had refused the petitioner's application by his order dated 29.11.2000. This is the second order the 2nd Defendant has moved to set aside now as per sub paragraph (c) of the prayer to the present petition. By the impugned order dated 29.11.2000 the learned judge has dismissed the Petitioner's application onthe ground that his predecessor in office who had delivered the judgment dated 10.10.1995 had clearly stated that the land described in schedule B in the plaint is a portion of the land described in schedule A to the plaint and that the Plaintiffs were

granted declaration to title to the property in schedule A and therefore the application was not a *bona fide* application.

Section 839 of the Civil Procedure Code thus reads as follows :

> **"Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

In this context now the necessity has arisen to consider the decision in *Leechman Company vs Rangalla Consolidated*[1] where it was held that :

"This section merely saves the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Where no provision exists it is the duty of the judge and it lies within his inherent powers to make such order as the justice of the case requires."

In the instant case by the judgment dated 10.10.1995 the reliefs that had been prayed for in sub paragraph (1) of the prayer to the plant had been allowed by the learned Trial Judge and there had been no relief for ejectment of the defendants and restoration of possession of the property described in schedule B to the plaint. In the course of the judgment the learned Trial judge has very clearly arrived upon the specific finding that the Plaintiffs are entitled to a declaration of title to the property described in schedule A to the plaint and that the Defendants are in possession of the property described in schedule B. The learned judge has quite correctly analyzed the evidence and having duly considered the principle of law that when a Plaintiff is seeking a declaration of title it is he who should prove the title to the subject matter has answered the issues in favour of the plaintiffs. Therefore I see no basis to interfere with the impugned judgment.

What has to be considered now is whether the learned Trial Judge was correct in issuing writ of possession when the judgment was silent about same and specially in this case when the Plaintiff had totally failed to move for ejectment and restoration of possession by the prayer to the plaint.

In the case of *Seneviratne vs Francis Abeykoon*[2] this question was considered by the Supreme Court *viz* - "whether in the absence of a decree restoring possession of the premises to the defendant - tenant the Court still had the power to make and order that possession be restored to the defendant which the Fiscal could execute.

In that case the plaintiff landlord after his appeal from a judgment dismissing his action for eviction of his tenant the defendant was abated, forcibly took posşession of the premises let alleging abandonment and consequential deterioration of the premises. The defendant - tenant denied abandonment and applied to the Trial Court to restore him to possession. The Court granted the application. Thereafter the Plaintiff moved the Court of Appeal by way of revision to have the aforesaid order of the District Judge set aside. The Court of Appeal dismissing the application upheld the learned Trial Judge's order and thereafter the Plaintiff in that case appealed to the Supreme Court from the order of the Court of Appeal. Supreme Court also dismissed the appeal while upholding the decision of the Court of Appeal. Per Thambiah,J at 5 :

"An extra - ordinary situation had arisen and to deal with it there was no express provision in the Civil Procedure Code. It is to meet such a case that section 839 was enacted. It empowered a Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court."

In view of the above principles of law I conclude that in the present case the learned Trial Judge had erred in having allowed the writ of possession when the relief of ejectment and restoration or possession was not granted

by the judgment nor was such relief even prayed by the prayer to the plaint. So obviously there cannot be a decree for ejectment and restoration of possession. It is to be noted that the decree which is filed of record and signed by the judge as per journal entry of 22.10.1997 is in conformity with the judgment.

Therefore, I conclude that by allowing the writ of possession by the order dated 08.04.1999 the learned Trial judge had given a relief to the Plantiffs which was not granted by the judgment and the decree and therefore same is hereby set aside.

Further on a perusal of the impugned 2nd order dated 29.11.2000 I conclude that the learned judge had erred by failing to invoke inherent powers under section 839 of the Civil Procedure Code and to make order restoring possession to the second defendant when sufficient grounds had existed to make such orders as may be necessary for the ends of justice. Therefore the above order dated 29.11.2000 too is hereby set aside.

It has to be further stressed here that ejectment and restoration of possession had neither been prayed for in the prayer to the plaint as a relief nor had there been any issue raised by the Plaintiff to that effect. Issue No. 7 raised on behalf of the Plaintiffs had been to the following effect :

7"ඉහත කී විසඳිය යුතු ප්‍රශ්නයට "ඔව්" නම් පැමිණිලිකරුවන්ට පැමිණිල්ලේ ඉල්ලා ඇති සහන ලබා ගත හැකිද?

It is quite evident from the above issue that the effect of the same was whether the Plaintiffs were entitled to the reliefs prayed in the plaint if the above issues (*viz* ; issues 1-6) are answered in the affirmative. It is clear from the above that there had been no issue on ejectment and restoration of possession by the plaintiff. The learned judge has correctly answered all the issues admitted to trial giving good reasons.

For the foregoing reasons while affirming the judgment of the learned Trial Judge dated 10.10.1995, the orders dated 08.04.1999 and 29.11.2000 are hereby set aside and this court makes order that the 2nd defendant petitioner be restored to possession forthwith.

In all the circumstances of the case no order is made with regard to costs of this application.

SRISKANDARAJAH. J. – *I agree.*

Application allowed.

2nd defendant–petitioner to be restored to possession.

MITHUNRAJ

vs.

UNIVERSITY GRANTS COMMISSION AND OTHERS

COURT OF APPEAL.
IMAM, J.
SRISKANDARAJAH, J.
C. A. WRIT 498/2003.
MAY 4, 2005.

University Grants Commission – University Admissions – Selection of University – On what criteria? – Who determines the administrative district of a candidate for admission? – School candidate and private candidate – Is there a difference?

The Petitioner was informed by the 1st respondent on 10.06.2002 that he has been selected to follow a course of study in Medicine at the University of Jaffna. Later on 17.08.2002 he was informed by the 1st respondent that for the purpose of University admission the District is Colombo and not Mannar and cancelled the selection. The petitioner sought to quash the said decision.

The respondents contended that the relevant three year period to be considered for University admission for the academic year 2002/03 was from 01.01.1998 to 31.08.2001, and that the petitioner was studying in Mannar from 01.08.1998 to 17.02.1999 - 6 months and 16 days and at Colombo from 22.02.1999 to 19.06.2000 - 1 year 3 months and 27 days and since the petitioner falls within the first limb of Rule 40.1 – that he has studied in a school for a period of more than one year his District is Colombo and that the petitioner has furnished false and inaccurate information that he should be considered for admission from Mannar District.

HELD:

(1) Rule 4.2 draws a distinction between a school candidate and a private candidate. In the case of a private candidate the rules not only requires the candidate to produce the school leaving certificate or pupils record but also requires him to submit evidence of a permanent place of residence. In a case of a private candidate both the school and residence become relevant when Rules 4.1 and 4.2 are read together.

(2) The petitioner is a private candidate and the major part of the studies during the relevant period was in Mannar. The relevant period is from 01.08.1978 to 31.08.2001. The petitioner had studied at Mannar from 01.08.1998 - 17.02.1999 (6 months, 16 days) Colombo 22.02.1999 - 19.06.2000 (1 year and 3 months 27 days) and returned to Mannar to reside and studied in Mannar from 26.06.2000 - 31.08.2001., a period of 1 year 2 months and 14 days.

(3) The determination of the administrative district of a candidate for admission to the University is vested with the 1st respondent - and not with the candidate.

Per Sriskandarajah, J.

> "Column 4 of the application for university admission form and column 8 of the computer data sheet annexed to the application possess only a question" From which administrative district should you be considered for admission" – answering this question by mentioning a district by a candidate will not tantamount for a declaration of the candidate but it is a request of a candidate to consider him as a candidate from that particular administrative district for admission on the material furnished by him."

(4) The application form has a specific column for office use. This column is for the office to indicate the district after verifying the documents and other material submitted in accordance with the relevant rules. This is not done by copying the district entered by the candidate in column 8 but by an officer of the 1st respondent after verifying the documents and materials.

APPLICATION for a Writ of Certiorari.

Geoffrey Alagaratnam with *M. P. Puvitharan* for petitioner.
Ms. M. N. B. Fernando, Senior State Counsel for respondents.

Cur.adv.vult.

June 28, 2005.

SRISKANDARAJAH, J.

The Petitioner submitted that he was born at Vidatalthivu Mannar on 16.12.1981 resided and had his early education at Vidatalthivu R. C.T. M. School Vidatalthivu Mannar from 05.01.1987 to 03.01.1995–P1. Thereafter at St. Xavier's M. M. V.Mannar from 02.01.1995 to 17.02.1999–P2. and Hindu College Colombo 04 from 22.02.1999 to 19.06.2000–P3. He submitted due to the security situation prevalent in Colombo around June 2000 and on account of prevalent tension resulting from sudden security searches and questioning the Petitioner left Hindu College Colombo and went back to Mannar to reside in Mannar as he was not successful in his G. C. E. (A/L) first attempt and continued his studies as a private candidate in Mannar. He sat for the G. C. E. (Advance Level) examination in August 2001 at Mannar St. Xavier's M. M. V. exam center as a private candidate P4, P 5. The Petitioner tendered his application in the prescribed form to follow Medical Degree as his first preference P6. This was acknowledged by the 1st Respondent by its letter dated 01.04.2002 stating *inter-alia* that the Petitioners' District for the purpose of admission will be Mannar (12))P7. The 1st Respondent by its letter dated 10.06.2002 informed the Petitioner that he has been selected to follow a course of study in medicine at the University of Jaffna P8. The Petitioner registered as an internal student of the University of Jaffna on 03.07.2002.

The 1st Respondent informed the Petitioner by its letter of 17.08.2002 P10 that it has been revealed that your District for the purpose of the University admission should be Colombo and not Mannar and he was asked to show cause why his selection to follow a course of study in Medicine at the University of Jaffna for the academic year 2002/2003 should not be cancelled. The Petitioner replied to this letter on 30.08.2001.

The Petitioner submitted that he received a letter on 14.02.2003 dated 27.01.2003 from the 1st Respondent informing him that the Petitioner's selection to follow a course of study in medicine has been cancelled–P11. The Petitioner submits that the regulation for academic year 2002/2003 P18 was unreasonably and wrongfully applied against him. He was not called for any inquiry or clarification or provided an adequate opportunity of being heard prior to the aforesaid decision, other than P10 which is a show cause letter. In these circumstances the determination or decision of the 1st and/or 3rd Respondents P11 and P12 is *ultra vires,* without jurisdiction, unreasonable, arbitrary and in violation of the principles of natural justice.

The Respondents submitted that the relevant three year period to be considered for university admission for the academic year 2002/2003 was from 01.08.1998 to 31.08.2001 and that the Petitioner was studying at St. Xavier's College, Mannar from 01.08.1998 to 17.02.1999 a period of 6 months and 16 days and at Hindu College, Colombo from 22.02.1999 to 19.06.2000 a period of 1 year 3 months and 27 days. The Respondents submitted that since the Petitioner had studied in a school for a period of more than one year the Petitioner falls within the first limb of Rule 04.1 of the regulations. As the major part of the stipulated three year period was in Colombo District *i.e.* 1 year 3 months and 27 days at Hindu College the Petitioner's application should be considered for university admission as per Admission Rules from the Colombo District and has been wrongfully indicated by the Petitioner in P6. Therefore the information furnished by the Petitioner in his application P6 was false and inaccurate and the decision to cancel the Petitioner's registration is correct, lawful and valid and in accordance with the law.

The relevant Rules applicable to the admission to the university for the academic year 2002/2003 is marked as P17. The determination of districts of candidates is dealt with in Rule 4. It reads as follows :

4.1 For purpose of university admission, the district of a candidate will be determined as follows:-

The district of any candidate will be the district of location of school/ schools in which he/she studied during the major part of the three - year period ending on the last day of the month immediately preceding the month in which he/she sat the G.C.E.(A/L) Examination to qualify for admission.

Provided however the district of a candidate who has studied in a school for a period of less than one year during the three year period stipulated above will be determined on the basis of the location of school/schools in which he/she had studied, permanent place of residence of the candidate and other evidence as decided by the UGC.

4.2 In the case of a candidate who sat G.C.E.(A/L) examination as a school candidate, the head of the school concerned should certify, on the basis of school records, the accuracy of the information provided by the candidates. Every candidate who sat the G.C.E. (A/L) examination as a private candidate should send along with his/her application for admission his/her school Leaving Certificate or Pupil's Record Sheet and documentary evidence on permanent place of residence, *e.g.* extracts of Electoral Register, Grama Niladhari Certificate and other relevant documents.

Rule 4.2 draws a distinction between a school candidate and a private candidate. In the case of a school candidate the head of the school concerned should certify, on the basis of school records, the accuracy of the information provided by the candidates. But in the case of a private candidate the rules not only requires the candidate to produce the school leaving certificate or pupil's record but also requires to submit evidence of permanent place of residence. This shows that the framers of these rules contemplated a situation where the residence of a private candidate becomes material. In case of a private candidate both the school and the residence becomes relevant *i.e.* the period of schooling and the period of studies without attending school within the three-year stipulated period becomes relevant when Rules No. 4.1 and 4.2 are read together. This position is further supported by the steps taken by the University Grants

Commission to amend said Rule 4.1 for the next academic year namely 2003/2004 to make the position clear. The amended Rule 4.1 reads as "the school/schools in which the candidate was enrolled (on the basis of school records) for the maximum number of days during the three-year period."

In this instant application, it is common ground that the Petitioner is a private candidate and the major part of the studies of the Petitioner during the relevant period was in Mannar. The relevant period is from 01.08.1998 to 31.08.2001 and that the Petitioner had studied at St. Xavier's College, Mannar from 01.08.1998 to 17.02.1999 a period of 6 months and 16 days and at Hindu College, Colombo from 22.02.1999 to 19.06.2000 a period of 1 year 3 months and 27 days and returned to Mannar and studied in Mannar from 20.06.2000 to 31.08.2001 a period of 1 year 2 months and 14 days.

Whatever it may be, the determination of the administrative district of a candidate for the admission to the University is vested with the 1st Respondent and not with the candidate. It is clearly borne out by the scheme formulated in the application form. The column 4 of the Application for university admission form and column 8 of the computer data sheet annexed to the application form poses only a question "From which administrative district should you be considered for admission?" Answering this question by mentioning a district by a candidate will not tantamount to a declaration of the candidate but it is a request of a candidate to consider him as a candidate from that particular administrative district for admission on the material furnished by him. The computer data sheet annexed to the application form at the bottom of page 2 has provided a scheme to consider this request at the outset by the officers of the 1st Respondent with the document and the materials submitted by the candidate in keeping with the provisions of the rules. Once they make a determination they enter the district in the given column at the bottom of page 2 of the computer data sheet and certify that he has checked the relevant information to arrive at this decision. The Respondent communicates this decision to the applicant when acknowledging the receipt of the application. Accordingly, the officers of the 1st Respondent in keeping with the request of the Petitioner after considering the information supported with the documents had come to the conclusion that the district for the purpose of admission of the Petitioner to the University is Mannar. It is

communicated by the 1st Respondent to the Petitioner by P7 which states "Your District for the purpose of admission will be Mannar, 12.".

The court also observes that the 2nd Respondent has failed to submit a copy of the application of the Petitioner after it was processed by the 1st Respondent for the university admission. The application has a specific column for office use at page 2. This column is for the office to indicate the district after verifying the documents and other material submitted in accordance with the relevant rules. The Respondent without submitting the Petitioner's processed application has annexed three other applications relating to other candidates as 2R2, 2R3 and 2R4 which had been processed. These applications clearly demonstrate at page two in the column "for office use only" that the relevant district of the candidate should be entered by an official. This is not done by copying the district entered by the candidate in column 8 but an officer of the 1st Respondent after verifying the documents and materials has to determine the district and enter the same and sign the adjoining column to certify that he has checked.

Rule 4 contains a foot note. It reads as follows:

"IMPORTANT"

"The heads of schools should take special care to ensure that correct information is provided by the candidates. Provision of incorrect information by any candidate will be considered a serious offence and liable for disciplinary action. A candidate who has been found to provide incorrect information will lose his/her admission/registration at whatever point in his/her career at the university and will not qualify for the award of a degree."

The counsel for the Respondent submitted that the only incorrect information that was submitted by the Petitioner is in column 8 *i.e.* he should be considered for admission from Mannar District. As I have discussed above this is not information but only a request of the Petitioner based on the information and documentations submitted by him. The decision to treat the Petitioner as a candidate from Mannar District is that of the 1st Respondent based on the information provided by the Petitioner. None of the information or documents provided by the Petitioner to arrive at that conclusion by the 1st Respondent was found to be incorrect. Under these circumstances the 1st Respondent is not entitled to cancel the selection of the Petitioner to follow a course of study in Medicine at the

University of Jaffna. Therefore the Court issues a writ of certiorari to quash the decision of the 1st Respondents as communicated by letters dated 27.01.2003 (P11) and the decision of the 4th Respondent communicated by letter dated 10.02.2003 (P12). The question of issuing a writ of mandamus does not arise as the Petitioner is continuing his course of study at the faculty of Medicine at the University of Jaffna in pursuance of an interim order issued by this court. The court allows this application without costs.

IMAM, J. — *I agree.*

Application allowed.

DE SILVA

VS.

WETTIMUNY

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CALA 215/2004.
DC BALAPITIYA PROBATE/24.
JULY 6, 2005.

Court of Appeal (Appellate Procedure Rules 1990 3(a) - 3(2) – Leave to appeal application – Non compliance with Rule 3(d) –Is it fatal? – Civil Procedure Code, sections 754(2), 757, 758 and 159 – Applicablility of the Rules to leave to appeal applications.

A preliminary objection was taken that, the petitioner had not averred in the application for leave to appeal that he has not previously invoked the jurisdiction of the Court of Appeal in respect of the subject matter of the application and moved that the application be dismissed *in limine.*

HELD:

(1) The provisions contained in the Court of Appeal (Appellate Procedure) Rules 1990 has no application to leave to appeal applications;

(2) The procedure in instituting an application for leave to appeal is governed by the provisions of the Civil Procedure Code and not by the Rules as laid down in the Court of Appeal (Appellate Procedure) Rules 1990;

(3) Leave to appeal is a statutory remedy. As such when exercising the statutory remedy there is no necessity to insert an averment in the petition that the petitioner had not invoked the jurisdiction of the Court of Appeal before.

APPLICATION for leave to appeal from an order of the District Court of Balapitiya– on a preliminary objection

Cases referred to :

J. M. C. Caderamanpillai vs. A. M.J. M.V. Caderampillai 2005 1 Sri L. R.

Rohan Sahabandu with Gamini Hettiarachchi for respondent -petitioner,
Navin Marapana with T. Palliyaguru for petitioner-respondent.

Cur.adv.vult.

October 7, 2005

ANDREW SOMAWANSA, J.(P/CA)

When this application for leave to appeal was taken up for inquiry counsel for the petitioner-respondent took up a preliminary objection, in that in as much as the respondent-petitioner has not averred in the petition that he has not previously invoked the jurisdiction of this Court in respect of the subject matter of the present application, the respondent-petitioner's application should be dismissed *in limine*. It is to be seen that the objection is based on non-compliance of the provisions contained in Rule 3(d) of the Court of Appeal Appellate Procedure Rules 1990.

Both counsel agreed to tender written submissions on this preliminary objection and accordingly both counsel have tendered their written submissions.