THE
Sri Lanka Law Reports

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

[2005] 3 SRI L. R. - Part 15

PAGES 393 - 420

PUBLISHED BY THE MINISTRY OF JUSTICE

Printed at the Department of Government Printing, Sri Lanka

Price : Rs. 18. 50

1-CM7229

DIGEST

ADMISSION – Enrolment as an Attorney-at-Law by a Buddhist Priest- Administration of Justice Law (AJL) No. 44 of 1973-Section 15(1)(e), Section 33 –Is there a rule of Vinaya Pitaka prohibiting a Bhikku from practicing the profession? – Are these rules purely of ecclesiastical nature?– Constitution –Section 6, 18(1)(d) - Is there incompatibility of the two vocations? - Is it morally reprehensible? - Does Section 6 override the effect of Section 33 (AJL) ?

CIVIL PROCEDURE CODE - Section 396, Section 760 - Rent Act, 7 of 1972 - Pending appeal defendant tenant dies - abatement - Three years later the wife makes application for substitution and set aside order of abatement - legality - Court of Appeal abating in the absence of an application for substitution, Art 126-Constitution - Court of Appeal Rules - Rule 38.

" ..... originally grantha dura meant only the learning and teaching of the Tripitaka. But as time went on the term was widened and it began to embrace languages, grammar, history, logic, medicine, and other fields of study as well. This trend on occasions took the monks not only beyond the confines of the Vinaya but also the criminal law of the land" (vide p. 86).

It is in this context that Rev. Rahula makes a reference to a Thera, named Abhidammika Godatta, an erudite monk learned in both Vinaya and Abidhamma. Although the applicant relies on a statement that Rev. Godatta had been appointed the Chief Justice of the country, that statement is not actually borne out by the citation. Rev. Godatta, according to Rev. Rahula "was raised to a position virtually equal to the office of the Chief Justice of Ceylon."

Even this opinion seems unwarranted because as Mr. Jayawardnea pointed out the legal profession and the courts as known today were unknown at that time. The proclamation of the King as regards Rev. Godatta was merely to the effect. "As long as I live, judgments given by Godatta Thera in cases either of the monks, nuns or layman are Abhidammika final.

I will punish them who does not abide by his judgment". This appears to mean nothing more than that his decisions had the approval of the king. Even lay people seem to have gone to Godatta Thera with their problems but there is nothing to indicate that he was the holder of an office that carried with it remuneration. In any event Rev. Godatta's case is one where a monk enjoyed royal favours and got mixed up in lay matters to an extreme degree. It shows to what extent monks at that historical period had departed from the original tradition.

Rev. Walpola Rahula then, tracing the history of the Sangha states that soon some monks got interested in other lay activities such as literature and the fine arts. With the inevitable acquisition of property and

temporalities within this way of life, further changes were wrought in the life of the Sangha. He goes onto say at page 166 :

" A large number of practices that the new situation demanded were against the original Vinaya. Monks had not the authority and the courage to change the Vinaya rules against the decision of the Rajagaha Council. Nor were they able to ignore the new situation. They were placed on the horns of a dilemma. Some of the examples given below will show how ingeniously they got over the difficulty without going against the letter of the law though in fact their solutions were quite contrary to the spirit of the teaching.

Fortunately, a survey of the history of the Sangha in Ceylon does not show (except with one or two rare exceptions) either a continuous decline of the Sangha or a degeneration that embraced the whole of it. Only on a very few occasions was the Dhamma threatened with destruction and on these occasions remedial action was taken successfully to preserve the Dhamma and the Sangha. Time and again, pious and able rulers and monks with faith and vision stepped into stop the decadence and purify the Sasana. Some of the great names in our history and the numerous kathika vathas bear testimony to this fact.

The latest was the Kathikavatha of Sri Rajadhi Rajasinghe which is reproduced in the Report of the Commission on the Administration of Buddhist Temporalities. In this view of the matter, harking back to an ancient period of decadence would give no indication of the state of the religion today or of any other period.

Looking at it in its historical perspective, our present constitutional provision giving protection to Buddhism could be regarded in many ways as being akin to such remedial action and as a measure thought out and designed to preserve Theravada Buddhism in this country. One may

well ask the question as to what is the real state of Sasana today when we see monks beginning once again to participate in secular activities. It is, however, common knowledge that the great majority of the monks in this country, particularly the elder monks, though following the *grantha dura*, still believe that the nobler ideal is a life of seclusion with their full time being devoted to the practice of virtue, meditation and wisdom. But, though their spirit may be willing, they do not choose to exert themselves to achieve that progress. They have been content to remain mere scholars and guardians of the books, leading lives of indolence and ease. But, one has no reason to presume that by and large they do not adhere to the basic morality and discipline expected of them. It may well be that the sum total of their lives, as Rev. Rahula says, are limited " to the recitation of the Suttas (Pirit Chanting), preaching a serman, attendance at funeral rites and alms giving in memory of the departed, and to an idle cloistered life in the temple". But, still a majority of monks in this country lead cloistered lives in temples and are content to lead even such scholarly and idle lives rather than betray the spirit of the Teaching by entering the public arena and taking an active part in worldly matters.

Side by side with this, the true and pristine monastic tradition, as outlined in the Pitakas, has survived in this country. There are still monks in this country who are scrupulous in the adherence to the Dhamma Vinaya and are faithfully following in the footsteps of the Master. That tradition has survived in this country virtually unbroken, and in recent times there has been an upsurge and revival of the practice of monks taking to a life of seclusion and meditation in remote and lonely places. Without fear or contradiction, one could say that there are probably more such monks today than at any time within the last 500 years. This tradition, constituting the practice and understanding of the Dhamma Vinaya, and not mere scolasticism , is, in my view, the true heritage of the Sangha.

I now come directly to the objection based on the constitutional provisions, namely, section 6 of the Constitution. This objection has

been taken in the papers filed by the Y.M.B.A. and it was also formally taken up before us by Mr. Amerasinghe. Mr. Jayawardena referred to it in passing and it is unfortunate that this question was not given its due importance, because the majority were not receptive to the argument arising from it. Needless to say there was more to this problem than outlined in the submissions. In my view it is this matter which has the greatest bearing on the issues before us and on which the decision in this case must turn.

Section 6 of the Constitution has been reproduced earlier in this judgment and I have referred to the important position it holds in our Constitution. This provision has had a noble and ancient ancestry. For over two thousand years the State in this country had undertaken the protection of Buddhism, which was at that time the State religion. It was so even in times of foreign domination and when alien rulers occupied the throne. At the time the Kandyan Kingdom was ceded to the British, the Chiefs and the High Priest insisted that a clause guaranteeing protection of the religion of the Buddha be embodied in it. But a foreign Government, with an established Church and Missionary activities found its Treaty Commitments in conflict with its colonial policy and Christian ideals. Thus, this clause in the Convention was quietly ignored during this period, though it remained on our statutes book, virtually a dead letter, till the present provision superceded it in 1972. The protection of Buddhism, whether by the courts or other instrumentalities of the Government, during that period was minimal and therefore those who point to the absence of any cases or precedent on this matter have merely searched for something which was not there to be found. This present provision in our Constitution may well be said to embody the aspirations of the great buddhist majority of this country, who, after we regained independence, once again wanted this guarantee written into the Constitution so that the state and the people could re-dedicate themselves to it.

Section 6 declares that the Republic of Sri Lanka shall give to Buddhism the foremost place and in the second part of the section enjoins the State in these words ;

"..... it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by section 18(1)(d)."

I do not think my bothers will disagree if I say that there is a clear duty cast on the State to protect and foster buddhism. The aspiration of our people are not embalmed in this section : neither was this section put in to deceive the people, nor is it a mere ornament to be admired from a distance. The section is very much alive and carries with it a force for the good to be availed of , so that our society will continue to be firmly anchored to the highest values of religion and morality.

These provisions create legal rights and obligations and have the force of law and are enforceable in the courts of this country. Further, any law, act or transaction inconsistent with these provisions can be brought up for legal determination before the appropriate forum. This legal position becomes apparent when we contrast this section with section 16 of the Constitution which sets out the principles of State policy. Section 17 expressly states that "the provisions of section 16 do not confer legal rights and are not enforceable in any court: Nor may any question of inconsistency with such provisions be raised in the Constitutional Court or any other court." There is no such indication in respect of section 6.

That section 6 creates obligations of a strictly legal nature binding on the State is manifest. Mr. Jayewardena submitted that whatever action that is called for in this matter should be left to the Legislature and Executive. My brothers appeared to acquiese in that view. If it is a question of power, both the Legislature and Executive undoubtedly have powers to intervene in the present situation in their own way. But I do not think that we need instruct them as to what they ought to do. On the

other hand, if these provisions cast a duty on us, could we remain indifferent or inactive in respect of our obligations?

Let us next find out what is meant by the " State" and more specifically whether the judicial department of government could be said to be included in the term "State".

An analysis of Chapter 1 of the Constitution shows that the people in whom the sovereignty of this country was vested established a sovereign State named the Republic of Sri Lanka. The manner in which the power of the State is to be exercised is set out in section 5, as modified by the Second Amendment. That is to say, there are now two supreme instruments of State power – the National State Assembly and the President. The judicial power is exercised by the National State Assembly through courts and other institutions created by law. These are the main instrumentalities of the State and there is reposed in them those important functions without which a State cannot exist. Even the ordinary meaning of "State" contemplates the Legislature, judiciary and executive – the three great departments of State. One distinction usually drawn between the judiciary and the other departments of State is that Judges do not govern." By this it is meant that the judicial department cannot initiate or promote action. It can act only when its jurisdiction is invoked in a case or controversy by parties. This distinction may be valid for certain purposes, but has no relevance in the present context. I do not think it can be seriously argued that the judiciary, which is such an important component of the Government, does not come within the ambit of the term "State."

To take an example, if the fundamental right of the freedom of worship enshrined in section 18(1)(d) is violated by executive action in a matter coming before Court, the court must, by the very nature of its functions, give effect to the superior provisions of the Constitution. In the present case the fundamental right of religion, so far as Buddhists are concerned, is contained not only in section 18(1)(d), but also in section 6. This section gives to Buddhism- the religion of the majority - a precedence

and greater emphasis, while assuring to all religions the freedom of worship contained in section 18(1)(d).

The application of section 6 to the matter before us arises in this way. The State is enjoined to protect and foster Buddhism. When a monk is enrolled by us as an attorney, this determination by us as Judges places a seal of approval on an act which is said to be violative of the Dhamma Vinaya. For this purpose it is not necessary that some specific tenet of the Vinaya should be transgressed even a significant division from the spirit of the religion, I think, may suffice if it could be said to endanger the Teaching.

Questions similar to this have arisen in other jurisdictions and those decisions, I find, are of great help in interpreting our law. In America, prior to 1948, there was a practice among the whites of having racial restrictive covenants which prohibited the sale or lease of land and other property to Negroes.. Those were purely private agreements. Where such conditions had been imposed by the government or municipal authorities, the Supreme Court had earlier ruled that they violated the equality clause of the Fourteenth Amendment. The Supreme Court in *Shelley v. Kramer*, [19] was confronted with a racial restrictive clause between private parties. But in this case judicial recognition by the local State Court had been given in enforcement proceedings. The question was whether the judicial intervention in the proceedings made it State action so as to constitute a violation of the fundamental rights guaranteed by the Constitution.

Justice Vinson, delivering the opinion of the Court, said,

"But the present cases, unlike those just discussed, do not involve action by state legislature or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here

confronted is whether this distinction removes those cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this court in the *Civil Rights Cases*, 109 U.S. 3, the principle has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the State. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.....

But here there was more. These are cases in which the purposes of the agreements was secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreement does not amount to state action; or, in any event, the participation of the States is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment.....

That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.....

Against this back ground of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of these States and, if so,

whether that action has denied these petitioners the equal protection of the laws which the amendment was intended to insure.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers, and contracts of sale were accordingly consumated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the ground of race or colour, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on as equal footing

.....

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand....."

In a later case , *Barrows v. Jackson*, [20] this principle was extended where one of the parties to a racial restrictive covenant was sued by the other for damages, both being white, for selling the property to a Negro. The Supreme Court held that the defendant seller could defend the action

on the ground that the contract was discriminatory of Negroes and that a State Court judgment for damages would constitute state action violative of the Fourteenth Amendment in the same legal sense as an order by a court for specific enforcement of a restrictive covenant.

Seervai in his book "Constitutional Law of India (1968 Edn.)" after referring to *Shelley v. Kraemer (supra)* and dealing specially with the Equality Clause in the Indian Constitution, observed,

"Those judgments are direct authority for the proposition, that the prohibition of the Equality Clause is as binding on Judges as it is on the executive and the legislature, and having regard to the identical language employed in Article 14, it is submitted that the prohibition of Article 14 applies to the Judiciary".

On the basis of those principles and in the light of all relevant considerations, it is manifest that the provisions of section 6 of our Constitution are intended to govern even the acts of Judges and, therefore, the section will have a controlling effect in the resolution of the matter before us. I would, however, like to stress that this is more than a mere terminological decision. I feel that, in coming to this conclusion, I have been able to avoid programming a series of contradictions which may have had the effect of unsettling a result achieved by the Legislature and the People. In saying this, I like to add one word of explanation; lest, some people misconstrue the actual effect of my ruling. It should be remembered that we are dealing here with the case of a Buddhist monk still in yellow robes, where a section of Buddhists have taken exception to the course of action on which he has embarked. This matter in essence is a dispute among the Buddhists and concerning the Buddhists only. In the course of the hearing, it was brought to our notice that a priest of another religious order had already taken his oaths as an attorney-at-law; but it was agreed that that case had no bearing on the issues in this case. Thus, my ruling in the present case is not meant to have wider effect. It is unnecessary in the present context to rule on the extent or

range of this constitutional provision; but, in the event it comes up for decision in the future in a different context, I have no doubt that section 6 will be so interpreted as to further the legitimate rights of all persons living in this country who go to constitute the multi-religious and multi-racial society of ours.

The next matter that arises for consideration is the extent of the protection afforded by section 6. The operative words are "protect" and "foster". They are ordinary words understood by everybody. "Protect" means keep safe, defend, guard against damages or injury. "Foster" means promote growth or, encourage tend. For the purpose of interpreting the provisions of section 6, it would be sufficient if I were to regard the year 1972 as the material date this being the date of the introduction of that provision. When it is said that Buddhism should be protected, does this envisage a restoration of the religion to its original purity or merely its preservation from further degeneracy and depredation? The issue becomes further complicated by the fact that, as stated earlier, it is still possible to see in this country the Dhamma Vinaya in its pure form, not only preserved as theory or text but also in practice as living example. Side by side with this, we also see in certain quarters the spectacle of a departure from those high ideals where laxity and degeneracy prevail. Let me again, for the present purpose, take as it were the lowest common denominator, namely the present state of the religion and the general standards now prevailing among the majority of the Buddhists. I find that it is unnecessary to express a wider opinion, since this case can be resolved on that basis. There is another way of looking at the same matter. One may pose the question whether the provisions of section 6 should be regarded as a sword or as a shield. That is to say, should section 6 be applied in a positive sense so as to undo even earlier transgressions and transactions, or only negatively in a defensive way, to prevent and ward off threatened dangers. Following what I have said earlier, let me again assume that we are concerned with prospective transgressions and the duty of preventing them. Even transactions, if any, between 1972 and today are not before us for determination and in

any case if there had been any such transgression, they will have to be tested in the light of the over-riding provisions of section 6. They too have no bearing on this matter.

In this case the Court is faced with an altogether new situation. Here we find a Buddhist monk knocking at the doors of the legal profession for admission. Such a thing has never occurred in contemporary times, nor do I think it ever occurred before in the 2500 years of the history of the sasana notwithstanding Rev. Dodatta Thera. It is a melancholy fact that today we see monks in yellow robes engaged in diverse worldly occupations. There are monks who are astrologers, makers of talismans, charmers of magic spells, and ayurvedic physicians. I do not think we still have a monk who has passed out and is practicing what is called "Western Medicine". Compared to these vocations, the practice of the law is a new departure, a sort of quantum leap a striking out in a new direction that cannot but have a most unhealthy influence on the prevailing position. History reminds us that it is always by such little advances that a retrograde movement imperiling the Dhamma has been able to achieve such deep penetration.

The legal profession, which is an honourable one, has its due place in the fabric of society and it serves the community in its own way. But from the spiritual stand-point of the Dhamma,. the practice of the law is regarded as being more materialistic and more worldly than even teaching and the practice of medicine. It is also reckoned as being different from them in kind rather than in degree.

In so far as the legal position is concerned, it is my view that any deterioration or worsening of the prevailing state of affairs of any significance would attract the protective provisions of section 6 of the Constitution. No standard less exacting than this can properly be attributed on an interpretation of these provisions. It will be noted that the protection afforded by this provision is to a religion. The manner and extent in which certain acts will have an impact on a thing which is of the spirit and of an

unworldly nature cannot be weighed or measured with any degree of precision, or assessed by worldly standards. We are dealing with imponderables and the consequences of the present act cannot be for seen. It is certain the ruling of the majority will be sought to be used as a spring board for a wider incursion into lay life. I am also inclined to agree with Dr. Wickramasinghe that if an increasing number of monks were to take to these worldly occupations, the destruction of Buddism will be hastened. The conduct and behaviour of such monks, who will find it increasingly difficult to confirm to their monastic vows, would be a reflection on the entire *Sangha* and in consequence the *Sangha* would, before long, forfeit the great respect and support it has earned from its lay supporters. The lay buddhist is an essential component and the stay and support of the *Sasana* : and when he turns lukewarm to the religion, we can expect its destruction to be at hand.

I now come to a part of the case where the applicant has shown the greatest amount of misunderstanding and confusion. The affidavits from the Mahanayakas - two respected and well known monks - have apparently being filed on the basis of certain authorities of this court, but unfortunately those cases, if carefully examined do not bear out the position taken up by the applicant.

There are cases which state that our courts will generally give recognition to decisions of domestic tribunals, where such decisions concern matters of internal management and discipline. A court will not go behind such a decision unless that decision was made without authority, or when in arriving at the decision the tribunal had disregarded the principles of natural justice. This principle has been made use of in temple cases where the courts have given recognition to decisions of *Sangha Sabhas.* There are however, numerous instances where court has refused to accept the decision of a *Sangha Sabha.* In those cases, the court itself had to consider and make a decision on every aspect of the case including the matters alleged to have been dealt with by the *Sangha Sabha.* Such

decisions involved an examination of what may be termed " pure ecclesiastical matters."

This shows that, although our courts do not function as ecclesiastical courts, they have the necessary jurisdiction to deal with ecclesiastical matters in the course of proceedings which are before them. There is ample authority for the proposition that where the decision on a religious or ecclesiastical matter is a necessary incident to the decision of a civil right, it is well within the power of this court to deal with such religious or ecclesiastical matter. *Aysa Oemma v Sago Abdul Lebbe* [21], *Devarakkita v Dharmaratana* [22], *Neisammah v Sinnethamby* [23]. Vide also section 9, Indian Procedure Code. It is undoubtedly on this basis that our courts have concerned themselves with Buddhist Ecclesiastical law and built up a body of legal principles relating to Sangika property. Hayley – Laws and Customs of the Sinhalese , 563.

In this case we must not forget that the present application relates only to civil rights. The applicant is seeking enrolment as an attorney-at-law. The petition and other material he has filed show this; and if there were any doubt on the matter, there is the statement of his counsel that the applicant has come before us to claim his civic rights to which every citizen of this country is entitled. He specifically relied on the provisions guaranteeing fundamental rights in the Constitution. Thus the ecclesiastical issues that arises for consideration are only incidental to the main issue in this matter, which is a pure civil right. This was then, on authority, clearly a matter which fell within the jurisdiction of this court for adjudication. There is thus no warrant for this court to refuse to go into this aspect of the matter on a supposed lack of jurisdiction in the court.

Let me now make a critical comment on the cases relied on by the applicant. These cases related to decisions of a duly constituted Maha Sangha Sabha. There is, however, no indication in the affidavits before us to show that a Maha Sangha Sabha was duly constituted and there has been a decision of such a Maha Sangha Sabha in the present matter.

Such a decision has certainly not been produced before us. In lieu of it, we have these two affidavits where the decadents has sought to express their own personal views on a matter now before court. The mere recital in the Mahanayake's affidavit that he is the president or Chairman of the Amarapura Maha Sangha Sabha, - there is no information before us as to the nature of this institution - is insufficient for this purpose. The uncertainty in this matter was re-in forced by the statement made by Mr. Prince Gunasekera that the applicant was advised to adopt the precaution of filing an additional affidavit from the other Mahanayaka - his immediate superior - because there was some doubt about the authority of the Mahanayake of the Amarapura Nikaya over him or over the group to which he belongs.

Further, an examination of the reported cases relied on by the applicant shows that those were instances where a decision of a Maha Sangha Sabha was relied on in a dispute regarding an incumbency or property appertaining to a particular set. Those decisions had no wider impact than that. The matter before us hardly bears analogy to these cases. The present matter can, by no means, be regarded as one confined to one Sect but concerns all buddhists. The Mahanayaka's statement amounts to a public pronouncement on the Dhamma Vinaya of which he is not entitled to be the spokesman or the sole spokesman. This is a matter concerning and affecting all the three Nikayas existing in this country and is also of great moment to all buddhists in this country - both monk and layman. Accordingly, in the face of this decision and what transpired here, a Mahanayaka of any other Nikaya might find it difficult or unwilling to prevent a monk under him from taking advantage of our ruling however much he may disapprove of it. For, if this court sees nothing incompatible in a monk practicing as a lawyer, while remaining a monk could a Mahanayake be expected to take a monk to task for an act which has been endorsed and given effect to by the highest judiciary of the land.

There are other infirmities in these affidavits. A perusal of them shows that they are not confined to statements of fact as required by the law,

but they purport to express certain opinions on this most complex and controversial matter. My opinion gives some indication of the essentially legal nature of the issues before us and the problems that could arise in trying to solve them without reference to the laws and the Constitution, and without a consideration of the chequered history of the Sangha. The Maha Nayakas cannot claim that they are in a position to express an opinion on all these matters nor do I think that these matters fall properly within their duties or authority. It is moreover highly significant that the Maha Nayakas have relied on the *grantha dura* as a basis for their pronouncement. If so, the statements must necessarily be of a limited nature, as they stand on the somewhat lesser ideal of mere scholasticism as against the fullness of the Buddha's real Teaching. These affidavits are therefore practically valueless as legal evidence. I regret to say that they contain nothing but an eloquent articulation of the irrelevant and inadmissible, and it would have been best for everyone if they had not been forthcoming. Even if the affidavits were legally admissible for the purpose intended by the applicant, then I agree with the learned Attorney-General that they could not have been used by the Court without having given Mr. Amerasinghe an opportunity of filing counter material. In my view, the majority erred when it gave no ruling on Mr. Amerasinghe's application in regard to the filing of counter affidavits. There is thus no legally admissible material on which the court could have determined one of the main issues in this case, namely, whether the applicant's conduct is violative of the Dhamma Vinaya. The court of course, did not think it was necessary in this case to have expert evidence to elucidate these matters.

Having regard then to my analysis of the legal position on the basis of the authorities cited, I am of the view that this application must be refused on one or more or all of the following grounds:-

(1) As a matter of law, on the ground of incompatibility of the two vocations. I think, this court has the power to lay down such a principle and every reason for adopting it. The court is entitled to

do so in the exercise of the powers contained in section 33. The notion that a regulation is necessary for this purpose is entirely erroneous. In fact, the power to regulate, i.e. the power to make rules and regulations does not include a power to take away a right given by the principal Act. *Ceylon Workers' Congress v. Superintendent Beragala Estate* (24) in any event, since the court's powers are discretionary, the discretion ought not to be exercised in favour of the applicant on this ground alone.

(2) On the ground that what the monk is seeking to do is morally reprehensible. His action has disturbed the moral sense of a section of the public. Accordingly the Court should not lend its aid or support or approve the conduct of the applicant. It was Mr. Rajapakse's submission that this monk, while representing to the public on the one hand that he is a mendicant monk dependent on alms food supplied by the public intends on the other hand to pursue a worldly occupation which is inconsistent with what he stands for. This he said was tantamount to a false representation. If this is the situation, I certainly think that there is an element of bad faith in his conduct. Our courts do not overlook moral considerations especially when there is a discretion vested in the court. For example, on principle our courts do not enforce immoral contracts or those which are contrary to public policy. This therefore, is eminently a case when we should follow those principles.

(3) On the basis that there would be a violation of the Vinaya rules which the court must recognize and give effect to. The Vinaya rules have been referred to and acted on by the courts on numerous occasions. At the very least, they must be given effect as customary law or placed on the same footing as the rules of a recognized institution or association which the courts are not averse from recognizing. If there were a rule of the Bar Association in regard to admissions, I have no doubt that the court would

have examined and given effect to such a rule. Vide *Solicitor-General v. Jayawickrema*,[17] where the court looked at certain rules of the Bar Council which, at that time, was in the nature of a private association. It is interesting to find that in the present case the applicant represents two "Vocations" in his own person. Since it is in the capacity of a monk that he is seeking admission to the profession, the applicable rules, *qua* monk, must be given as much relevance as the Bar Association rules. I think, the learned Attorney-General agreed that these rules can be so recognized.

(4) On the ground that the applicant had failed or had not been able to discharge the burden lying on him in this matter. Having sought enrolment in his capacity as a monk and being governed by monastic rules and discipline, it was incumbent on him to satisfy the court that his continuing to lead the life of a monk would be no impediment to his practicing as a lawyer. He sought to establish this by the affidavits which stated that he would not be transgressing his monastic discipline by becoming a lawyer. As I have pointed out earlier, these affidavits were legally inadmissible for this purpose and should have been ruled out. If this had been done by the court, the application would have failed at that stage. In any event, if the necessity for gong into that aspect of the matter had arisen provided a *prima facie* case was first made out the proper procedure which should have been adopted by Court was to call expert opinion. This the majority failed to do and I cannot therefore see how the issue can be decided in the absence of the necessary material which should have been obtained by following the correct procedure. Even if the affidavit were considered to be admissible, they are again (for the reasons stated earlier in this judgment) insufficient and inadequate to discharge the onus that lay on the applicant. There is also the disconcerting fact that these affidavits had been filed without due notice and were sprung on the objectors without warning. When Mr. Amerasinghe indicated that he would like to file counter affidavits, the court deferred giving a ruling on his applications. At the least, it could be said that the matter is still at large and it was improper for the majority to have based their ruling on material which was adduced virtually *ex parte*.

(5) On the overriding ground of the application of section 6 of the Constitution to this matter. Its effect is manifold. First, as a matter of pure legal interpretation the superior provision of the Constitution must prevail over all ordinary laws that are repugnant to it. Section 6 of the Constitution has this overriding effect over section 33 of the Administration of Justice Law. Second, the constitutional provision must necessarily be considered as a relevant factor and given effect to whenever a discretionary power is vested in us as in this case. Third, its power, as directly imposing a duty on the Judiciary, must be recognized and given effect whenever the occasion arises for doing so. This would prohibit the court from giving judicial approval to any conduct that can be brought within the ambit of the Constitutional provisions.

For the above reasons I find myself unable to concur in the judgment of the majority of this court and I am of the view that the applicant was not entitled to enrolment as an attorney-at-law, and that his application should have been refused. It is a matter of regret that I have to disagree with my brothers who are at variance with me on a number of issues which, I think, can only be decided on the lines set out here. To reassure myself, I have gone over this opinion more than once and every time I did so I found myself adhering to what I have said here with increasing conviction.

I would therefore refuse this application.

Application refused.

By majority decision application to be admitted and enrolled as an Attorney-at-Law – allowed.

Editor's Note.- Applicant priest wrote to the Registrar of the Supreme Court requesting permission to take oaths in robe of a monk. This was conveyed to his lordship the Chief Justice who stated that the attire for an attorney-at-law is prescribed in the Supreme Court rules, and applicant must comply. The record does not indicate that he has taken oaths as an attorney-at-law.

JABIR
VS.
KARUNAWATHIE

SUPREME COURT.
S. N. SILVA CJ.
TILAKAWARDANE, J.
AMARATUNGA J.
SC 18/2004.
FEBRUARY 18, 2005.

Civil Procedure Code - Section 396, Section 760 - Rent Act, No. 7 of 1972 - Pending appeal defendant tenant dies - Abatement - Three years later the wife makes application for substitution and set aside order of abatement - Legality - Court of Appeal abating in the absence of an application for substitution, Article 126-Constitution - Court of Appeal Rules - Rule 38.

The 1st defendant tenant lodged an appeal against the judgment of the District court which held in favour of the plaintiff landlord. Whilst the appeal was pending the defendant tenant died on 30.01.2000. On 29.01.2002 the plaintiff filed a motion bringing this matter to the notice of Court and sought an abatement. The Court issued notice on the registered Attorney on record. On being satisfied that the notices were served - the Court of Appeal allowed the motion of the plaintiff-respondent. The appeal was abated, and Writ was executed.

On 13.05.2003, more than 3 years after the death of the defendant - appellant tenant, his spouse made an application to get the abatement order set aside and for substitution of herself in the room of the deceased defendant-appellant. The Court of Appeal set aside the order of abatement and substitution was allowed and the case relisted.

On special leave being granted,

HELD:

(1) The consequence of abatement of a case is because the case record has become defective on account of the death of a party

and those parties who are materially interested in the case not taking necessary steps. No cogent or explicit reasons are given for the cause of delay.

Per Shirani Thilakawardane. J.

"The Petitioner could not after more than 3 years and 3 months of the death of the 1st defendant-appellant, and one year after the order of abatement seek to remedy this situation".

(2) The proxy of the Registered Attorney had been revoked. It was incumbent upon the 1st defendant-appellant even prior to his death to have taken steps to have his registered Attorney-at-Law enter proxy and file the required papers. In failing to give such instructions, the appellant had even prior to his death failed to exercise due diligence in the prosecution of his appeal.

Held further :

(3) The Court of Appeal must in such applications made on the death a party require such applicant or the petitioner or appellant or as the case may be to place before Court sufficient material to establish who is the proper person to be substituted – Court of appeal Rule 38, Section 760 Civil Procedure Code.

Per Shirani Tilakawardana, J.

"With the death of the 1st defendant-appellant tenant the contract of tenancy came to an end and in the circumstances his surviving spouse admittedly not in occupation of this premises would not be a fit and proper person to be substituted in the room of the 1st defendant-appellant tenant. The only manner in which the surviving spouse of the 1st defendant-appellant could continue would be as a statutory tenant under Section 36(2) but clearly as she is not resident in the premises, she could not plead same".

APPEAL from the judgment of the Court of Appeal reported in 2004 3 Sri LR 123.

Cases referred to :

1. *Simon Silva vs. Sivasupramaniam* - 55 NLR 562
2. *Suppramaniam et al vs. Symons et al* - 18 NLR 229.

LC Seneviratne PC with *Riza Muzni* for *plaintiff-appellant-respondent-petitioner .*

Sanjeewa Jayawardane with *Priyanthi Gunaratne* for *petitioner-respondent.*

September 7, 2005

SHIRANEE TILAKAWARDANE, J.

The Plaintiff instituted action in the District Court of Mt. Lavinia for the ejectment of his tenant (now Deceased) the 1st Defendant-Appellant for the wrongful subletting of the premises in suit, namely 393, Galle Road, Colombo 4, to the 2nd, 3rd, 4th and 5th Defendant-Respondents, without the prior sanction of the Landlord. It was common ground that the Rent Act No. 7 of 1972 governed the said premises. The District Judge of Mt. Lavinia by Judgment dated 28/08/1997 held in favour of the Plaintiff (A5).

Only the 1st Defendant lodged an appeal, but while it was pending the 1st Defendant-Appellant died on the 30/01/2000, a fact proved by the death certificate marked A7.

On 29.01.2002, almost two years later, the Plaintiff-Respondent filed a motion bringing this matter to the notice of court. The Court issued notice on the registered Attorney-at-Law on record. On 7.5 2003 after ascertaining the fact that notice was not returned and thereby being satisfied that the notices had been served, the Court of Appeal allowing the application of the said Plaintiff-Respondent made an Order for abatement of the Appeal.

On the 13.05.2003, more than three years after the death of the 1st Defendant Appellant, his spouse, the Petitioner Respondent, filed an application by way of a petition in the Court of Appeal. The District Court referred to in the caption is the District Court of Moratuwa, though this case was a case instituted in the District Court of Mt. Lavinia. Be

that as it may, it is important to note that the Petitioner-respondent filed the application only after the writ of execution was issued in the District Court of Mt. Lavinia, after the Appeal was abated. This emanates from the facts adverted to in the prayer of the petition filed by the Petitioner respondent in the Court of Appeal.

The Petitioner-respondent by this Petition made an application to set aside the said Order of Abatement made by the Court of Appeal dated 07.05.2003, for substitution of herself in the room of the deceased 1st Defendant-Appellant, and for a re-listing of the Appeal. She claimed therein that she had a daughter who was a co-heir to the estate of the deceased 1st Defendant-Appellant. Her daughter has filed no affidavit consenting to the substitution nor was she noticed of the application for substitution.

This application was allowed by the Court of Appeal by its order of 12.12.2003 in which the objections of the Plaintiff-Respondent-Respondent were overruled, the Order of Abatement was set aside the substitution was allowed and the case was re-listed.

On 24/02/2004 this Court granted special leave to appeal on the following question of law.

(1) Can the Petitioner-respondent make this application for substitution after more than 3 years of the death of the 1st defendant-Appellant?

(2) Was the Court of Appeal justified in the circumstances of this case, in particular in the absence of any application for substitution to have abated the said appeal?

(3) Without prejudice to the aforesaid questions of law is the Petitioner-respondent eligible to seek substitution in place of her deceased husband the 1st Defendant-Appellant in view of the provisions of Section 36 of the Rent Act No. 7 of 1972 as amended.

In the aforesaid Order of 12.12.2003, the Court of Appeal reference was made that the Petitioner-respondent's spouse, who was the 1st Defendant-Appellant in the Appeal, had died on 30/01/2001. This

appears to be a factual error, as according to the death certificate, which has been produced marked A7 and pleaded by the Plaintiff-Respondent-Respondent-Petitioner his death had occurred a year earlier, on 30.01.2000.

Indeed, according to the Court of Appeal it is clear that the only application that was made before the Court was by the Plaintiff-respondent in the Court of Appeal who had informed the Court that the 1st Defendant-Appellant was dead and produced A7. The Court had according to law thereupon noticed the registered Attorney-at-Law. The notice was issued on 08/02/2002 and according to the journal entry dated 05/03/2002 the said notice has not been returned undelivered. Thereupon, on application made on 07/05/2002 appeal was abated.

The consequence of abatement of a case is because the case record has become defective on account of the death of a party and those parties materially interested in the case not taking the necessary steps.

The Petitioners could not after more than almost 3 years and 3 months after the death of the 1st Defendant-Appellant and one year after the order of abatement by the Court of Appeal, seek to remedy the situation.

In the case of *Simeon Silva vs. Sivasupramaniam*[1] where after the death of the plaintiff, his legal representative delayed for nearly 18 months to have themselves substituted, it was held that the order of abatement of the action should be entered under Section 396 of the Civil Procedure Code.

In considering all the facts relating to the case therefore the order of abatement of the action had legitimately been made because the Petitioner who seeks to substitute herself in place of the 1st Defendant-Appellant had failed to take steps rendered necessary by law.

This Court has also considered that in any event the Petitioner had not come within a reasonable time to have the order of abatement set aside. Furthermore no cogent or explicit reasons were given for the cause of the delay except to say that it was "for reasons beyond her

control". In other words she has not proffered any rational explanation, which could legitimately be considered as a valid reason for the delay.

In this respect it is also important to consider whether there has been a defect or error made by the Court of Appeal, in the delivery of notice on the Petitioner. This arises in the circumstances that at the time of the service of this notice, according to the pleadings of the Petitioner, the Registered Attorney's proxy had been revoked and a new registered Attorney-at-Law had been appointed.

The proxy of the registered Attorney-at-Law had been revoked. The Petitioner-Respondent admitted that she knew this fact as far back as 22.09.1998. According to the affidavit of the Petitioner dated 21/05/2003 paragraph 2(b), "the Petitioner was aware that prior to the death of the 1st Respondent", and he had taken steps to revoke the proxy of the registered Attorney-at-Law on 22/09/1998". It is noteworthy that at this time the Appeal was pending, having been lodged in the Court of Appeal on 17/10/1997. So it was incumbent upon the 1st Defendant-Appellant, even prior to his death, to have taken steps to have his new registered Attorney-at-Law enter proxy and file the required papers in the Court of Appeal. In failing to give such instructions the 1st Defendant-Appellant had even prior to his death failed to exercise due diligence in the prosecution of his Appeal.

It was such failure and lack of diligence on the part of the 1st Defendant-Appellant, which facilitated and/or caused the notice sent by the Court of Appeal on 07/05/2002, to be sent to a registered Attorney-at-Law on record whose proxy by then had been revoked. It is required by law that the Court before making an order of abatement should notice the parties only as far as it conveniently can, to give them an opportunity of showing cause against the order. But even though the Court had followed such procedure it was solely due to the inept failure of the 1st Defendant-Appellant, even prior to his death, to exercise due diligence in his case and failure to give adequate but necessary instructions for the filing of fresh proxy in the Court of Appeal that no papers had been filed by the 1st Defendant-Appellant's spouse. The consequences of such failure must be borne by the party.

It is important when cases are pending before courts to prevent any of the aggrieved parties from being unduly barred from achieving the legitimate result of their litigation by intervening factors. In this context, Wood Renton C.J. and Ennis J. in *Suppramaniam et al Vs. Symons et al* (2) said that "People may do what they like with their disputes so long as they do not invoke the assistance of the courts of law. But whenever that step has been taken they are bound to proceed with all possible and reasonable expedition, and it is the duty of their legal advisers and of the Courts themselves to see that this is done. The work of the Courts must be conducted on ordinary business principles, and no Judge is obliged, or is entitled, to allow the accumulation upon his Court list of a mass of inanimate or semi-animate actions".

The only ground urged by the Petitioner in the Petition for the order of abatement to be set aside, was that no proper notice had been issued on the Petitioner and the bald statement that the said order of abatement had been made "due to reasons beyond the control of the Petitioner". No details or material has been placed before the Court as to what "reasons were beyond the control of the Petitioner". In other words she has failed to explain the delay in taking steps according to law on the death of a party. Furthermore on the facts referred to above it is clear that the Applicant-Petitioner-Respondent had not acted diligently and with the required level of due vigilance to remedy the defect in the record on the death of the 1st Defendant-Respondent. The order of abatement is the reasonable and expected outcome of such failure.

After the 1st Defendant had lodged an appeal in the Court of Appeal, the record of the Court of Appeal became defective by the reason of the death of the 1st Defendant on 30/01/2000. The procedure according to law to rectify the defect and seek substitution has been explicitly described in the Code of Civil Procedure.

In terms of Section 760A of the Civil Procedure Code, " in the manner provided in the rules made by the Supreme Court for that purpose, the Court could determine, who, in the opinion of the Court is a proper person to be substituted or entered on the record in place of or in addition to the party who had died or undergone a change of status

and upon such order of the Court the person shall thereupon be deemed to have been substituted or entered of record".

The relevant Rule 38 of the Court of Appeal Rule reads as follows :

"Where at any time after the lodging of an application for special leave to appeal, or an application under Article 126, or a notice of appeal, or the grant of special leave to Appeal, or the grant of leave to appeal by the Court of Appeal, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may, on an application in that behalf made by any person interested, or ex mero motu, require such applicant or the petitioner or appellant, as the case may be, to place before the court sufficient material to establish who is the proper person to be substituted or entered on the record in place of, or addition to, the party who has died or undergone change of status....."

The Court of Appeal must therefore in such applications made on the death of a party, "require such applicant or the petitioner or appellant, as the case may be, to place before the Court sufficient material to establish who is the proper person to be substituted."

It is neither an automatic Order but a considered Order that is envisaged. All the more so if there is more than one heir. In this case the Petitioner has explicitly pleaded that both she and her daughter were lawful heirs in paragraph 15 of her petition dated 13.05.2003.

In this context, it is relevant to note that admittedly on her own affidavit dated 13/05/2003 filed in the District Court of Mt. Lavinia she had not stated as to how the rights of the 1st Defendant-Appellant, even if such were available, would devolve upon her. Especially in view of the fact that this was a rent and ejectment matter and it appears that admittedly she was not residing in the premises, which was the subject matter of the action. Furthermore, even though she has claimed to be the legal wife no material has been placed before the Court to determine whether she is the lawful wife of the 1st Defendant-Appellant nor that she is a fit and proper person to be substituted in the room of the 1st Defendant-Appellant.

In any event, with the death of the 1st Defendant-Appellant the contract of tenancy came to an end and in the circumstances that the surviving spouse of the 1st Defendant-Appellant was not, admittedly, in possession of the premises and was not a registered member of the partnership she would not be the fit and proper person to be substituted in the room of the 1st Defendant-Appellant.

The only manner in which the surviving spouse of the 1st Defendant-Appellant could continue would be as a statutory tenant under section 36(2) but clearly as she is not resident on the premises, she could not plead the same.

Accordingly, the order of the Court of Appeal dated 12/12/2003 setting aside the order of abatement and allowing substitution is set aside and the appeal is abated and the order dated 07/05/2003 made by the Court of Appeal abating the appeal is upheld and the application for substitution in the room of the 1st Defendant-Appellant is refused.

S. N. SILVA, C. J. — *I agree.*

AMARATUNGA, J. — *I agree*

Judgment of the Court of Appeal set aside.
Order of abatement to stand.