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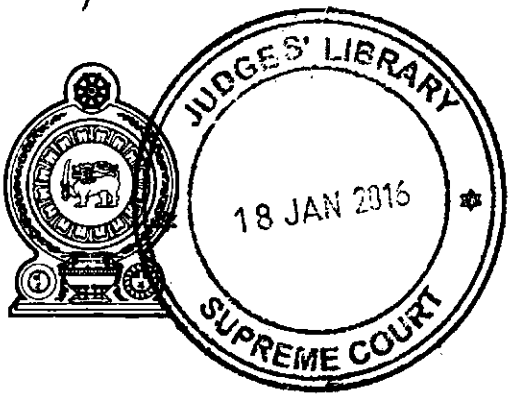

THE
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up for inquiry the learned counsel for the intervenient -plaintiff - respondent - petitioner (hereinafter referred to as the petitioner) brought to the notice of Court that the petitioner has already filed an appeal against the said order. At the commencement of the inquiry a preliminary question was raised by the petitioner - respondent (hereinafter referred to as the respondent) in that whether the impugned order is a final order or an interim order.

Briefly, the facts as set out in the petition are as follows :-

The petitioner instituted action against the House and Property Trades Limited (defendant - respondent) for the recovery of a sum of Rs. 2,400,000 together with interest thereon at 20% per annum from 01.10.1999 until payment in full. After the trial the judgement was entered against the defendant - respondent as prayed for in the plaint. Thereafter the District Court on an application made by the petitioner issued a writ and the land described in the plaint was sold by public auction in execution of the decree. The sale took place on 24.04.1999 and the respondent purchased certain allotments of land at the fiscal sale.

The total consideration was Rs.3,600,000. Thereafter, a fiscal conveyance was executed in favour of the respondent. When the respondent sought to develop the said land, it was found that it was possessed by a third party, namely, R. A. L. Ranjith de Alwis. The respondent had done a search in the Land Registry, Colombo and it was revealed that the defendant - respondent, the said, House and Property Trades Limited had sold the said allotment of land by deed No. 1909 dated 28.08.1998 for a sum of Rs. 500,000 before the fiscal sale. Thereafter, the respondent made an application to Court in terms of Section 284 of the Civil Procedure Code and sought a money decree against the petitioner. The petitioner filed objection. The Court directed the parties to file written submissions. Thereafter, the Court made order on 23.07.2003 and directed the petitioner to pay a sum of Rs.450,000 to the respondent. It is against this order that the petitioner has filed this application for leave to appeal.

The question before Court is whether the order complained of amounts to a final judgment within the meaning of Section 754(5) of the Civil Procedure Code.

In the case of *Siriwardena Vs. Air Ceylon Ltd.*[1] Sharvananda, J. (as he was then) after analyzing several English authorities, laid down the following tests to be applied to determine whether an order has the effect of a final judgment and so qualifies as a judgement under Section 754(5) of the Civil Procedure Code :

(i) It must be an order finally disposing of the rights of the parties.

(ii) The order cannot be treated as a final order, if the suit or the action is still left alive for the purpose of determining the rights of the parties in the ordinary way.

(iii) The finality of the order must be determined in relation to the suit.

(iv) The mere fact that the cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order, a final order.

It was held in the case of *Peter Singho vs. Wydeman*[2] that an order made by the District Court in dismissing an application made under Section 86(2) of the Civil Procedure Code is a final order and direct appeal lies against such an order.

Accordingly, in the instant case the test to be applied to determine whether an order has the effect of a final judgment, shall be decided by examining whether the impugned order has the character of a final judgment in relation to the suit. It is to be observed that, on an application made in terms of Section 284, the order that will finally be delivered by Court is not an interlocutory order as there is nothing more to be decided by the Court in the ordinary way in the same application.

It was held in the case of *Brooke Bond (Ceylon) Ltd. Vs. Stassen Export Ltd. and another*[3] that interlocutory appeals are appeals from interlocutory orders. In law an interlocutory order is one which is made or given during the progress of an action, but which does not dispose of the rights of the parties. It is incidental to the principal object of the action, namely the judgement.

In the instant case it seems to me that the order delivered by the learned Judge on 23.07.2003 is not an incidental order nor is it an order made on a cardinal point in the suit. As far as the parties are concerned, after the

caption to the petition states that it is an application under section 29 of the Debt Conciliation Ordinance. It is to be noted that the said section 29 does not provide for presenting such an application to Court. At the time the petitioner- respondent filed his application, the said Dissanayake was dead and accordingly his wife and children were made respondents to the application Since the children of Dissanayake were minors, their mother, the present petitioner was appointed guardian-at-litem of the minors.

The learned Judge, having considered the petition filed by the petitioner - respondent has issued a decree nisi. After it was served on the present petitioner she has filed her objections to the petitioner - respondent's application. Thereafter, at the inquiry held by Court several witnesses have given evidence for the petitioner - respondent and the present petitioner has given evidence on her own behalf. After the inquiry the learned Judge has made order making the decree nisi absolute. This revision application is against that order.

The question to be decided in this revision application is whether there was a valid legal proceeding before Court. The provision under which the petitioner - respondent could have brought his action to get the property re-conveyed to him is section 39 of the Debt Conciliation Ordinance. The section reads as follows.

> "Where a certificate has been granted under this Ordinance in respect of a debt secured by a conditional transfer of immovable property and subsequent to the granting of that certificate an action is instituted in any Court for the recovery of that property, the Court (a) may, notwithstanding that the title to that property has vested in the creditor in relation to that debt, make such appropriate orders as are necessary to re-convey title to, and possession of that property to the debtor, in relation to that debt, on the payment by the debtor of the debt together with the interest thereon in such installments and within such period not exceeding 10 years, as the Court thinks fit".

Section 39 is the only section which provides for an action by the debtor to obtain an order to re-convey a property in respect of which a certificate under section 29 of the Debt Conciliation Ordinance has been issued. There is no procedure laid down for such an action. Section 8 of the Civil Procedure Code enacts that "Save and except actions in which it is by this Ordinance or any other law specially provided that proceedings may be taken by summary procedure, every action shall

commence and proceed by a course of regular procedure, as hereinafter prescribed".

Thus, in the absence of any reference to summary procedure in section 39, an action for an order to re-convey a property conveyed by a conditional transfer to secure a debt has to be instituted by way of regular procedure. The petitioner respondent's action had been filed under summary procedure. Therefore, that action had not been properly filed according to the proper procedure. As such the decree nisi had been improperly issued and accordingly has no force as a decree nisi. In the result, the order of Court making the decree nisi absolute is a nullity. Section 45 of the Debt Conciliation Ordinance, under which the District Court dealt with the petitioner - respondent's application has no application to the action as that section dealt with an action by a creditor to enforce a settlement. The whole procedure adopted by Court to deal with the petitioner - respondent's purported application was irregular and illegal and accordingly all proceedings taken in D. C. Kuliyapitiya case No. 11745 were null and void and were incapable of producing any legally binding decree. I accordingly allow this revision application and quash all proceedings in the purported action including the decree nisi and the decree absolute. The petitioner is entitled to Rs.7,500 as costs of this application.

BALAPATABENDI J.- I agree.

Application allowed.

DAYARATNE

vs

RAJITHA SENARATNE, MINISTER OF LANDS AND OTHERS

COURT OF APPEAL,
SALEEM MARSOOF P. C., J (P/CA) AND
SRISKANDARAJAH, J.
C. A. 1790/2003
AUGUST 24, AND
OCTOBER 6, 2004

Land Acquisition Act - Section 2 Notice - Is it amenable to writ jurisdiction ? - Public Officer ceasing to hold office - Without amending the prayer are the

December 16, 2004
SALEEM MARSOOF, J. P /CA

The petitioner who claims to be the owner of the part of a land called "Kurakkanmandiyehena" in extent 1 rood situated in Nugawela, Pannil Pattu, in Atakanal Korale in the Kahawatte Divisional Secretary's Division in the Ratnapura District, has filed this application on or about 16th October 2003 challenging the order or decision said to have been made by the respondents to acquire the petitioner's aforesaid land and the notice dated 27th March 2003 (P15) which was exhibited on the land in terms of Section 2 of the Land Acquisition Act, No. 9 of 1950, as subsequently amended. The petitioner claims that although the ostensible purpose of the said proposed acquisition is to widen the Pelmadulla - Embilipitiya highway, land necessary for the said purpose in the vicinity have already been acquired by the Order made under Section 38 proviso (a) of the Land Acquisition Act published in the Gazette Extraordinary bearing No. 1169/ 11, dated 30th January, 2001 (P3a) after the exhibition of another Section 2 Notice (P2a). The 1st Respondent was the person holding office as the Minister of Lands at the time of filing this application, and the 2nd respondent was the Minister of Defence, Transport, Highways and Civil Aviation at the relevant time, and both these Respondents have been cited by name as well as their respective official designations. The 3rd respondent is the Road Development Authority, the 4th Respondent is the Divisional Secretary and the 5th Respondent is the Project Engineer attached to the Asian Development Bank Project Office of the Road Development Authority. The petitióner seeks *inter alia*-

(i) a writ of *certiorari* quashing the orders/decisions of the 1st and / or 2nd and / or 3rd and / or 4th and / or 5th respondents to acquire the petitioner's land and the notice issued by the 4th respondent under Section 2 of the Land Acquisition Act marked P 15 ;

(ii) a writ of *mandamus* directing the 1st and / or 2nd and / or 3rd and / or 4th and / or 5th respondents to continue the acquisition proceeding commenced with the notice issued under Section 2 of the Land Acquisition Act (P2a) and the order made under Section 38 proviso (a) of that Act and published in the Gazette marked P3a ; and

(iii) interim relief restraining the 1st to the 5th respondents, jointly or severally, from continuing with the impugned acquisition proceeding and taking over any portion of the petitioner's land.

The application was supported by the learned Counsel for the petitioner on 27th October, 2003, and the Court issued notice on the respondents and also granted the interim relief prayed for by the petitioner. The respondents filed their statement of objections in due course and the application was to be mentioned on 18th May, 2004 for the counter affidavit of the petitioner, with the stay order expiring on 19th May, 2004. However, it appears from the docket that when the application was mentioned on 18th May, 2004 before Wijeratne J., there was no appearance for the petitioner nor was the counter affidavit filed. Court had on its own motion granted the petitioner time till 21st June 2004 to file his counter affidavits but the stay order was not extended and it lapsed on 19th May, 2004. When the case was called on 21st June, 2004 before Balapatabendi. J, and Imam, J., learned Counsel for the petitioner informed Court that he will be filing the counter affidavit of the petitioner in the Registry the very next day and moved that the stay order may be restored as he failed to attend Court on 18th May, 2004 owing to a genuine mistake made by him regarding the date. Court made order directing that this matter be mentioned before Wijeratne, J. on 29th June, 2004. Thereafter, the petitioner tendered the counter affidavit of the petitioner with the motion dated 22nd June, 2004 and moved Court to-

(i) re-issue the stay order prayed for ; and

(ii) add the incumbent Minister of Agriculture, Livestock Development, Lands and Irrigation as the 6th respondent and the Prime Minister and Minister of Highways as the 7th respondent since the 1st and 2nd respondents who previously held the portfolios of Minister of Lands and Minister of Highways respectively have ceased to hold office.

Although, there is no record to bear this out in the docket, it may be surmised from the journal entry of 1st July, 2004 that the case was mentioned before Wijeratne, J on 29th June 2004 who in turn had directed that the case be mentioned in the President's Court on 1st July, 2004. On that date, when the case was accordingly mentioned, Court had issued an interim order in the same lines as the interim order issued on 27th

October 2003, and fixed the case for argument on 24th August, 2004. No application was made on that date to add the successors in office to the 1st and 2nd respondents as the 6th and 7th respondents or to amend the prayers to the petition.

When the case was taken up for argument on 24th August, 2004, learned Deputy Solicitor General appearing for the 3rd to 5th respondents took up the following preliminary objections :

(a) Since the 1st and 2nd respondents do not hold office respectively as Minister of Lands and Minister of Highways, can the petitioners seek relief as prayed for in prayers (b), (c), (d) and (e) of the prayer to the petition ?

(b) Is the notice marked P15, a decision or determination amenable to writ of *certiorari* ?

Learned Counsel agreed to the disposal of these preliminary objections by way of written submissions. Learned Counsel for the petitioner reserved his right to support his motion dated 22nd June 2004 to add the 6th and 7th respondents named in the said motion in the event the said preliminary objections are not upheld by Court.

Preliminary objection (a) raises an important question relating to the procedure to be followed in the event of a public officer who is a respondent to a writ application ceasing to hold office during the pendency of the application before this Court. There is no dispute that at the time this application was filed on or about 16th October 2003, the 1st and 2nd respondents did hold the respective portfolios which included the Ministries of Lands and Highways respectively. It is also common ground that after the General Election which was held on the 2nd April 2004, the 1st and 2nd respondents ceased to hold their respective Ministries and the persons now sought to be added as the 6th and 7th respondents took over the said portfolios. Learned Deputy Solicitor General has pointed out that while the petitioner has by his prayers (b), (c), (d) and (e) prayed for certain relief against *inter alia* the 1st and 2nd respondents in terms of the existing pleadings and prayers, It is further submitted by the learned Deputy Solicitor General that premitting the petitioners to amend the caption with a view of adding the present incumbents of the offices of Minister of Lands and Minister of Highways at this late stage respectively as the 6th and 7th respondents would be quite meaningless as the petitioner in the prayer to

the petition does not seek any relief against these persons. It is further submitted by the learned Deputy Solicitor General that the petitioner has prayed for relief against *inter alia* the 1st and 2nd respondents who have now ceased to hold office and do not enjoy any of the powers that were vested in them at the time of the filing of this application. Learned Deputy Solicitior General relies on the decisions in *Haniffa v. Chairman, Urban Council, Nawalapitiya* [1] and *Abayadeera v. Dr. Stanley Wijesundera* [2] for the proposition that the writ of *mandamus* would only be issued agaisnt the officer or authority in whom the power in question is vested by Law. In fact, in the first of these cases, Tambiah J. (with whom Sri Skanda Rajah J. agreed) observed that a *mandamus* can only issue against a natural person, who holds a public office. Learned Deputy Solicitor General submits that to issue a writ of *a mandamus* against a person who does not possess the power would be an exercise in futility.

Learned Deputy Solicitor General has also submitted that in terms of Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules 1990, a party may *with the prior permission of the Court*, amend his pleadings, or file additional pleadings, affidavits or other documents, within two weeks of the grant of such permission, unless the Court otherwise directs The said Rule expressly provides that after notice has been issued in any case, such permission shall not be granted *ex parte*. Learned Deputy Solicitor General has invited the attention of Court to the decision of the Supreme Court in *Kiriwanthe and Another v. Nawaratne and Another*, [3] which has held that the Court has a discretion in allowing any non-compliance or omission in pleadings to be cured upon an application of the party concerned. However, learned Deputy Solicitor General submits that no application has been made to Court by the petitioner praying for the exercise of such discretion, although the petitioner had ample opportunity to do so.

Learned Counsel for the petitioner relies heavily on Rule 5(4)(b) read with Rule 5(5) of the Court of Appeal (Appellate Procedure) Rules 1990 for his submission that where a respondent who has been cited both by reference to his name and his designation ceases to hold office while an application filed against him in terms of Articles 140 or 141 of the Constitution is pending before court, the case can proceed against his successor for the time being in such office, "Without any addition or substitution of respondent afresh, proxy or the issue of any notice, unless the Court considers such addition substitution, proxy or notice to be necessary in the interests of justice".

For the purpose of appreciating the Rules in question, it is necessary to quote in full all sub-rules of Rule 5 of the Court of Appeal (Appellate Procedure) Rules 1990-

"(1) This rule shall apply to applications under Articles 140 and 141 of the Constitution, in which a public officer has been made a respondent in his official capacity, (Whether on account of an act or omission in such official capacity, or to obtain relief against him in such capacity, or otherwise)

(2) A public officer may be made a respondent to any such application by reference to his official designation only (and not by name), and it shall accordingly be sufficient to describe such public officer in the caption by reference to his official designation or the office held by him, omitting reference to his name. If a respondent cannot be sufficiently identified in the manner, it shall be sufficient if his name is disclosed in the averments in the petition.

(3) No such application shall be dismissed on account of any omission, defect or irregularity in regard to the name designation, description, or address of such respondent, if the Court is satisfied that such respondent has been sufficiently identified and described, and has not been misled or prejudiced by such omission, defect or irregularity. The Court may make such order as it thinks fit in the interest of justice, for amendment of pleadings, fresh or further notice, costs, or otherwise, in respect of any such omission, defect or irregularity.

(4)(a) In respect of an act or omission done in official capacity by a public officer who has thereafter ceased to hold such office, such application may be made and proceeded with against his successor, for the time being in such office, such successor being made a respondent by reference to his official designation only, in terms of sub-rule (2)

(b) If such an application has been made against a public officer, who has been made a respondent by reference to his official designation (and not by name) in respect of an act or omission in his official capacity, and such public officer ceases to hold

such office, during the pendency of such application, such application may be proceeded with against his successor, for the time being, in such office, without any addition or substitution of respondent afresh, proxy or the issue of any notice, unless the Court considers such addition, substitution, proxy or notice to be necessary in the interest of justice. Such successor will be bound, in his official capacity, by any order made, or direction given, by the Court against, or in respect of, such original respondent.

(c) Where such an application has been made against a public officer, who has been made a respondent by references to his official designation (and not by name), and such public officer ceases to hold such office after the final determination of such application, but before complying with the order made or direction given therein, his successor, for the time being in such office will be bound by and shall comply with, such order or direction.

(5) The provisions of sub-rules (4)(b) and (4)(c) shall apply to an application under Article 140 and 141 filed before *such date as may be specified by the Chief Justice* by direction, against a public officer, in respect of an act or omission in his official capacity, even if such public officer is described in the caption both by name and by reference to his official designation.

(6) Nothing in this rule shall be construed as imposing any personal liability upon a public officer in respect of the act or omission of any predecessor in office

(7) In this rule, "ceases to hold office 'means' dies, or retires or resigns from, or in any other manner ceases to hold, office" (Emphasis added)

It is the contention of the learned Counsel for the petitioner that in terms of Rule 5(4)(a) where a public officer ceases to hold office, a writ application may be made and proceeded with against his successor for the time being in such office, such successor being made respondent by reference to his official designation only in terms of sub-rule 2. It is

submitted that the 1st and 2nd respondents to this application have admittedly ceased to hold their respective offices, and it is sought to add the 6th and 7th respondents who are their successors in office. Learned Counsel for the petitioners submits that this application of the petitioner can be proceeded with as it presently stands against the 6th and 7th Respondents in place of the 1st and 2nd Respondents after the 6th and 7th respondents have been added as parties to this application. It is submitted by learned Counsel for the petitioner that there is no necessity to amend the petition or the prayer thereto as stated by the learned Counsel for the 1st to 5th respondents.

I have several difficulties in agreeing with this submission made on behalf of the petitioner. Firstly, even assuming that a Minister can be regarded as a "public officer" within the meaning of the phrase as used in Part IV of the Court of Appeal (Appellate Procedure) Rules 1990, neither Rule 5(2) nor Rule 5(4)(a) of these Rules has any relevance to this case as this is not a case where any public officer or successor in office to a public officer has been cited as a respondent by reference to his official designation only. Secondly, neither Rule 5(4)(b) nor Rule 5(4)(c) would apply to the instant case as this is not a case where a public officer cited as respondent by his official designation only has ceased to hold office during the pendency of the case or after the judgment but prior to its execution. This is a case where the 1st and 2nd respondent have been described in the caption by name and by reference to their respective official designations. Such a case could attract Rule 5(5) of the aforesaid Rules only if–

(i) A Minister can be regarded as a "public officer" within the meaning of Part IV of the aforesaid Rules ; and

(ii) the application was filed before such date "as may be specified by the Chief Justice by direction."

In the absence of any definition of the phrase "public officer" in the Rules, I have some doubt as to whether a Minister of the Government is caught up by these Rules as the said phrase is defined in Article 170 of the Constitution of the Democratic Socialist Republic of Sri Lanka (in terms of Article 136 of which these Rules have been made) so as to exclude a Minister. Of course, the definition contained in Article 170 will only apply with respect to the provisions of the Constitution, and it is possible to argue that the definition is not applicable to the Rules made

under Article 136 of the Constitution. It is also possible to argue that the phrase "public officer" as used in the Rules in question should be broadly interpreted. It is however not necessary to decide those quesiton as this application has been filed on or about 16th October 2003, long after 31st December 1991 which is the date specified by the Chief Justice for the purposes of Rule 5(5) in terms of the notification dated 16th December 1991 published in the Gazette of the Democratic Socialist Republic of Sri Lanka bearing No. 697 and dated 10th January 1992 ; it will follow that Rule 5(5) will not have any application to this case, and accordingly Rule 5(4)(b) too will not have any application to this case.

Had this been an application filed before the "specified date" (31st December 1991) against public officers cited as respondents by reference to their names and designations, the combined effect of Rule 5(4)(b) and Rule 5(5) would have been to permit the continuation of the proceedings against the successors in office of the public officers in question even after they cease to hold office "without any addition or substitution of respondent afresh". That facility may not be available in a case like the present, for two reasons : Firstly, this being an application for *mandamus*, relief can only be obtained against a natural person who holds a public office as was decided by the Supreme Court in *Haniffa v. Chairman, Urban Council, Nawalapitiya.* (*Supra*) Secondly, this is an application that has been instituted after 1st January 1992. Accordingly, it will be necessary in cases such as this to add or substitute the successor in office of any original respondent who has been made a respondent by reference to both his name and his official designation, but as pointed out by learned Deputy Solicitor General it would be quite meaningless to add or substitute the successor in office of the respondent who has ceased to hold office unless the pleadings, and in particular the prayer, is amended to apply to the added or substituted respondent. I note that although the learned Counsel for the petitioner has reserved his right to support his motion dated 22nd June 2004 to add the 6th and 7th respondents named in the said motion in the event the preliminary objections raised in this case are not upheld by Court, no application has ever been made on behalf of the petitioner to amend the prayer to the petition.

However, I am inclined to the view that the Court of Appeal (Appellate Procedure) Rules have been formulated, and have to be interpreted and applied, so as to further the ends of justice rather than to perpetrate

injustice. This policy is reflected in Rule 5(3) which expressly provided that Court may make such order as it thinks fit in the interest of justice, for amendment of pleadings, fresh or further notice, costs, or otherwise, in respect of any ....omission, defect or irregularity. I am conscious that Rule 5(3) strictly has no application to the present case as the 1st and 2nd respondents have been cited as respondents to this application both by reference to name and official designation, but the policy manifested in the said Rule is universally applicable. I would therefore have permitted the Petitioner to add the successors in office to the 1st and 2nd respondents as the 6th and 7th respondents respectively and to amend the prayer to the petition as may be appropriate subject to an order for costs, had an application been made at least on the occasion when the case was taken up for argument.

However, there is an even more formidable obstacle to the maintainability of the application before Court. That obstacle takes the form of preliminary objection (b) that has been raised on behalf of the 3rd to 5th respondents. The said is simply that the notice marked P15 is not a decision or determination amenable to writ of *certiorari*. In this connection, the attention of Court has been invited to the seminal and oft cited speech of Lord Atkin in *R v. Electricity Commissioner ex parte London Electricity Joint Committee Company Ltd* [4] at 205, pronouncing that -

> "Wherever any body of persons having legal authority to *determine questions affecting the rights of subjects*, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these Writs" [emphasis added]

Learned Deputy Solicitor General has submitted that it is trite law that a writ will issue only where the decision-maker has determined questions affecting the rights of subjects, but the Section 2 notice marked P15 does not contain any such determination. Learned D. S. G. has referred us to certain decisions relating to Commission of Inquiry such as *De Mel v. De Silva*[5], *Dias v. Abeyawardena*[6] *and Fernando v. Jayaratne* [7] holding in essence that only a determination which directly or inevitabley results in the legal rights of a subject being affected is amendable to writ of *certiorari*. In the last of the above mentioned cases, Sharvanada J (as he then was) observed at page 129 of the judgement that-

> "The only power that the Commissioner has is to inquire and make a report and embody therein his recommendations. He has no power of adjudication in the sense of passing an order which can be enforced *proprio vigore*, nor does he make a judicial decision. The report of the respondent has no binding force ; it is not a step in consequence of which legally enforceable rights may be created or extinguished."

In *G. P. A. Silva & Others v. Sadique and Others* [8], it was held that as the impugned decision had no effect *proprio vigore* no writ shall lie against such a decision. However, in *Bandaranaike v. Weeraratne* [9] writ of *certiorari* was issued on the basis that-

> "Although, the writs will not *normally* issue to a body having no power to make a binding determination, they have issued to persons and bodies making reports and recommendations that acquire legal force after *adoption or confirmation or other consequential* action by another body" [emphasis added]

The Court reasoned that once the Special Presidential Commission of Inquiry determined that a person was guilty, there was nothing more left to be done than the adoption of that decision by the executive and the legislature, Similarly in *Mendis, Fowzie & Others v. Goonewardena and G. P. A. Silva* [10] Vythialingam, J. after an extensive survey of the case law, held that a writ should lie against the decision of the Commission of Inquiry as it had force *proprio vigore.*

In the instant case, the order sought to be quashed by *certiorari* is the notice exhibited under Section 2 of the Land Acquisition Act marked P 15. It is clearly not a decision or order which has force *proprio vigore.* In the scheme of the Land Acquisition Act, a Section 2 notice only facilitates an authorized officer to enter into a land and determine whether such a land is suitable for the public purpose for which the land is required. Thus the Section 2 notice by itself does not affect the right of any person to his land except to the limited extent of permitting the authorised officer to enter upon the said land and consider its suitability for acquisition, which is a very preliminary stage of the entire process. Therefore, if the Minister considers that a particular land is suitable for a public purpose, he directs the acquiring officer in terms of Section 4(1) of the Act to publish a notice

calling for written objections to the intended acquisition, and after considering such objections, if any, and the relevant Minister's observations on such objections, the Minister has to decide in terms of Section 4(5) of the Act whether such land should be acquired or not. It is thereafter that a written declaration that such land is needed for a public purpose is made by the Minister and published in the Gazette as required by Section 5 of the Act. It is for this reason that this Court in *Gunasekara v. The Principal, MR/Godagama Anagarkika Dharmapala Kanishta Vidyalaya and Others*[11] held that an application for a writ of *certiorari* to quash a Section 2 notice under the Land Acquisition Act was premature and thereby upheld the preliminary objections to that effect. As Shiranee Tilakawardena J. observed at page 7 and 8 of her judgment-

> "Another matter that is relevant to this application is that at the time of filing of this application the acquisition proceedings were at an initial stage, and only notice under Section 2 of the Land Acquisition Act had been issued. A notice in terms of Section 2 of the Land Acquisition Act is issued when the Minister decides that the land in any area is needed for any public purpose. The Section 2(1) notice is issued with the objective of making a survey of a land and making boundaries thereon and to determine whether a land would be found within its parameters that would be suitable for the public purpose of the said Act."

Justice Tilakawardene went on to hold in this case that the application for writ of *certiorari* was premature in the circumstances of that case, and should be dismissed *in limine*, Similarly, in *Lucian de Silva v. Minister of Lands*[12] and *Wickremasinghe v. Minister of Lands* [13], it was held that steps taken under Section 2 of the Land Acquisition Act are only investigative in character, and that it is premature to invoke the writ jurisdiction of our courts with a view of quashing a Section 2 notice.

Learned Counsel for the petitioner has in this connection drawn the attention of Court to the judgment of the Supreme Court in *Manel Fernando v. Jayaratne* [14]. That was a fundamental rights application filed in the Supreme Court under Article 126 of the Constitution M. D. H. Fernando J. after carefully analyzing the relevant provisions of the Land Acquisition Act held that the Section 2 notice in that case was bad in law insofar as it did not disclose the particular public purpose for which the land was sought to be acquired. His Lordship observed at page 126-

"Section (2)2 required the notice to state that one or more acts may be done" in order to investigate the suitability of that land for that public purpose" : obviously "that" public purpose cannot be an undisclosed one. This implies that the purpose must be disclosed. From a practical point of view, if an officer acting under Section 2(3)(i) does not know the public purpose, he cannot fulfill his duty of ascertaining whether any particular land is suitable for that purpose.

Likewise, the object of Section 4(3) is to enable the owner to submit his objections which would legitimately include an objection that his land is not suitable for the public purpose which the state has in mind, or that there are other and more suitable lands. That object would be defeated, as there would be no meaningful inquiry into objections, unless the public purpose is disclosed. If the public purpose has to be disclosed at that stage, there is no valid reason why it should not be revealed at the Section 2 stage.

In my view, the scheme of the Act requires a disclosure of the public purpose, and its objects cannot be fully achieved without such disclosure. A Section 2 notice must state the public purpose - although exceptions may perhaps be implied in regard to purposes involving national security and the like."

Although *Manel Fernando's* case (*Supra*) was a fundamental rights application which was not circumscribed by the parameters enunciated by Lord Atkin in the *Electricity Commissioners* case (*Supra*) as developed by our Courts in the decisions mentioned above, I find that the above quoted *dicta* of Fernando, J. support the view that a Section 2 notice is exhibited to facilitate investigation into the suitability of the land, and that it would be premature to challenge a Section 2 notice which sets out the particular public purpose for which the land is needed, at a stage prior to a decision being made by the Minister under Section 4(5) of the Land Acquisition Act that the land in question should be acquired. I am satisfied that the Section 2 notice marked P15 which is sought to be quashed in these proceedings clearly sets out the particular public purpose for which the land is needed, namely for the widening of the Pelmadulla - Embilipiitiya highway, and is therefore not afflicted by the malady that was sought to be remedied in Manel Fernando's case (*Supra*) , I therefore uphold preliminary objection (b) raised by the learned Deputy Solicitor General and dismiss

this application. There shall be no order of costs in all the circumstances of this case.

SRISKANDARAJAH, J.— I agree.

Application dismissed.

ALIMA UMMA
vs
SIYANERIS

COURT OF APPEAL,
AMARATUNGA, J.,
C. A. 1359/2002
D. C. KURUNEGALA 5538/L
NOVEMBER 12, 2005

Civil Procedure Code, sections 27, 87(B) and 87(1)(3)-Plaintiff absent - Counsel and registered attorney present - Dismissal of action under section 87(1) - Is it lawful?

On the trial date the plaintiff was absent and her registered attorney and counsel were present and were ready to start the plaintiff's case. The objection taken by the defendant that since the plaintiff has failed to appear, the action has to be dismissed under section 87(1) was upheld.

The plaintiff moved in revision.

HELD:

(i) In terms of section 24 of the Code, the registered attorney or an attorney at law instructed by the registered attorney can represent a party to the action in court. If the registered attorney is in court and represents the party, that is an appearance for the party even if the party is not physically present in court. Court cannot dismiss the action for the absence of the party.

APPLICATION in revision from the order of the District Court of Kurunegala.

Case referred to :

1. *Anandappa Chettiar vs Sanmugam Chettiar* (DB) 33 NLR217

Upali de Almeida with Anna de Almeida for plaintiff respondent.
Jacob Joseph for defendant respondent

Cur.adv.vult

October 15, 2004
GAMINI AMARATUNGA, J,

This is an application to revise two orders made on 26.02.2001 and 22.05.2002 by the District Court of Kurunegala. The plaintiff filed action against the defendant to recover possession of the premises she had let to the defendant. The position of the defendant was that the property belonged to him by virture of prescriptive possession. After issues were framed the trial was fixed for 26.02.2001. On that day the plaintiff did not attend but her registered attorney and counsel represented her in court. The plaintiff's witnesses too were present and the counsel for the plaintiff was ready to start the plaintiff's case. The counsel for the defendant has submitted that since the plaintiff has failed to appear, the action had to be dismissed under section 87(1) of the Civil Procedure Code. The learned counsel for the plaintiff had pointed out to Court the provisions of Section 27 of the Code, but the learned Additional District Judge had dismissed the plaintiff's action under Section 87(1) of the Code.

Thereafter, the plaintiff has tendered a notice of appeal. Having given the notice of appeal, the plaintiff has also filed an application under Section 87(B) to have the order purported to have been made under Section 87(1) set aside and also to get the order set aside on the basis that the said order had been made *per incuriam* and that under Section 839 of the Code, the Court had power to set is aside.

The learned District Judge had held an inquiry into the application. The learned District Judge in his order has stated that since the appearance of the registered attorney and the counsel was an appearance for the party, it was not open to the plaintiff to seek relief under Section 87(3) of the Code. This is a correct conclusion. However in fairness to the attorney at law who filed the application under Section 87(3) it must be stated that the application under Section 87(3) has been made in view of the learned Additional District Judge's specific reference in her order to Section 87(1). The learned District Judge has also come to the conclusion that the order of the Additional District Judge was not an order made *per incuriam*, and that he had no jurisdiction to set it aside. Accordingly, the application was

dismissed by order dated 22.05.2202. The plaintiff has filed this revision application on 02.08.2002 seeking to have orders dated 26.02.2001 and 22.05.2002 set aside.

In the written submissions filed in this Court on behalf of the defendant it is stated that since the revision application has been made more than one year after the order of 26.02.2001, the plaintiff was guilty of laches and accordingly she is not entitled to any relief by way of revision.

In terms of Section 24 of the Civil Procedure Code, the registered attorney or an attorney at law instructed by the registered attorney can represent a party to the action in Court. If the registered attorney is in Court and represents the party in Court, that is an appearance for the party even if the party is not physically present in Court. *Andiappa Chettiar vs Sanmugam Chettiar,*[1]. In such a situation a Court cannot dismiss the action for the absence of the party.

In the instant case the Court's order dismissing the action of the plaintiff under Section 87(1) was clearly wrong. In making its order the Court has turned a blind eye to Section 24 of the Code, cited by the learned counsel for the plaintiff, to show that the situation did not come within Section 87(1). By the Court's failure to consider the legal submission made by the counsel for the plaintiff and by the acceptance of the wrong legal submission made by the counsel for the defendant, the Court has brought into existence a wrong order which has caused injustice and grave prejudice to the plaintiff. This Court's revisionary powers and inherent powers are wide enough to remedy the injustice caused to the plaintiff by the wrong order made by Court.

The learned District Judge who made the order dated 22.05.2002, was rightly of opinion that in the circumstances that existed on 26.02.2001, the order dismissing the plaintiff's action under Section 87(1) was wrong. However he has declined to interfere with that order on the ground that he did not have jurisdiction to set it aside as it was not an order made *per incuriam*. However, as I have pointed out earlier the learned Additional District Judge's order dismissing the action under Section 87(1) had been made without considering a clear provision of Law, that is Section 24 of the Code. To that extent it is an order made *per incuriam*.

For the reasons set out above, I hold that the plaintiff petitioner is entitled to the relief claimed by this application. Accordingly, I allow the revision

application and set aside the order dated 22.05.2002 and the order of 26.02.2001 dismissing the plaintiff's action and make order restoring the plaintiff's case to the trial roll. The learned District Judge of Kurunegala is hereby directed to proceed with the action from the point it was on 26.02.2001. The defendant-respondent shall pay a sum of Rs. 10,000 to the plaintiff-petitioner as costs of this revision application and depending on the outcome of the action this cost is to be recovered or set off at the end of the action.

Application allowed.

EDIRIWEERA
VS
THE ATTORNEY GENERAL

COURT OF APPEAL
BALAPATABENDI, J.
WIJERATNE, J. AND
DE ABREW, J.
C.A(PHC)25/2005
H.C. COLOMBO NO.955/2002
JYLY 13 AND 20TH, 2002

Penal Code, sections 32, and 380 - Robbery -Convicted - Bail pending appeal referred by High Court - Criminal Procedure Code, section 404-Bail Act, No. 30 of 1997-Jurisdiction of the Court of Appeal to grant bail- Exceptional circumstances? - Could the order of the High Court be revised?

The accused -appellant - petitioner was convicted of the offence of robbery of gold and sentenced to a term of 10 years R. I. and a fine. The application for bail made to the High Court was refused. The accused appellant thereafter moved the Court Appeal for bail. The exceptional circumstances urged were (a) that the petitioner is suffering from a rare blood condition where he must be treated in a hospital where such facilities are available. (2) disruption of his studies (3) that appeal would take time.

HELD

BALAPATABENDI, J. WIJEYARATNE, J. AND ABREW, J.

(1) It is a settled principle that the release of a person on bail pending appeal to the Court of Appeal will only be granted in exceptional circumstances.

***Per* Abrew, J.**

"If the High Court Judge's order is correct, that there are no exceptional circumstances the order cannot be revised. Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."

Balapatabendi, J. and **Wijeyaratne, J.**

(i) It is to be noted that the respondent has not denied the fact that the accused appellant needs specialised treatment as stated in the Medical Certificate and such treatment could not be given by the Prisons Authorities in the Prisons Hospital or in a hospital.

(ii) In the Court of Appeal it will take at least more than one year for this appeal to be taken up - so that the final determination of the appeal may take many years and it could be considered as a long delay to determine the appeal.

(iii) Important points of law namely - common intention and *actus reus* not been applied in evaluating the evidence by the High Court, the position taken up in the judgment that the 2nd accused appellant was caught red handed is questionable.

(V) The father of the accused appellant had been a cancer patient when this application was filed and had been recommended by Professor Silva, to allow the accused appellant to see his father on humanitarian grounds.

The matters above could be considered as exceptional circumstances.

Abrew, J dissenting :

(i) "There is no evidence before Court that the petitioner's health condition cannot be treated either at the prison hospital or at any hospital in Sri Lanka.

(ii) Delay in preparation of the appeal brief and the delay in taking up the argument - considering the facts of this case-do not come under the category of exceptional circumstances.

APPLICATION for bail pending appeal.

Cases referred to :

1. *Q* vs *Rupasinghe Perera - 62 N LR 238*
2. *K* vs *Keerala - 48NLR 202*
3. *Q* vs *Cornelis Silva - 74NLR 113*
4. *Salahudeen* vs *Attorney General - 77NLR 262.*

5. *Jayantha Silva* vs *Attorney General - (1997) 3 Sri LR 117*
6. *Ramuthamotheram Pillai* vs *Attorney General - SC 141/75*
7. *Vanik Incorporation LTd.* vs *Jayasekera - (1997) 2 Sri LR 365*
8. *Q* vs *Liyanage - 65 NLR 289 at 291*
9. *King* vs *Mathuratta - 54 NLR 493*
10. *Kamal Addaraarachchi* vs *Attorney General (2000)3 Sri LR 393*
11. *R* vs *Cooray - 51 NLR362*
12. *Harbajan Singh* vs *State of Punjab - (1977) Cr LR 1424*

Dr. Ranjith Fernando for accused appellant petitioner.
Yasantha Kodagoda, Senior State Counsel for Attorney General.

Cur.adv.vult.

August 2, 2005

SISIRA DE ABREW, J. – (Dissenting)

The accused appellant - petitioner (petitioner) was convicted of the offense of robbery of gold valued at Rs. 2,928,720. and sentenced to a term of 10 years rigorous imprisonment on 30.03.2004 by the learned High Court of Colombo. In addition to the above sentence a fine of Rs.5000 was also imposed in default of which a term of 2 years imprisonment was imposed. Being aggrieved by the said conviction and sentence the petitioner preferred an appeal to this court. After the conviction the petitioner made an application for bail pending appeal, which application was refused by the learned High Court Judge on 31.01.2005. Being aggrieved by the said order the petitioner preferred the present application for bail to this court.

The learned High Court Judge refused the application for bail on the ground that the petitioner had not established exceptional circumstances. It is necessary to consider whether the refusal of the application for bail by the learned High Court Judge on the said basis was correct or not. In deciding this question it is pertinent to consider whether the Bail Act, No. 30 of 1997 (the Bail Act) had taken away the requirement to establish exceptional circumstances in grating bail pending appeal. In *Queen VS Rupasinghe Perera*[1] Basnayake CJ with Sansoni J and Sinnathamby J agreeing remarked as follows "Bail is not granted by the Court of Criminal Appeal unless there are exceptional circumstances". Same view was expressed in *King Vs Keerala*[2] *Queen Vs Cornelis Silva*[3] *Salahudeen Vs Attorney General*[4] *Jayantha Silva Vs the Attorney General Ramu Thamotheram Pillai Vs Attorney General*[4] (Considered by Gunasekara J in Jayanthi Silva's case.)

Thus it is seen from the above judicial decisions, to release a convicted prisoner on bail there must be exceptional circumstances. Since the above cases are decided prior to the enactment of the Bail Act, it is safe to conclude that the requirement to establish exceptional circumstances in an application for bail pending appeal existed even prior to the enactment of the Bail Act.

Since I am dealing with the legality of the order of the learned High Court Judge it is necessary to consider the relevant provisions which vested power with the High Court. The relevant provision is section 333(3) of the Criminal Procedure Code which reads as follows. "When an appeal against a conviction is lodged, the High Court may subject to subsection (4) admit the appellant to bail pending the determination of the appeal be treated in such manner as may be prescribed by rules made under the Prisons Ordinance." So when Court granted bail pending appeal under section 333(3) of the Criminal Procedure Code, convicted prisoners were released on bail only in exceptional circumstances. It is now necessary to consider whether the statutory provisions relating to granting of bail have undergone any changes after the enactment of the Bail Act. The relevant provision of the Bail Act is section 20(2) which reads as follows.

"When an appeal against a conviction by a High Court is preferred, the High Court may subject to subsection (3) release the appellant on bail pending the determination of his appeal. An appellant who is not released on bail shall, pending the determination of the appeal be treated in such manner as may be prescribed by rules made under the Prisons Ordinance." It is therefore seen that section 333(3) of the Criminal Procedure Code was in terms identical with section 20(2) of the Bail Act. Thus, statutory provisions relating to granting of bail prior to and after the enactment of the Bail Act remain unchanged. Therefore requirement to establish exceptional circumstances to grant bail pending appeal should exist even after the enactment of the Bail Act. I therefore hold that the learned High Court Judge was correct when he concluded that there must be exceptional circumstances to release a convicted prisoner on bail.

If the learned High Court Judge's order on this point is correct, should it be revised? Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice. *Vide Vanik Incorporation Ltd*[7] Vs *Jayasekara.*

Applying the principle laid down in the above case to the issue in question, I hold that the question of revision of the said order of the learned High Court Judge does not arise for consideration. On this ground alone petition of the petitioner should be dismissed.

In the case of *King* Vs *Keerala* (Supra) Wijewardena J held that "this Court (the Court of Criminal Appeal) does not grant bail in the absence of exceptional circumstances" In *Queen* Vs *Rupasinghe Perera* (Supra) Basnayake CJ with Sansoni J and Sinnathamby J agreeing remarked as follows "Bail is not granted by the *Court of Criminal Appeal unless there* are exceptional circumstances". In *Queen* Vs *Cornelis Silva* (Supra) 113 the accused had been convicted of the offence of attempted murder and sentenced to terms of four years rigorous imprisonment. The appellant's application for bail pending appeal was refused on the ground that no exceptional circumstances had been established. In *Salahudeen* Vs *Attorney General* (Supra) the accused had been sentenced to a term of three years rigorous imprisonment on a conviction for attempted culpable homicide. Samarawickrama J refusing the appellant's application for bail observed as follows. "It is a settled principle that the release of a prisoner on bail pending an appeal to the Court of Criminal Appeal will only be granted in exceptional circumstances". In *Ramu Thamotheram Pillai* Vs *Attorney General* (Supra) (Considered by Gunasekara J in *Jayanthi Silva's* case) the application for bail made on behalf of the appellant who was sentenced to a term of 7 years rigorous imprisonment was refused on the ground that no exceptional circumstances had been established. In *Jayanthi Silva* Vs the *Attorney General* (Supra) Gunasekara J held as follows. "Over the years a principle has evolved through judicial decisions that bail pending appeal from conviction by Supreme Court would only be granted in exceptional circumstances". On a consideration of the above judicial decisions, it seems to me that the release of a prisoner on bail pending an appeal to the Court of Appeal will only be granted in exceptional circumstances. This position remains unchanged even if the application is made under Section 404 of the Criminal Procedure Code. I have earlier pointed out that the requirement to establish exceptional circumstances to grant bail pending appeal exists even after the enactment of the Bail Act, No.30 of 1997. For the above reasons, I hold that an application for bail pending appeal will be allowed only in exceptional circumstances. It now remains for me to consider whether the petitioner has established exceptional circumstances. The petitioner has submitted following grounds

as exceptional circumstances. (a) The petitioner is suffering from a rare blood condition requiring regular and frequent medical treatment and he must be treated in a hospital where such facilities are available. (b) Disruption of his studies; (c) Preparation of appeal brief would take time; and (d) The delay in taking up the appeal for argument.

Learned counsel for the petitioner produced medical certificate P6 in support of ground (a) above. But P6 does not state that the petitioner's health condition cannot be treated in a hospital in Sri Lanka. There is no evidence before this court that the petitioner's health condition cannot be treated either at the prison hospital or at any hospital in Sri Lanka. Therefore ground (a) above does not come under exceptional circumstances. With regard to ground (b) above, learned counsel for the petitioner has submitted a diploma certificate marked P7. The petitioner completed his diploma in May 2000. The petitioner was convicted on 30.03.2004. There is no evidence to suggest that the petitioner has engaged in any studies after his diploma in May 2000. Therefore ground (b) above does not fall within the category of exceptional circumstances.

Ground nos (c) and (d) above are the delay in preparation of the appeal brief and the delay in taking up the appeal for argument.

In *Queen* Vs *Rupasinghe Perera* (supra) the main ground urged in support of the application (bail pending appeal) was that the hearing of the appellant's appeal was likely to be delayed as the preparation of the transcript of short hand notes of the proceedings was likely to take more than usual time owing to the length of the trial in the course of which over 100 witnesses were examined and more than 400 exhibits were produced. Basnayake CJ remarked as follows "The applicant has not satisfied court that this is a case in which we should take the exceptional and unusual course of granting bail". The application for bail in that case was refused.

When the principles laid down in the above case are applied to the facts of this case ground nos (c) and (d) do not come under category of exceptional circumstances.

The other ground urged by the counsel for the petitioner may be set out as follows. (a) The subject matter of the robbery was fully recovered ; (b) There is no claimant for the subject matter of the charge (items of gold);

(d) The petitioner was convicted on the basis of common intention ; The petitioner is prepared to furnish two sureties of very high professional standing.

These grounds, in my view, are not exceptional grounds to release the prisoner on bail.

For the above reasons, I hold that the petitioner has not adduced exceptional circumstances to grant bail. I therefore refuse the application for bail and dismiss the petition of the petitioner.

Application dismissed

JAGATH BALAPATABENDI, J.

The 1st accused and the 2nd accused - appellant had been found guilty for a charge of robbery under section 380 of the Penal Code read with section 32, and they were sentenced to 10 years R, I in addition to a fine of Rs.5000.

The application made by the 2nd accused - appellant for bail pending the appeal, had been refused by the learned High Court Judge on 13.01.2005.

This application was made by the 2nd accused - appellant on the 26.01.2005 under section 404 of the Criminal Procedure Act, against the order of the learned High Court Judge, praying that the accused - appellant be enlarged on bail pending the appeal, on the grounds averred in the petition. The grounds averred as exceptional circumstances before the learned High Court Judge were refused on the following reasons :-

(1) No documents were tendered in support of :

(a) the accused -appellant pursuing his studies,
(b) the incarceration of the accused - appellant would disrupt his education
(c) the ill - health of the accused - appellant.

(2) No material placed to satisfy Court that there would be long delay for the appeal to be heard.

(3) The chances of succeeding in the appeal would be very remote as the accused appellant was caught 'red - handed'.

Section 2 of the Bail Act No. 30 of 1997 states as follows :-

> "Subject to the exception as hereinafter provided for in this Act, the guiding principle in the implementation of the provisions of this Act shall be, that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.".

In the case *Queen Vs. Liyanage*[8] it was observed by Sansoni J. that "Even if our discretion to grant bail is unfettered it must still be judicially exercised". It proceeded to state further at page 293 as follows : "But it is not to be thought that the grant of bail should be the rule and refusal of bail should be the exception where serious non - bailable offences of this sort are concerned, bail is in such cases granted only in rare instances and for strong and special reasons, as for instance, where the prosecution case in prima- facie weak".

In the case of *Salahudeen vs. Attorney General*[4] it was stated that "It is settled principle that the release of a prisoner on bail pending an appeal to the Court of Criminal Appeal will only be granted in exceptional circumstances."

In *Ramu Thamotherampillai* vs. *Attorney General*[6] Vythelingam,J affirmed the principle that the Court would require the appellant to show the existence of exceptional circumstances to warrant the grant of bail pending appeal".

As aforesaid the Sri Lanka Courts have consistently held that bail pending appeal would not be granted unless there were 'exceptional circumstances' shown to exist :-

Eg. King Vs *Mathuratta*[9] *King* Vs *Keerala*[2] *Queen* Vs *Coranelis Silva*[7] In the case of *Kamal Addarachchi* Vs *Attorney Genera*l, the Court took into consideration that the preparation of the appeal briefs and hearing of the appeal would take a considerable period of time, and it was treated as an 'exceptional circumstance' to grant bail.

In *Rex* Vs *Cooray* bail was granted on the ground of ill-health, that the accused - appellant was not likely to abscond and the complexity of the

case. So that, it is clear the existence of exceptional circumstances would depend on the facts and circumstances of each case.

In the case of *Harbhagan Singh* Vs. *State of Punjab*[12] it was held that the factors which the Appellate Court is to consider in an application for bail pending appeal were :- (a) whether a prima facie ground exists for substantial grounds for believing that the convicts committed the offences in question, or (c) whether the circumstances are such as likely to delay the decision of the appeal for an unreasonable time. It would afford scant satisfaction to the accused if after serving their full or substantial portion of their jail sentence their appeal succeeds and they are merely acquitted of the charge. This factor cannot be ignored and should be one of the considerations for granting bail.

Now I would like to deal with the grounds averred by the accused - appellant, in his application for bail pending appeal.

(a) The accused - appellant had alleged that he is suffering from a rare-blood condition and getting treatment for 'vasculties and atopy' from Dr. Chandima de Mel, a Consultant Physician, and he needs to be followed up at a specialized medical facility. (Vide the medical certificate dated 04.09.2004)

It is to be noted upto date the respondent has not denied the fact that the accused-appellant needs specialized treatment as stated in the medical certificate, and such treatment could not be given by the Prison authorities in the Prison Hospital or in a hospital.

The other point to be noted is from our experience in the Court of Appeal we note that it will at least take more than one year for this appeal to be taken - up, and at present we hear the appeals lodged in 2001, 2002 and 2003; further at present we have fixed appeals up to March, 2006.

So that, the final determination of this appeal may take many years, and it could be considered as a "long delay" to determine this appeal.

The learned High Court Judge had mentioned in his order the fact that the chances of succeeding the appeal were remote as the accused-appellant had been caught 'red-handed'

On the point, I would like to refer to the page 33 of the judgment, which contains as follows:-

> ලීනස් ද මෙල්ගේ සාක්ෂිය අනුව ඉතා සන්සුන් වාතාවරණයක් මේ අවස්ථාවේදී තිබී තිබුණි. ලීනස් ගේ අතේ තිබුණු පාර්සලය පොලිස් නිලධාරියෙකු බවට හැඳුනුම්පතක් පෙන්වූ අයකු විසින් ලබාගෙන පොලිසියට යෑ කියලා බලහත්කාරයෙන් ජීප් රථයට දාගෙන ඇත. මෙසේ පැමිණි පොලිස් නිලධාරියා කවුදැයි පැමිණිල්ලෙක් ප්‍රශ්න කර නොතිබුණ අතර විත්තියෙන් ද ඒ සම්බන්ධයෙන් ප්‍රශ්නයක් අසා නොතිබිණ. කෙසේ වෙතත් ලීනස් ද මෙල්ගේ පාර්සලය ගත්තේ 1 වන චූදිත බවට අනෙක් සාක්ෂිකරුවන් මඟින් සහ 1 සහ 2 චූදිතයන්ගේ ප්‍රකාශ වලින් ද දක්නට ඇත.

The above paragraph reveals, the 1st accused took the parcel of gold from the witness Lenus de Mel which fact the 1st accused as well as the 2nd accused - appellant had admitted.

Did the 2nd accused-appellant share the common intention of the act done by the 1st accused under Section 32 as charged ? And whether there had been only a actus-reus of the 1st accused without the mens-rea. These important points of law had not been applied on evaluation of the evidence by the learned High Court Judge. The position taken up in the judgment that the 2nd accused - appellant was caught red-handed is questionable.

Further, I would like to advert our minds to the fact that the accused - appellant was only 21 years of age when the offence was committed with the principal offender the 1st accused. The father of the accused - appellant had been a cancer patient when this application was filed. *Vide* the letter by the Prof. H. J. De Silva, dated 22.03.2005 where he had recommended to allow the accused-appellant to visit his father a cancer patient on humanitarian grounds.

Thus, the reasons mentioned above could be considered as 'exceptional circumstances' to release the accused-appellant on bail pending the appeal.

The accused-appellant is released on bail in a sum of Rs. 75,000 in cash with two sureties namely - Professor S. B. Hettiarachchi and Ediriweera Weerawardena, In addition, I direct the mother of the accused-appellant namely Induruwage Dona Chandarani Jayanthi

Gunatillake Ediriweera to stand as a surety, on a surety bond in a sum of Rs.100,000. Also the accused-appellant is directed to report to the O. I. C. of Panadura Police last Saturday of every month, till the appeal is determined.

WIJEYARATNE, J. - I agree

Application allowed;

Bail granted by majority decision.

Application allowed

PATHMASIRI AND ANOTHER
VS
BABY AND ANOTHER

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA 160/90F DC KEGALLE No.: 22142/P
APRIL, 11 AND
JUNE 12, 2003 AND
OCTOBER 3, 2004

Partition Law, No. 21 of 1977 - Exclusion sought - Prescriptive possession - Co-owners possession - Acquiring of rights to a divided lot? - Adverse possession - Ouster

The plaintiff respondent instituted action to partition the land in question. The contesting 2nd and 3rd defendant appellants sought an exclusion of the lots they were in possession on the basis that the lots consist of a different land. The trial court held with the plaintiff respondent.

On appeal :

Held :

Mere possession of a specified portion of co-owned property for convenience cannot constitute an adverse possession although he possessed the specified portion for more than 50 years.

APPEAL from the judgment of the District Court of Kegalle.

Cases referred to :

1. *Tilakaratne vs. Bastian - 21 NLR 114 (FB)*
2. *Corea vs Appuhamy - 15 NLR 65*
3. *Hamidu Lebbe vs Ganitha - 27 NLR 33*
4. *Simon Perera vs. Jayatunga - 71 NLR 338*
5. *Sediris Appuhamy vs. Jamis Appuhamy - 60 NLR 297*
6. *Gunawardena v Samara Koon - 60 NLR 481*

J.C. Boange for 2A and 3A defendant appellants.
Mahinda Nanayakkara for plaintiff respondent.

Cur. adv. vult.

October 03, 2003.

A.M. SOMAWANSA. J.

The plaintiff - respondent instituted the instant action in the District Court of Kegalle seeking a partition of the land called and known as "Badaheladeniya Hena" morefully described in the schedule to the plaint and depicted as lots 1 to 5 in plan No. 4056 dated 10.05.1979 prepared by C.K. Badewella marked X. The contesting 2nd and 3rd defendants appellants (now substituted) sought an exclusion of the lots 1 and 2 from the corpus on the basis that the said lots 1 and 2 consist of another land called and known as "Peellagawahena". They also averred that Siri, Meniki, Kudaduraya and Hapu mentioned in the plaint as the plaintiff-respondent s vendors by deed No. 42857 marked 2D2 conveyed this land to Sittiya the father of the 2nd and 3rd defendants - appellants and on the basis of exclusive possession by the said Sittiya and on his death by the 2nd and 3rd defendants -appellants that they have acquired prescriptive rights to lots 1 and 2 in plan marked X.

Parties went to trial on 11 points of contest and at the conclusion of the trial the learned District Judge by his judgment dated 22.02.90 held with the plaintiff - respondent. It is from the said judgment that the 2nd and 3rd defendants - appellants (now substituted) have preferred this appeal.

At the hearing of this appeal the counsel for the 2nd and 3rd defendants-appellants contended that the learned District Judge erred and misdirected himself when he stated that there is no evidence of execution of deeds or possession according to a plan and accordingly the land remains co-owned and so ordered a partition of the entire land. He submits that there

is no necessity to have cross deeds or a partition plan but the question of ouster has to be decided as a question of fact. That in the instant case there are distinct boundaries and long continued possession in addition another name, thus justifying an inference of ouster or that it is a separate land.

On an examination of the evidence led in this case it is to be seen that the only evidence available to show that lots 1 and 2 in plan marked x is a separate land called "Peelagawahena" is that of the 2nd defendant - appellant's evidence and the deed No. 42857 marked 2V2. It is to be noted that Peelagahawahena as described in the schedule to the statement of claim of the 2nd and 3rd defendants is bounded on the east by rock ridge of Badahaladeniya hena south by Rock of Dangollawatta west and north by ela. However the land described in the schedule to deed No. 42857 marked 2V2 does not tally with the boundaries given in the schedule to the statement of claims nor do they tally with the boundaries shown in the plan marked X. According to the schedule to the statement of claim Peelagawahena which is alleged to be depicted as lots 1 and 2 in plan marked X is bounded on the south by the Rock of Dangollawatta. However according to the plan marked X Dangollawatta is shown as the north eastern boundary of the corpus and certainly not shown as southern boundary of lots 1 and 2. The southern boundary of lots 1 and 2 are shown as Nugawelamulahena. Therefore it appears that when comparing the boundaries of Peelagahawahena as given in the schedule to the statement of claim as well as deed 2V2 and 2V3 with the boundaries shown in the preliminary plan marked X it is apparent that they do not tally.

It appears that the 2nd defendant-appellant under cross examination admits that northern and western boundaries given in the deeds pertaining to Badahaladeniya hena are correct. Another factor that came to light under cross examination is that the extent of the land described in the deeds marked 2V2 and 2V3 when compared with the extent of lots 1 and 2 in plan marked X there is a vast difference.

On a consideration of the evidence led in this case, It appears that the 2nd and 3rd defendants have failed to establish that lots 1 and 2 depicted in plan marked X do not form part of the corpus but is a separate land called Peelagawahena. The learned District Judge has addressed his mind to the issues at hand and I would say he has come to a correct finding that lots 1 and 2 are is not separate land but forms part of the corpus sought to be partitioned.

The other matter that needs consideration is the prescriptive rights of the 2nd and 3rd defendants - appellants to lots 1 and 2 depicted in plan marked X. However it appears that the only evidence available on this claim of acquiring prescriptive title to lots 1 and 2 in plan marked X is the *ipse dixit* of the 2nd defendant - appellant who said that on the death of his father in 1962 he alone took the produce and possessed lots 1 and 2. As stated above, lots 1 and 2 form part of the corpus and it is admitted by the plaintiff respondent that the 2nd and 3rd defendants - appellants are entitled to certain shares in the land in view of certain deeds which convey rights to the 2nd and 3rd defendants - appellants. Therefore it follows that the 2nd and 3rd defendants - appellants are co-owners to the land sought to be partitioned. Except for the *ipse dixit* evidence of the 2nd defendant - appellant there was no other evidence forthcoming to establish that he had prescribed to these two lots. It is very relevant to note that no suggestions and for that matter no questions were put to the plaintiff-respondent or the 1st defendant - appellant on the basis of prescriptive rights claimed by the 2nd and 3rd defendants - appellants.

In the case of *Tillekeratne* vs. *Bastian* [1] full Bench of the Supreme Court considered the meaning of "adverse possession" in an exhaustive manner. Possession by one of the co-owners is presumed as the possession on behalf of all the co-owners however much the length of time. For one co-owner to acquire prescriptive title against the other co-owners. he shall prove ten years exclusive possession after changing the nature of the possession to one adverse to the title of others.

The leading case on the question of prescriptive possession by co-owners is that of *Corea* vs. *Appuhamy*[2]in which the Privy Council held that possession by a co-heir ensures to the benefit of his co-heirs. It was further held that;

> "A co-owner 's possession is in law the possession of his co-owners, It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. The whole law of limitation is now contained in Ordinance, No. 22 of 1871."

In that case the property was belonging to four co-owners jointly. One Elias Appuhamy who was the owner of certain lands died in July 1878. He

was not married and died intestate. His heirs were his brother Iseris and three sisters. His brother Iseris also joined him when he was 10 years old to look after the interest of property of the deceased. After the death of some of the sisters of Elais their shares were devolved on their children. Thereafter when an action was filed to partition the land among co-owners. Iseris Appuhamy claimed prescriptive title to the subject matter. His claim was upheld by the District Court and Supreme Court.

But the Privy Council set aside the judgment and directed to enter decree for the partition of the land.

Lord Mac Naghten pronouncing the opinion of the Privy Council held as follows :

"Assuming that the possession of Iseris has been undisturbed and uninterrupted since the date of his entry, the question remains, Has he given proof as he was bound to do, of adverse or independent title? His title certainly was not independent. The title was common to Iseris and to his three sisters. On the death of Elias, his heirs had unity of title as well as unity of possession. Then comes the question, Was the possession of Iseris adverse? The District Judge held that Iseris "entered in the character of sole heir or plunderer. Whichever it was, says the learned Judge, "so he continued, and acknowledged no title in any one else. He has acquired a good prescriptive title. " It is difficult to understand why it should be suggested that Iseris may have entered as "plunderer." He was not without his faults. He is described by the learned Judge who decided in his favour as " a convicted forger and thief", and "expert not only in crime and incarceration, but also in perjury". But it is perhaps going too far to hold that he was so fond of crooked ways and doing wrong that he may have scorned to take advantage of a good legal title and may have preferred to masquerade as a robber or a bandit, and to drive away the officers of the Court in that character. It is not a likely story. But would such conduct, were it conceivable, have profited him entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His must have enured for the benefit of his co-proprietors. The principle recognized by Wood V.C. in Thomas Vs. Thomas holds good : " possession is never considered adverse if it can be referred to a lawful title."

In the case of *Hamidu Lebbe* vs. *Ganitha*[3] which was a case filed by the plaintiff for a declaration of title to a half share of a particular land, which originally belonged to one Kirihatana and in the course of the case he died leaving two sons, the defendant Ganitha and Suddana. Suddana had two children Rankira and Ukku, who in 1921 sold to the plaintiff. Trial Judge dismissed the plaintiff's action on the basis that plaintiff's claim must fail on the issue of prescription.

In appeal to the Supreme Court Ennis A.C.J. said that :

"Where a co-owner of a land seeks to establish prescriptive title against another by reason of long- continued exclusive possession it depends on the circumstances of each case where it is reasonable to presume an ouster from such exclusive possession."

In the written submissions tendered on behalf of the 2nd and 3rd defendants - appellants counsel has brought to our notice the decision in *Simon Perera* vs. *Jayatunga*[4] the head note reads as follows :

"The question whether a co-owner has acquired prescriptive title to a divided lot as against the other co-owners is one of fact and has to be determined by the circumstances of each case."

The facts were:

" A land was owned in common by members of one family. An undivided one third share of it was purchased by one B, an outsider, who was already the owner of an adjoining land. Thereafter, without execution of any deeds there was an amicable division among the co-owners in pursuance of which B possessed a divided lot exclusively for nearly thirty years in lieu of her undivided share. She had not only annexed this lot to her own adjoining land but had also separated it off from the rest of the common land by erecting a parapet wall of a permanent nature."

It was held :

" That there was sufficient evidence of ouster and that B had acquired, as against the other co-owners, prescriptive title from the time of ouster in respect of the lot which she possessed exclusively in pursuance of the amicable division."

That case can be distinguished from the instant case for in the instant action other than the bare statement of the 2nd defendant - appellant that he possessed and took the produce. There is no other evidence like in that case where a permanent parapet wall had been erected.

In *Sediris Appuhamy* vs. *James Appuhamy*[5] Sinnathamby, J went on to affirm the position that the mere possession of a specific portion of co-owned property for convenience cannot constitute an adverse possession although he possessed the specific portion for more than fifty years. A similar principle was followed in *Gunawardene* vs. *Samarakoon*[6]

I must say that unlike me the learned District Judge had the greater advantage of seeing, hearing and observing the demeanour of the witnesses who gave evidence. Having analysed and evaluated the evidence led, it appears to me that on a balance of probability he has come to a correct finding.

In view of the above reasons, I would dismiss the appeal with costs fixed at Rs. 5,000.

The Registrar is directed to send the case record to the appropriate District Court forthwith.

DISSANAYAKE, J. - I agree,

Appeal dismissed.

RANAWICKREMA
VS
MINISTER OF AGRICULTURE AND LANDS AND OTHERS

COURT OF APPEAL
IMAM J. AND
SRISKANDARAJAH, J.
C.A. (WRIT) 280/2001
MAY 10, 2005

Writ of certiorari - Land Acquisition Act, sections 2,3 and 4(1) - Section 2 Notice - Should the land be identified with precision ? - What is a Section 2 Notice ? - Is it amenable to writ jurisdiction ? - What is the first decisive exercise of discretion by the Minister ?

Held :

(i) Without identifying a land, if Section 2 Notices are issued on several lands in an area for the purpose of investigation, it will cause inconvenience to the public and at the same time the Acquiring Authority may incur unnecessary liabilities under section 3.

(ii) The Land Manual has laid down the procedure to be followed in cases of acquisition of land for public purposes. The officers of relevant government departments should conduct a preliminary investigation before identifying a land for the stated purpose. They should compare the lands available in the area and identify a land for the said purpose and after identifying the land only a "request" could be made to the relevant Minister for acquisition. The Minister thereafter issues a direction to the Acquiring Officer of the area, to publish a Section 2 Notice to investigate whether the land identified is suitable for the said public purpose.

(iii) A Section 2 Notice is a notice to investigate for selecting, a land for a public purpose. The investigation will not necessarily result in a subsequent acquisition of that land. This is not a decisive exercise of discretion by the Minister.

The first decisive exercise of discretion by the Minister, affecting the rights of a person is at the stage of section 4(1). Seeking a writ of certiorari to quash a Section 2 Notice or a writ of prohibition is premature and not ripe for review.

APPLICATION for a writ of certiorari.

Case referred to :

1.D.C. Jayawardena vs. *V.P. Silva* - 72 NLR 25

Manohara R de Silva for petitioner

Sanjay Rajaratnam, Senior State Counsel for 1-3 Respondents

S.T. Gunawardena for 4th and 5 th respondents.

Cur. adv. vult.

June 30, 2005

SRISKANDARAJAH, J.

The Petitioner in this application has sought a writ of certiorari to quash the order marked P4B made by the 1st Respondent and writ of prohibition restraining and /or prohibiting 1st to the 5th Respondents from taking any steps to acquire any part of the Petitioner's land.

The petitioner is the owner of the property bearing assessment No. 6 Peiris Road, Mt. Lavinia. The petitioner and her family are presently living overseas in the United Kingdom and the said property was rented out until their return to the Island. The Petitioner's husband is 61 years of age and intends to settle down in Sri Lanka with the Petitioner in a few months time after retirement. In the month of November or December 2000 the Petitioner's tenant had received from the 3rd Respondent a registered letter dated 21.11.2000 P4A addressed to the Petitioner. To this letter a notice under Section 2 of the Land Acquisition Act is annexed P4B, informing the Petitioner that the land in the area described in the notice is required for a public purpose namely to join the existing road to Peiris Road through the land which is available in between the buildings bearing Nos. 271 and 273 Galle Road. The said land is in extent of 3.56 Perches a portion of lot 8 depicted in Plan No. 16/95 dated 26.6.1995 marked P5. The Petitioner submits that the whole exercise is to acquire 3.56 Perches of the Petitioners land and not to widen the existing road. She further submits that by this acquisition the benefit will only accrue to premises No. 259/5A and 259/5. The Petitioner submits that these two lands were originally one land owned by the 4th Respondent and these two premises have access from the Galle Road. The purpose of the acquisition of the Petitioner's land is solely to provide the 4th Respondent access to the

Galle Road through Peiris Road and this acquisition has been initiated by the 5th Respondent using his political power to the benefit of his father the 5th Respondent.

The Petitioner further submits that as evident from the said Section 2 notice the Respondent proposes to acquire 3.56 perches of the Petitioner's land purportedly on the basis to connect the road which runs between premises No. 271 and 273 Galle Road, Mt. Lavinia to Peiris Road, But the Plan P5 filed in this case shows that the existing road is to be widened from Galle Road up to Peiris Road. However the Section 2 notice only deals with lot 8 and not lots 1 to 7 depicted in the said plan. This clearly demonstrates that the whole exercise is to acquire 3.56 perches of the Petitioner's land and not to widen the existing road. She further submits that the Section 2 notice that was published describes with precision the portion of the land the state intends to acquire from the Petitioner's land. The said order has taken away the duty vested on the Acquiring Officer in ascertaining the suitability of the land for the intended public purpose. Section 2 notice is published in an area for the purpose of investigating and as certaining the suitability of the land required for the public purpose and the notice in question had identified the land in question and therefore the said notice is of no force or effect in law and hence the notice of the purported acquisition is unlawful, arbitrary, capricious and *mala fide* and had been made without jurisdiction.

The 4th and 5th Respondents in their objections have stated that the said acquisition is being done in order to expand the width of the present foot path of 3ft. to 10ft. road way for the benefit of the residents of the area and the members of the public. All the residents of the area whose lands are being affected by the proposed road widening have given their consent to the said widening whereas the Petitioner is the only party who has objected to the said road widening and therefore the 3rd Respondent has been forced to take the mandatory step of acquiring a minor portion of the Petitioners land at the request of the local authority. The petition of the residents of that area P1 and the resolutions passed by the Municipal Council P2, P3 and P4 are annexed to support this contention.

The 1st to the 3rd Respondents submitted that on an application dated 10th March 2000 forwarded by the Ministry of Provincial Councils, the Ministry of Lands initiated action to acquire the land in question. The

predecessor - in - office to the 1st Respondent being satisfied that the purpose of this acquisition being a public one gave directions under Section 2 of the said Act. The 1st Respondent submitted that he was also satisfied that the purpose of this acquisition was to extend the road from Gall Road up to Peiris Road, Mount Lavinia. Hence he directed the 3rd Respondent the acquiring officer to cause a notice in accordance with section 2(2) of the Land Acquisition Act. The 3rd Respondent published the said notice on 22nd November 2000.

The submissions of the 1st to the 3rd Respondents are that the said land is required for widening of the existing road and to connect the same to the Peiris Road. Further the residents who live along the said road have given their consent for the takeover of portions of their land to this purpose. Therefore there is no necessity to acquire lands to widen the said road. But a portion of the Petitioner's land was identified for the purpose of connecting the said road to the Peiris Road for the benefit of the public and that is why steps are being taken to acquire that portion of the land. The Petitioner's contention that the portion of the Petitioner's land acquired is for the benefit of the 4th Respondent was denied by the 1st to the 3rd Respondents.

The Petitioner's submission that the land that has to be acquired for a public purpose should not be identified with precision at the stage of publishing Section 2 notice but it can only be identified after investigating and ascertaining the suitability of the land required for the public purpose cannot be accepted. The Land Manual has laid down the procedure that has to be followed in case of acquisition of land for public purpose. Clause 248 of the Manual provides for the procedure that has to be followed by a Government Department or an Authority that needs a land for a public purpose. It provides that before a Government Department or an Authority make a request for acquisition the officers of the relevant Government Department or Authority should conduct a preliminary investigation before identifying a land for that purpose. These officers should compare the lands available in the area and identify a land for the said purpose keeping in line with the provisions laid down in Clause 248(a) (1) to (12). By this process the officers of the relevant Government Department or an Authority have to first identify a land for the said public purpose and after identifying the land only a request could be made to the Minister of lands for acquisition. The Minister of lands after the receipt of a request issues a direction to the

acquiring officer of the area in which the said land is situated to publish a notice as provided in Section 2 to investigate whether the land identified is suitable for the said public purpose. Without identifying a land, if Section 2 notices are issued on several lands in an area for the purpose of investigation it will cause inconvenience to the public and at the same time the acquiring authority may incur unnecessary liabilities under section 3 of the said Act.

The Petitioner in this application is seeking to quash the order P4B made by the 1st Respondent. The said order is in fact is not an order but a notice under Section 2 of the Land Acquisition Act. This notice is to investigate for selecting a land for public purpose.

In D. C. *Jayawardana* vs. *V.P Silva*[1] the court held that certiorari does not lie against a person unless he has legal authority to determine a question affecting the rights of subjects and, at the same time, has the duty to act judicially when he determines such questions.

Administrative Law by H.W.R.Wade & C.F. Foster, Ninth Edition the authors in pages 611,612 & 613 states :

> "As the law has developed, certiorari and prohibition have become general remedies which may be granted in respect of any decisive exercise of discretion by an authority having public functions, individual or collective. The matter in question may be an act rather than a legal decision or determination, such as the grant or refusal of a license, the making of a rating list on wrong principles, taking over of a school, the dismissal of employees who have statutory protection, or the issue of a search warrant. They will lie where there is some preliminary decision, as opposed to a mere recommendation, which is a prescribed step in a statutory process which leads to a decision affecting rights even though the preliminary decision does not immediately affect rights itself"

> "If confusion and complication are to be avoided judicial review must be accurately forcussed upon the actual existence of power and not upon the mere preliminaries. The House of Lords perhaps appreciated this point in refusing to review letters in which a Minister refused to accept that legislation about unfair dismissal and redundancy pay was sexually discriminate or contrary to European community law. That was a case of prematurety, where the issue was not ripe for review".

In this instant case on an application of the Ministry of Provincial Councils dated 10th March 2000 to the Ministry of Lands, the Minister of Lands, the 1st Respondent decided under section 2 of the Land Acquisition Act that a land in an area specified in the request is needed for a public purpose. A notice was published under section 2(2) of the said Act to investigate a land for selecting a land for the said public purpose. In this instant the decision of the 1st Respondent under section 2 is that a land in a specific area is needed for public purpose. To identify a land in that area for the said public purpose is the function of the requesting Ministry. The Minister of Lands under section 2 directs the acquiring officer to investigate by causing a notice under section 2 whether the land identified is suitable for the said public purpose. The direction of the Minister under section 2 or the act of the acquiring officer under this section is not a decision affecting the rights of a person but an investigation which leads to a recommendation to the Minister that the said land is either suitable or not suitable for the said purpose. The Minister after considering the suitability of the said land as provided in section 4(1) of the said Act makes a preliminary decision to acquire.

The decision that is challenged in this application is P4B, a notice under section 2 of the Land Acquisition Act to investigate a land and this investigation will not necessarily result in a subsequent acquisition of that land. Therefore, this is not a decisive exercise of discretion by the Minister. The first decisive exercise of discretion by the Minister under the Land Acquisition Act affecting the rights of a person is made at the stage of section 4(1) of the said Act. At this stage the person who has an interest in the land could object to the acquisition of the land as provided by that section. Therefore, seeking a writ of certiorari to quash a notice under section 2 of the Land Acquisition Act marked P4B or for a writ of prohibition at this stage from taking any steps to acquire any part of the Petitioner's land is premature and not ripe for review. Therefore the court dismisses this application without costs.

IMAM, J. - I agree,

Application dismissed.

Ed. Note.: The Supreme Court in SC SP CA 166/05 on 04.07.2006 refused Special Leave to the Supreme Court.

JOHN KEELLS LTD.
VS
CEYLON MERCANTILE, INDUSTRIAL AND GENERAL WORKERS UNION AND OTHERS

COURT OF APPEAL,
SRIPAVAN, J. AND
SRISKANDARAJAH, J.
CA 1531/2003
SEPTEMBER 9 AND OCTOBER 8, 2004

Writ of certiorari - Industrial Disputes Act, section 3 (1) (d)-Arbitration-Just and equitable concept in Labour Law-Arbitrator not relying on evidence led at domestic Inquiry-Is it lawful?–Alternative relief-Loss of confidence-Circumstances-Evidence Ordinance-Applicability.

The services of the workman, who was employed as an office minor staff was terminated for misconduct after a domestic inquiry. The dispute was referred for arbitration and the Arbitrator after inquiry, re-instated the employee with back wages. The employer petitioner sought to quash the said order on the basis that (a) it is ultra vires, illegal and null and void, and (b) the Arbitrator had not considered the evidence of the eye witness and had refused to accept as evidence in the arbitration proceedings, the evidence given by the virtual complainant at the domestic inquiry.

Held :

(i) The evidence given before the domestic inquiry was not under oath, and therefore the truthfulness of the evidence is not established.

Per Sriskandarajah, J.

"A charge against a person has to be proved by direct evidence. Hence reliance cannot be placed in her evidence unless it is before the Arbitrator. Even though the Evidence Ordinance is not strictly applicable to inquiries held under the Industrial Disputes Act, the principle behind the admissibility of evidence should be borne in mind in accepting such evidence. The purpose of leading direct evidence is to test the credibility of a witness and to test the truthfulness of the facts given by the witness when giving evidence.

In the circumstances pleaded, the Arbitrator has correctly come to the conclusion that the evidence of the virtual complainant given at the domestic inquiry should not be relied upon in considering the award".

(ii) There are circumstances, where alternative relief in lieu of re-instatement is granted even if the workman is not found guilty to the charge. Instances include where the allegation against the workman is such that it would not promote harmonious relations between parties or by this allegation the employer lost confidence in the workman. The evidence led does not show that the reinstatement will affect the harmonious relationship between the parties and further, the workman is only an office minor staff-the question of loss of confidence would not arise. Further the allegation of misconduct is not related to his office functions.

APPLICATION for a writ of certiorari.

Gomin Dayasiri with *Manoji Jinadasa* for petitioner.

Pradeep de Silva for 1st respondent

Uresha de Silva, State Counsel for 2nd respondent.

Cur.adv.vult

October, 20, 2004

SRISKANDARAJAH, J

The petitioner is a limited liability company in which the workman W. A. S. Jayaweera was employed as an office minor staff. This workman's service was terminated for misconduct after a domestic inquiry. The 2nd respondent made an order under Section 3(1)(d) of the Industrial Disputes Act referring this dispute to the 3rd respondent who was appointed as the arbitrator. The workman was represented by his trade union the 1st respondent in the arbitration proceedings.

The dispute referred for arbitration was as follows : "whether the termination of employment of W. A. S. Jayaweera by John Keells Limited is justified ; if not to what relief the said workman is entitled to". After an inquiry the 3rd respondent made an award on 03.06.2003 wherein he held that the dismissal of the workman was unjustified and awarded reinstatement on or before 1st July 2003 with back wages from 01.09.1997 calculated at Rs. 6,174 per month. This award is marked as X9.

The petitioner submitted that the said award is ultra vires and/or illegal and/or null and void and/or no force and effect in law and/or excess or without jurisdiction and therefore it should be quashed for reasons set out

in Paragraph 15 of the Petition. The counsel for the petitioner submitted that the arbitrator when coming to the conclusion has not considered the evidence of an eye witness, namely, Omar who saw Ms. Kotalawala the female employee of the petitioner with a purple patch on her skirt and the workman W. A. S. Jayaweera apologizing to her. The counsel further submitted that this was a major lapse in the consideration of evidence by the learned arbitrator to determine the justifiability of the termination of services. The counsel urged that the arbitrator had relied heavily on the fact that Ms. Kotalawala did not give evidence before him and submitted that he has erroneously refused to accept as evidence in the arbitration proceedings, the evidence given by this witness at the domestic inquiry. Therefore the contention of the counsel was that non consideration of this material evidence was a complete violation of the "just and equitable concept" in labour law and constitutes an error on the face of the record.

The arbitrator in his award has given his reasons for not relying on the evidence of Ms. Kotalawala (virtual complainant) led at the domestic inquiry. According to him a domestic inquiry cannot be considered as a judicial inquiry and the evidence in a domestic inquiry is not led after administering oath. Hence reliance cannot be placed in her evidence unless it is led before the arbitrator. A charge against a person has to be proved by direct evidence . But the rules of evidence provided in the Evidence Ordinance permit evidence led in a former judicial proceedings to be led in a subsequent judicial proceeding in exceptional circumstances where the witness cannot be found or cannot be brought without unreasonable delay or expenses or the witness is prevented from giving evidence. Even though the Evidence Ordinance is not strictly applicable to inquiries held under the Industrial Disputes Act, the principle behind the admissibility of evidence should be borne in mind in accepting such evidence. The purpose of leading direct evidence is to test the credibility of a witness and to test the truthfulness of the facts given by the witness when giving evidence. If this opportunity is denied to a tribunal then only on exceptional circumstances, it can accept evidence subject to the aforesaid test.

As observed by the arbitrator, the evidence given before a domestic inquiry is not under oath and therefore the truthfulness of the evidence is not established. In this domestic inquiry the workman against whom the inquiry was held was not permitted to retain counsel. It appears from the proceedings that the workman himself was given an opportunity to cross

examine this witness. This may be to comply with the rules of natural justice. In this instant case the petitioner has sent two letters to Ms. Kotalawala and thereafter did not make any attempt to summon this witness and to lead her evidence. The submission of the petitioner is that all endeavors to summon this witness were made who is no longer working in the petitioner's company. The Human Resources Manager, Mithraka Fernando in his evidence before the arbitrator on 07.11.2001 admitted that even though letters were sent to Ms. Kotalawala there was no response from her. He also admitted that he had not taken personal interest in contacting her over the telephone but he came to know through others that the witness was threatened and was told not to give evidence. The petitioner did not call any witness to substantiate this fact.

There is no evidence to prove that this witness was threatened or prevented from giving evidence. According to the Human Resource, Manager this witness is working in Colombo. In the absence of sufficient proof that the witness cannot be brought to give evidence it is dangerous to admit the evidence given by that witness in an earlier proceedings which was not given under oath or subjected to proper cross examination. Under these circumstances the arbitrator has correctly come to the conclusion that the evidence given by Ms. Kotalawala at the domestic inquiry should not be relied upon in considering the award.

The petitioner further submitted that the arbitrator has failed and neglected to consider the evidence of the eye witness Omar. The arbitrator in his award has stated that he has carefully and diligently considered all the evidence led in the case and was of the considered view that the company has failed to prove the guilt of the accused workman of the offense he was charged with.

It appears that the arbitrator has not dealt with the evidence of Omar in the award but he may have considered this evidence in arriving at his conclusion. The evidence of Omar in relation to the charge of misconduct is in pages 6 and 7 of the proceedings before the arbitrator dated 12.01.2000 marked X5. Witness Omar has stated that his attention was drawn towards Anusha Kotalawala when she was talking to Jayaweera. This witness also said that he saw an ink stain in the skirt of Anusha. When he was questioned whether he saw the incident, he said he saw them only after the incident. This witness also said that he saw Jayaweera following Anusha and saying "I am sorry Miss Anusha". This witness also said that he did not see anything in the hand of Jayaweera. This is the evidence of Omar in

relation to the incident. From this evidence it appears that he is not an eyewitness to the incident but a person who has seen a conversation between Jayaweera and Anusha. The fact that Jayaweera apologized to Anusha cannot be construed as a confession. This witness who claims to have seen Jayaweera and Anusha immediately after the incident had said that he has not seen anything in the hand of Jayaweera. This evidence is not sufficient to establish a charge of misconduct. Therefore the failure to deal with this evidence in the arbitrator's award will not make any difference in the outcome of the award.

When considering the totality of the arbitration inquiry the only witness who can speak of the incident is the virtual complainant Anusha Kotalawala. But she did not give evidence before the arbitrator ; the other witness is Omar who claims that he did not see the incident but he only saw the conversation between Anusha the complainant and Jayaweera the workman charged for misconduct. According to this witness he has seen the complainant in a disturbed stage and there is ink stain on her skirt but he said he saw Jayaweera closer to her but he did not have anything in his hand. Other than these witnesses there is no witness to speak to the incident. In these circumstances the arbitrator had come to the correct conclusion that the company has failed to prove the guilt of the accused workman of the offense he is charged with.

The counsel for the petitioner submitted that even though the arbitrator had come to the conclusion that the termination is unjustified, yet there is a major error in the award of the learned arbitrator, namely he has failed to consider two primary principles of industrial law. Firstly, to evaluate the evidence placed before the learned arbitrator ; and secondly the need to act judicially at the inquiry between the employer and employee. In this regard the counsel submitted that the learned arbitrator has not given his mind to the question of relief and has automatically awarded reinstatement with back wages to the workman without considering the evidence and analyzing whether or not the relief is suitable in the given circumstances of the case. He has a duty imposed by law to consider what is the proper relief and he has failed to consider other alternative relief available which is essential for a just an equitable award. The counsel further contended that there could be cases where such a consideration of the relief is not essential. But the evidence led in this case warrants a consideration on the question of relief for the reason that there was a trade union action in the place of work and there were certain employees who did not take part in the

picketing and they were harassed and abused. The accused workman was a union member and the female employee he allegedly harassed was a member who has resigned from the union and did not take part in the trade union action of picketing. Therefore the arbitrator could have considered alternative relief.

There are circumstances where alternative relief in lieu of reinstatement is granted even if the workman is not found guilty to the charge. Instances include, where the allegation against the workman is such that it would not promote harmonious relation between parties or by this allegation the employer lost confidence in the workman. In this instant case there is no evidence whatsoever against the workman in relation to the charge framed against him and also there is no evidence that he harassed or abused other employees or created industrial unrest. On the other hand according to the evidence led, the workman has nothing to do with this incident and there is evidence to the contrary to state that the workman has gone out of the premises during the relevant time. This is borne out by the log entry made at the gate in the vehicle movement chart. According to this entry the workman left the premises at 3.07 p.m. This entry was made by the security officer at the gate. According to the charge the incident has taken place at 3.20 p.m. The female employee who is supposed to have been humiliated is not working in the petitioner's company now. There is no allegation of misconduct against this employee in relation to the employer or other employees ; therefore the reinstatement of this employee will not affect the harmonious relationship between the employer and the employee.

In considering the question of loss of confidence the workman is only an office minor staff ; he will not fall within the category of officers such as accountants, cashiers, watchers and bank employees who occupy positions of confidence. In addition the allegation of misconduct is not related to his official function. Therefore there cannot be a loss of confidence in the workman. Under these circumstances the arbitrator has no alternative but to reinstate the workman with back wages. For the reasons stated above I dismiss this application without cost.

SRIPAVAN, J. - *I agree.*

Application dismissed.

PUTTALAM CEMENT COMPANY LIMITED
vs.
MUTUKIMARANA AND ANOTHER

SUPREME COURT,
DHEERARATNE, J.
BANDARANAYAKE, J. AND
WEERASEKERA, J.
SC(AP) NO. 11/98
H.C. CHILAW NO. 8/97
L.T. CHILAW NO. 21/0277/88
7th JUNE AND 1st JULY, 1999

Incorporation of a Public Company under section 2(1)(ii) of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987, to take over the functions of a public corporation or part of the corporation, specified in the incorporation order - Whether in view of section 3(2)(e) of the Act, Labour Tribunal proceedings which were pending in the High Court on the date of the incorporation of the new company may be continued - Interpretation of statutes harmoniously for avoiding conflict between different parts.

The appellant company being a part of the 2nd respondent (Sri Lanka Cement Corporation) was registered as a company in terms of section 2(2)(ii) of the Conversion of Public Corporation or Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987. What property, liabilities etc., of the corporation vest in the new company are set out in section 3(1)(a) to (c) and section 3(2)(a) to (g). Section 3(2)(e) refers to actions and proceedings instituted against the original corporation and pending on the relevant date (date of incorporation of the new company) and "specified in the order made under section 2(2)"

On the date of the order under section 2(2), there was pending before the Court of Appeal (thereafter referred to the High Court) an appeal made by the 1st respondent against the 2nd respondent Cement Corporation seeking to vary an order of the Labour Tribunal. The High Court noticed the new company to appear before the court to be added as the employer in place of the 3rd respondent Cement Corporation, to continue proceedings against the new company (the appellant).

Held :

1. The appellant should be substituted as the employer in proceedings before the High Court notwithstanding a preliminary objection by the

appellant company that it could not be added as a party since the Labour Tribunal proceedings had not been "specified" in the incorporation order under section 2(2) of the Act.

2. The words of a section of a statute should be interpreted harmoniously to avoid conflict between two provisions of an enactment on a proper construction thereof.

3. Section 2(2) which enables incorporation of a new company of a corporation or a part of a corporation and the relevant provision of section 3(1) and 3(2) do not necessarily require that proceedings pending on the date of incorporation must be specified in the incorporation order. The question is whether the words of section 3(2)(e) "and specified in the order made under section 2(2)" refer to action or proceeding or to the "corporation". That is not free from ambiguity.

Case referred to :

1. *Distilleries Company of Sri Lanka Ltd.* vs. *Fernando* SC (AP) 36/94 SCM 20.03.95 (not followed)

APPEAL against the Order of the High Court.

Tilak Marapana, P.C. with *Anil Tittawela and A. Rodrigo* for appellant.

Daya Guruge with *Samantha Vithana* for respondents

Cur. adv. vult.

July 24, 1999
JUDGMENT OF COURT

Special leave to Appeal was granted by this Court on the following questions :

* Whether an action instituted against a Public Corporation whose functions have been taken over by a company incorporated under the provisions of the Conversion of Public Corporations or Government owned Business Undertakings into Public Companies Act, No. 23 of 1987, which action is not specified in the order made under S. 2(2) of the said Act, could be deemed to be an action initiated against the Company.

The 1st Applicant-Respondent (1st Respondent) was an employee of the 2nd Employer-Respondent (2nd Respondent) until his services were terminated on 31.07.88. The 1st Respondent made an application to the Labour Tribunal dated 17.08.1988 seeking relief in terms of section 31(b) of the Industrial Disputes Act, No. 43 of 1950, against the 2nd Respondent. After inquiry, the Labour Tribunal, Negombo, dismissed the application of the 1st Respondent by order dated 15.03.1991. The 1st Respondent appealed to the Court of Appeal on or about 08.04.1991 against the order of the Labour Tribunal. On or about 09.01.1997, the Court of Appeal referred that appeal to the Provincial High Court of the North Western Province holden in Chilaw. When this matter came up before the Provincial High Court, Chilaw, it was submitted on behalf of the 2nd Respondent that by operation of the provisions of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act (Conversion Act) No. 23 of 1987, the Appellant should be substituted as Employer instead of the 2nd Respondent and the 2nd Respondent should be discharged from the proceedings, Pursuant to this application, the Provincial High Court Chilaw issued notice on the Appellant to appear before the High Court on 12.05.1997. The Appellant took a preliminary objection that it should not be substituted as the Employer because the schedule of the order made under Section 2 of the Conversion Act published in the Gazette Extraordinary No. 770/1 dated 07.06.1993, fails to refer to the Labour Tribunal case filed by the 1st Respondent. The objection was overruled and the appellant has now appealed to this Court from that order. The order made under Section 2 reads :

"J. C. de Alwis, Registrar of Companies, acting under paragraph (ii) of sub section (2) of Section 2 of the Conversion of Public Corporations of Government Owned Business Undertakings into Public Companies Act, No. 23 of 1987, do by this order declare that a Public Company is incorporated in the name of "Puttalam Cement Company Limited" to take over the functions of such part of the Public Corporation as specified in the Schedule hereto.

Schedule

The Puttalam Cement Works of the Sri Lanka Cement Corporation situated in Puttalam being a part of Sri lanka Cement Corporation (having its registered office at 130, W. A. D. Ramanayake Mawatha, Colombo

2 established by the order made under Section 2 of the State Industrial Corporations Act, No. 49 of 1957 and published in Gazette Extraordinary No. 11,634 of January, 2 1959 as amended by order made under Section 2 of that Act, and published in the Gazette Extraordinary No. 75/5 of February, 11, 1980.

It is the submission of learned Counsel for the appellant Company, that the action filed by the 1st Respondent in the Labour Tribunal, cannot be deemed to be an action instituted against the appellant company in terms of sub section 3(2) of the Conversion Act. He submitted that for the deeming provisions to be applicable the action against the corporation must necessarily be pending immediately preceding the relevant date and specified in the order made under Section 2(2).

It would be convenient, in order to consider this submission, if we set down here so much of the wording of Sections 2 and 3 of the Conversion Act, omitting therefrom references to Government Owned Business Undertakings and other matters not relevant to our decision in this case. After such truncation those sections would read as follows :-

2(1) Where the Cabinet of Ministers considers it necessary that a company should be incorporated for the purpose of taking over the functions of any public corporation or part thereof, the Minister in charge of the subject of finance, forward a memorandum and articles of association to the Registrar of Companies, together with a direction to such Registrar to register such public Corporation, or any part thereof a public company under the Companies Act, No. 17 of 1982.

(2) Notwithstanding any other provisions of the Companies Act, No. 17 of 1982, on receipt of a direction under sub section (1) the Registrar of Companies shall -

(i) (Re certificate of incorporation-omitted)

(ii) Publish an order in the Gazette declaring that a public company is incorporated in the name specified in the order to take over the functions of the Public Corporation specified in the order or such part of the corporation as specified therein.

(3) (Re allotment of shares - omitted)

(4) (Re stamp duty - omitted)

3 (1) with effect from the date of publication of the order under subsection (2) of section 2, in the Gazette (in this section referred to as "the relevant date") the corporation, or part thereof, as the case may be, to which the order relates shall vest absolutely in the company referred to in that order.

(definitions of "Corporations" and "business undertaking" omitted)

(2) Without prejudice to the generality of sub section (1)

(a) Re property - omitted
(b) Re liabilities - omitted
(c) Re officers and servants - omitted
(d) Re contracts and agreements - omitted
(e) all actions and proceedings instituted by or against -

a. the corporation; or
b. .....

and pending on the day immediately preceding the relevant date, and specified in the order made under Section 2(2) shall deemed to be actions and proceedings instituted by or against the company;

(f) (Re profits and income - omitted)
(g) (Re losses - omitted)

The words and pending on the date immediately proceeding the relevant date "unambiguously refer to "all actions and proceedings." The question then is whether the words "and specified in the order made under Section 2(2) in (e) refer to actions or proceedings" or to " the corporation" That is not free from ambiguity. A plain reading of the sub section seems to suggest, that the words by their collocation, refer to actions and proceedings "That interpretation commended itself to Kulatunga, J. in the case of *Distilleries Company of Sri Lanka Ltd., v. Fernando.* [1] Words in a section of statute cannot be interpreted in isolation; they must be given an interpretation to read in harmony with other provisions of the statute. Obviously, there is no

provisions in subsection 2(2) to enable the Registrar of Companies to specify in the order made thereunder "action and proceedings" on the other hand, the sub-section mandates him to specify in the order " the public corporation" either in whole or in part. Reference to a "part" of a corporation in sub-section 3(2) (a) would have been meaningless, as a part of a corporation is not a legal person by or against whom actions and proceedings could have possibly been instituted and pending as at the relevant date. It is to be noted that the words and specified in the order made under Section 2(2) appear in sub sections 3(2) (a), (b) and (d) as well. If we were to agree with the interpretation advanced by learned Counsel for the appellant Company, we will render those words superfluous and meaningless not only in sub-section 3(2) (e) but also in sub section (a) (b) and (d) as well.

Discussing the nature of conflicting provisions in a statute and how inconsistency is to be avoided, Bindra has stated that,

> "A section of a statute should, if possible, be construed so that there may be no repugnancy or inconsistency between its different portions or members. If it is possible to avoid a conflict between the two provisions of an enactment on a proper construction thereof, then it is the duty of the court to so construe them, that they are in harmony with each other. A construction that involves reading two successive sentences as flatly contradicting each other must be avoided if possible; all parts of a statue, should if possible be construed so as to be consistent with the other "Bindra's *Interpretation of Statutes*, Revised by Mahmood and Yudhishthira, 7th Edition, 1984, pg. 565)

On a consideration of the aforesaid matters, we hold that the Appellant should be substituted as the Employer in the proceedings before the High Court of the North Western Province holden in Chilaw, We affirm the order made by the High Court and dismiss the appeal. In all the circumstances we make no order as to costs.

DHEERARATNE. J., BANDARANAYAKA J., WEERASEKARA J.

Appeal dismissed.

YAPA
VS
PEOPLE'S BANK AND ANOTHER

COURT OF APPEAL,
WIMALACHANDRA, J.
C. A. 2241/2003,(REV)
D. C. COLOMBO 6932/SPL,
AUGUST 6, 2004.

People's Bank Act, No. 29 of 1961-Amended by Act, No. 32 of 1986 – Sections 29 and 29 D - Parate execution –Ouster clause-Granting of interim relief – Ingredients necessary ? - Stamp Duty Act, No. 43 of 1982, section 16 – Applicability - Could the Board resolution be challenged indirectly ?

The People's Bank sought to parate execute the mortgaged property. The petitioner sought an enjoining order to restrain the Bank from selling the land by public auction. The enjoining order was refused. The petitioner moved in revision.

It was contended by the petitioner that-

1. In view of section 16 of the Stamp Duty Act, the 1st respondent (Bank) cannot claim the amount in the Board Resolution, as according to the amount of stamp duty paid on the mortgage bonds the Bank cannot recover more than Rs. 1,1419,770/- and any attempt to recover over and above the said amount is illegal.
2. That no consideration passed at the time of the execution of the mortgage bonds and hence the bonds are of no force or avail in law.

Held :

(i) According to section 29D, the borrower is not competent to make an application to court to move to invalidate a resolution to sell by public auction any immovable property mortgaged to the Bank. The petitioner cannot challenge the resolution even indirectly by challenging the mortgage bonds on the basis that they are not properly stamped. The petitioner is trying to do indirectly, what he cannot do directly.

(ii) That the plaintiff cannot now complain that no consideration passed in view of the acknowledgment made by him to the receipt of the said banking facilities as per the receipts issued by the plaintiff.

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

Cases referred to :

1. *Felix Dias Bandaranaike vs The State Film Corporation and another* (1981) 2 Sri LR 287 at 301
2. *People's Bank vs. Hewawasam* – (2000) 2 Sri LR 29
3. C. A. L. A. 74/97 with CA 433/97 – D. C. Colombo 4707/Spl.

Derrick Samarasekera for plaintiff petitioner.

Rohan Gunapala with *Deepa Govinna* for defendant respondents

Cur.adv.vult

08.12.2004

WIMALACHANDRA J.

This is an application in revision from the order of the Additional District Judge of Colombo dated 18.12.2003 in case No. 6932/Spl, refusing to grant an enjoining order in terms of paragraph (b) of the prayer to the plaint.

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

The plaintiff-petitioner (plaintiff) was a customer of the Matara-Uyanwatte Branch of the 1st defendant-respondent bank (1st defendant). Admittedly, the plaintiff made several applications for banking facilities to the 1st defendant. The 1st defendant granted the banking facilities sought by the plaintiff and as security for the said facilities he executed four mortgage bonds, 3024 dated 22.08.1996, 2668 dated 27.11.1998, 490 dated 08.07.1999 and 4270 dated 27.11.1998 respectively. It is not in dispute that upon the execution of the aforesaid mortgage bonds the 1st defendant released the banking facilities sought by the plaintiff and the plaintiff issued the receipts marked "X9", "X10" and "X11" annexed to the objections filed by the 1st defendant acknowledging receipt of the same. The plaintiff failed to repay the loan installments to the 1st defendant as agreed upon notwithstanding the reminders sent by the 1st defendant bank. Thereafter the 1st defendant adopted a resolution under Section 29B of the People's Bank Act, No. 29 of 1961 as amended by Act, No. 32 of 1986 to sell the properties mortgaged to the 1st

defendant to recover the monies due to the 1st defendant bank. The 1st defendant published the aforesaid resolution in the newspapers and in the Government Gazette in terms of provision 29 of the aforesaid People's Bank Act. The 1st defendant thereafter instituted an action in the District Court of Colombo seeking *inter alia* an enjoining order and an interim injunction against the 1st defendant from selling or alienating the said properties mortgaged to the 1st defendant bank by public auction until the final determination of the District Court action. The application for an enjoining order and an interim injunction was taken up for inquiry and after considering the pleadings, documents and submissions of counsel, the learned District Judge refused to grant an enjoining order to stay the auction sale by his order dated 18.12.2003. It is against this order the petitioner has filed this application in revision.

It is settled law that in deciding whether to grant an enjoining order or an injunction the plaintiff must first establish a strong *prima facie case in his favour.* In the case of *Felix Dias Bandaranaike* Vs. *The State Film Corporation* and Another [1]. 308 Soza, J said ;

> **" In Sri Lanka we start off with a *prima facie* case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning."**

If a *prima facie* case has been made out, the Court would then consider the balance of convenience.

The learned Counsel for the petitioner submitted that in view of section 16 of the Stamp Duty Act, No. 43 of 1982, the 1st defendant cannot claim the amount in the Board Resolution. The learned Counsel further submitted that according to the amount of stamp duty paid on the aforesaid mortgage bonds the 1st defendant could not recover more than Rs. 1,419,770/= and any attempt to recover over and above the said amount is illegal.

The petitioner cannot take any advantage by challenging the mortgage bonds stating that they are not properly stamped, to restrain by an interim injunction a sale by public auction upon a resolution adopted by the bank in terms of the provisions of the People's Bank (Amendment) Act, No. 32

of 1986 to sell by public auction any immovable or movable property mortgaged to the bank as security for any loan in respect of which default has been made, in order to recover the whole or unpaid portion of such loan.

However, it is to be noted that mortgage bond No. 3024 bears the value of Rs. 5000/=. The total amount secured is Rs. 500,000/= and interest thereon. The mortgage bond No. 2668 bears stamps to the value of Rs. 5000/=. Similarly, each bond No. 490 and No. 4270 bear stamps to the value of Rs. 8,200/= and the amount secured by each bond is Rs. 500,000/= and interest thereon respectively.

According to Section 29 D of the People's Bank Act, N o. 29 of 1961 as amended by Act, No. 32 of 1986, a borrower is not competent to make an application to Court to move to invalidate a resolution to sell by public auction any immovable property mortgaged to the Bank.

Section 29 D states as follows :

"The Board may by a resolution.....authorise any person to sell by public auction any immovable property mortgaged to the Bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, and the interest due thereon.....and thereafter it shall not be competent for the borrower in any Court to move to invalidate the said resolution for any cause whatsoever and no Court shall entertain any such application."

In the case of *People's Bank* Vs. *Hewawasam*[2] Jayawickrema, J. held that :

"The above expression in Section 29(D) is of similar import as "*shall not be called in question in any Court*", contained in Section 22 of the Interpretation Ordinance. Hence, we agree with the submissions made by the learned President's Counsel on behalf of the Defendant Petitioner that the said resolution (marked E) passed by the Board of Directors of the People's Bank, cannot be invalidated or challenged in an action in the District Court.

Therefore, in these circumstances, the sale of the mortgaged property by public auction upon the said resolution marked "E" cannot be restrained by an interim injunction. The plaintiff-respondent has failed to establish a *prima facie* case. The plaintiff respondent has taken advantage of a mere mistake of the date of the execution set out in the original bond to fabricate a case to the extent of even challenging the mortgage bond itself."

Jayawickrema, J. in the course of his judgement cited with approval the following passage from the judgment of the Court of Appeal case C. A. L. A. No. 74/97 with CA Application (revision) No. 433/97[3] wherein Edussuriya, J. held that:

"Section 29(D) sets out that it shall not be competent for the borrower to move any Court to invalidate such a resolution for any cause whatsoever, and no Court shall entertain such an application .....

If this Court were to fall into the error of drawing a distinction between the words invalidate and null and void in the construction of Section 29(D), this Court would be in my view seeking to act in contravention of the intention of the legislature and bring to naught the intention of the legislature in granting parate execution rights to the Bank....."

It seems to me that the petitioner is trying to do indirectly what he cannot do directly. As Edussuriya, J. pointed out in the aforesaid judgment, in terms of Section 29(D) it shall not be competent for the borrower to move any Court to invalidate such a resolution for any cause whatsoever and the Court cannot entertain such an application.

Accordingly, the petitioner cannot challenge the resolution even indirectly by challenging the mortgage bonds on the basis that they are not properly stamped in terms of the Stamps Ordinance.

Another submission of the learned counsel for the plaintiff is that no consideration had passed at the time of the execution of the mortgage bonds and hence the bonds are of no force or avail in law. In my view the plaintiff cannot now complain that no consideration had passed in view of

the acknowledgement made by the plaintiff to the receipt of said banking facilities as per the receipts issued by the plaintiff marked "X9", "X10", and "X11" (annexed to the statement of objections produced by the plaintiff).

In the circumstances, I am of the view that the plaintiff has failed to establish a *prima-facie* case in his favour. It is only if the plaintiff has made out a *prima facie* case the Court must consider where the balance of convenience lies.

In my view there is no substantial error of law or fact in the order made by the learned Judge that could be considered as an exceptional circumstance to grant relief in this application in revision.

For these reasons I refuse the plaintiff's application in revision with costs fixed at Rs. 2,500/=

Application dismissed.

MOOSAJEES LIMITED
VS
ARTHUR AND OTHERS

SUPREME COURT
FERNANDO, J.
WIGNESWARAN, J. AND
WEERASOORIYA, J.
SC APPEAL NO. 58/2001
CA APPLICATION NO. 1354/98
SEPTEMBER 16, 2002

Writ of Certiorari - Ceiling on Housing Property Law, No. 1 of 1973-Application under section 13 - Decision of Commissioner - Appeal under section 39(1) - Board of Review - Finality clause, section 39(3) - Application of section 22 of Interpretation Ordinance - Whether Court of Appeal varied a decision which was ex facie not within the power of the Board of Review - Wrong application of section 47 of the Law - Definition of house - Burden of proof - Evidence Ordinance, sections 101 and 102 - Effect of Article 140 of Constitution on section 22 of Interpretation Ordinance.

The 1st respondent tenant applied to the 2nd respondent (Commissioner for National Housing) under section 13 of the Ceiling on Housing Property Law, No. 1 of 1973 ("CHP Law") to purchase the house in dispute owned by the appellant. On 25.01.1984 the Commissioner refused the application holding the premises were business premises under section 47 of the CHP Law. On appeal to the Board of Review under section 39(1) of the Law, the Board held that it was a house as it had been used for residence from 1943. The Court of Appeal refused an application by the appellant to quash the decision of the Board by certiorari. The Court held that in view of section 22 of the Interpretation Ordinance, read with section 39(3) of the CHP Law, the court's jurisdiction was ousted as the decision of the Board using the test of user was not *ex facie* outside the Board's jurisdiction and by its order dated 09.02.2001, refused the application for a writ.

Held;

1. In terms of section 47 (definition of 'house') the premises had been originally constructed as an eating house and assessed as such, but not originally constructed for residential purpose, although since 1943, it had been used for residence and assessed as such in 1980.

2. The Court of Appeal wrongly placed the burden of proof on the appellant to prove that the building was originally constructed for residential purposes when in terms of sections 101 and 102 of the Evidence Ordinance, the burden of proving the original purpose of the building was on the 1st respondent.

3. In the above circumstances, the decision of the Board of Review was *ultra vires* and a nullity-outside its jurisdiction and the appellant was entitled to a writ of certiorari notwithstanding section 39(3) of the CHP Law. Further, Article 140 of the Constitution prevailed over section 22 of the Interpretation Ordinance. For that reason also, section 39(3) of the CHP Law had no application.

Cases referred to :

1. *Abeysekera* v *Wijetunga* (1982) 2 SLR 737 at p. 739
2. *Mohammed Ismail* v *Hussain* (1993) 2 SLR 380
3. *Anderson* v *Ahamed Husny Appellate Law Recorder* Vol 2 March 2001 p. 13
4. *Withanarachi* v *Gunawardena* (1996) (1) SLR 253 at p. 257

5. *Sitamparanathan* v *Premaratne* (1996) 2 SLR 202
6. *Rex* v *Northumberland Compensation Appeal Tribunal* (1952) 1 All ER 122
7. *Anisminic Ltd* v Foreisn Compensation Commission (1969) 2 AC-147
8. *O' Reilly* v *Mackman* (1983) 2 AC 237 at p. 278
9. *R* v *Hult University Visitor* (1993 A.C.) 682 at p 701
10. *Maradane Masque Trustes* v *Mahamud* (1967) 1 AC 13
11. *Atapattu* v *People's Bank* (1907) 1 SLR 208 at p 221
12. *Sirisena Cooray* v *Tissa Bandaranayake* (1999) 1 SLR 1 at p.14
13. *Wljepala Mendis v PRP Perera* (1999) 2 SLR 110 at p 119

APPEAL against the judgment of the Court of Appeal reported in (2001) 2 SLR 101 (Overruled)

Dr. J. de Almeida Gunaratne with *Parakrama Agalawatta* and *Kishali Pinto Jayawardena* for appellant.

Rohana Jayawardena for 1st respondent.

Uditha Egalahewa, State Counsel for 2nd respondent.

Cur.adv.vult

December, 5, 2002

WEERASOORIYA, J.

The 1st respondent-respondent ("the 1st respondent") made an application under Section 13 of the Ceiling on Housing Property Law, No. 1 of 1973 "(the C. H. P. Law") to the Commissioner of National Housing ("the Commissioner") to purchase the premises bearing No. 17, Hunupitiya Road, Colombo 2, and the Commissioner by his order dated 25.01.1984, dismissed the application holding that the premises were business premises. The 1st respondent appealed against that order to the Ceiling on Housing Property Board of Review ("the Board")under Section 39(1) of the C. H. P. Law, and the Board reversed the Commissioner's finding and allowed the appeal on the basis that the premises in question were residential and therefore a house. The petitioner-appellant ("the petitioner") thereafter invoked the jurisdiction of the Court of Appeal seeking to quash

the said order of the Board by way of a writ of certiorari. The Court of Appeal by its judgment dated 09.02.2001, dismissed the petitioner's application. Thereafter the petitioner obtained special leave to appeal from this Court upon the following questions.

(1) Whether the Board of Review and the Court of Appeal erred in law in applying the test of user of premises instead of considering the purpose of construction in determining whether the premises constituted a 'house' as defined under Section 47 of the C. H. P. Law ?

(2) Whether the Board of Review and the Court of Appeal erred in law in placing the burden of proof on the petitioner to establish that the premises is not a house as so defined ?

(3) Whether the Court of Appeal lacked jurisdiction to review the order of the Board of Review in view of the clause contained in Section 39 (3) ?

(1) Test of User

It is not in dispute that the 1st respondent as tenant of the petitioner made an application in terms of Section 13 of the C. H. P. Law to purchase the premises. Upon such application being made, the Law requires the Commissioner to hold an inquiry into such application and upon being satisfied on the requirements laid down in Section 17 (1) (a), (b), and (c) to make a recommendation to the Minister whether such premises should be vested. The issue whether a tenant could maintain such an application depends on whether the premises fall within the meaning of a 'house' as defined in Section 47 of the C. H. P. Law :

"House" means an independent living unit, whether assessed or not for the purpose of levying rates, constructed mainly or solely for residential purposes and having a separate access, and through which unit access cannot be had to any living accommodation, and includes a flat or tenement, but shall not include-

(1) sub divisions of, or extensions to a house which was first occupied as a single unit of residence ; and

(2) a house used mainly or solely for a purpose other than a residential purpose for an uninterrupted period of ten years prior to March, 1st, 1972 ;"

This definition postulates the following criteria to be satisfied by the applicant.

(a) It must be an independent living unit whether assessed or not for the purpose of levying rates.

(b) It must have been constructed mainly or solely for residential purposes ; and

(c) It must have a separate access and through which unit access can not be had to any other living accommodation.

The Commissioner by his order dated 25.01.1984 (P1a) held that the premises were business premises. However, on appeal, the Board reversed the finding of the Commissioner and held that the said premises had been used mainly or solely for residential purposes.

Learned Counsel for the petitioner contended that the Board applied the wrong test by misconstruing Section 47 of the C. P. H. Law.

It is to be observed that the Board without asking itself the question as to whether the premises had been constructed mainly or solely for residential purposes as laid down in the definition of a house in Section 47 asked the question ".....whether the said premises is a business premises or not" and thereafter applied exception (2) to the definition of a house contained in the section. In fact, the said exception is meant to take even a building which was constructed mainly or solely for residential purposes, outside the definition of a 'house' if such building was used mainly or solely for a purpose other than a residential purpose for an uninterrupted period of 10 years prior to March 1st, 1972.

The Court of Appeal disagreed with the contention of learned Counsel for the petitioner that the Board formulated the wrong question and held that implicit in this question was the proposition whether the premises in question were residential or business.

The petitioner had presented his case on the basis that the premises at the inception had been assessed for the purpose of levying rates as an "eating house" indicating that the original purpose of construction was for

business. Therefore, the petitioner's case was that though used by the 1st respondent as residential premises, the premises had been originally constructed for business purposes.

It would be manifest that there was no dispute that from 1943, since the 1st respondent came into occupation of the premises, that the premises were used for residential purposes. But to enable the 1st respondent to purchase it, it must be shown that the premises were constructed mainly or solely for residential purposes. It was open to the 1st respondent to state that premises had been continuously used as a residence thereby entitling him to the protection of the Rent Act. However, it would be a different situation when the (1st respondent) tenant makes an application under Section 13 of the C. H. P. law to purchase it, where different criteria are spelt out under Section 47 of the C. H. P. Law.

In the circumstances, the Board misdirected itself in addressing the question whether the said premises were business premises or not. This misdirection was the outcome of failing to appreciate the provisions of Section 47 of the C. H. P. Law. The Court of Appeal has taken the mistaken view that implicit in the question was whether the premises in question were residential or business.

The misconstruction of Section 47 of C. H. P. Law was reflected in the application of the test of user of premises to determine the question whether the premises was a house. The primary test postulated by that section is the test as to whether the premises were constructed for residential purposes. It is to be noted that this section does not permit a choice between two primary tests. The effect of the reasoning of the Board and the Court of Appeal was to impose a burden on the owner to prove that it was constructed for business purposes which is contrary to what is envisaged in Section 47.

It is necessary to consider the decisions of this Court, on the definition of a house as given in Section 47 of C. H. P. Law.

The case of *Abeysekera* vs. *'Wijetunga*[1] laid down the rule that the test to be applied to determine what a house is, for the purposes of C. H. P. Law, must be an objective test and not a subjective one and that its initial construction and the purpose of construction is what matters.

"In *Mohamed Ismail* vs. *Hussain*[2] Court applied the criterion of user mainly because of the lack of direct evidence relating to the initial purpose of construction. However, it was disclosed that the premises had been originally assessed as a house. Therefore, it would be clear that, there was no occasion to consider the original purpose of construction of the premises and the question of devolution of the burden of proof in the context of Section 47 of the C. H. P. Law did not arise for consideration.

On the foregoing material, I hold that the Board and the Court of Appeal erred in applying the test of user of premises instead of considering the purpose of construction in determining whether the premises constituted a house within the meaning of Section 47 of C. H. P. Law.

(2) Burden of Proof

Section 101 of the Evidence Ordinance provides :

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist. When a person is bound to prove the existence of any fact, it is said that burden of proof lies on that person".

This section is concerned with the duty to prove one's case as a whole and is distinguishable from Section 103 which explains the burden of proof as to a particular fact. This section reads as follows

"The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

The difference in scope could be seen from illustration (A) to Section 101 which states as follows.

"A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime."

But however, where B concedes that he committed the act alleged but pleads that it does not entail criminal liability since the general exception relating to exercise of the right to private defence or any special exception

contained in the Penal Code is applicable, B is bound to establish facts to bring him within that exception. (*Vide* Section 105).

Section 102 provides for the devolution of the burden of proof in the following terms.

> *"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".*

The question as to which party should begin to lead evidence before the Labour Tribunal came up for consideration before the Supreme Court in the case of *David J. Anderson* vs. *Ahamad Husny*.[3] The Court held that although the Labour Tribunal is not bound by the Evidence Ordinance, the principle enshrined in Section 102, that the person on whom the burden of proof lies would fail if no evidence at all were given on either side, is a common sense principle, departure from which would not be justified if the circumstances do not warrant such a departure.

In the present case, the primary test postulated by Section 47 of C. H. P. Law is whether the premises were constructed for residential purposes. If no evidence is given by either side, it is the 1st respondent who would fail before the Commissioner. The 1st respondent had failed to lead any evidence to establish that the premises were constructed for residential purposes. The petitioner had produced assessment extracts (P43-P53) which showed the premises were originally assessed as an eating house though used as a residential house. There was no reason to deviate from the rule set out in Section 102 of the Evidence Ordinance at the inquiry before the Board of Review.

Accordingly, I hold that the burden of proof that the premises were constructed for residential purposes lay with the 1st respondent, and has not been discharged.

(3) Ouster Clause

Learned Counsel for the 1st respondent contended that the order of the Board is final and conclusive and cannot be impeached on the material submitted by the petitioner. This contention is based on Section 39(3) of the C. H. P. Law read with Section 22 of the Interpretation Ordinance as amended by Act, No. 18 of 1972.

Section 39(3) of the C. H. P. Law provides :

"The determination of the Board on any appeal made under sub section (I) shall be final and shall not be called in question in any Court".

The material parts of Section 22 of the Interpretation Ordinance (as amended) read as follows.

"Where there appears in any enactment.....the expression "shall not be called in question in any Court".....in relation to any order, decision,.....which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision.....made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal.

Provided however, that the preceding provisions of this Section shall not apply to the Supreme Court or the Court of Appeal as the case may be.....in respect of the following matters only, that is to say-

(a) Where such order, decision.....is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision....; and

(b) .....".

Learned Counsel for the petitioner contended that the Board had the power *ex facie* to make the order it did, namely to hold whether the premises in question were either residential or business premises. He contended that nevertheless that power of the Board did not confer jurisdiction to the Board :

(a) to formulate the wrong question.

(b) to misconstrue the provisions of Section 47 of the C. H. P. Law and apply the wrong test ; and

(c) to take into account irrelevant considerations.

The ouster clause in Section 39(3) of the C. H. P. Law read with Section 22 of Interpretation Ordinance came up for consideration in *Withanaratchi vs. Gunawardena*[4] where the Court held that on a consideration of the entirety of the facts and circumstances it could not conclude that the decision of the Board was unreasonable and unsupported by the evidence on record. The Court observed that at most the alleged error lay in the evaluation and the assessment of the oral and documentary evidence and therefore the error if at all was one made within the area of jurisdiction of the Board of Review.

Thus, the two grounds enumerated namely ; (a) where a decision is unreasonable or (b) where it is unsupported by evidence are obviously grounds that would affect the jurisdiction of the Board.

The decision in the case of *Sitamparanathan vs. Premaratna* [5] is significant in that it held that Section 39(3) of the C. H. P. law did not protect a decision which patently lacked jurisdiction to decide.

At this point it is useful to examine this question in the light of the English precedents.

In *R. vs. Northumberland Compensation Appeal Tribunal*[6] the Court of Appeal held that certiorari to quash the decision of a Statutory Tribunal lay, not only where the tribunal had exceeded its jurisdiction but also where an error of law appeared on the face of the record. This case turned upon the amount of compensation payable to the clerk to a hospital board in Northumberland who has lost his employment consequent upon the introduction of the National Health Service. Upon a misconstruction of the regulations, the Compensation Appeal Tribunal refused to allow him his full period of service on the basis that there were two periods of service and that only the second period of service should be counted which appeared to be a manifest error of law.

This case is significant in that it revived the power of review for mere error of law on the face of the record and marked the beginning of the process towards bringing all decisions on questions of law within judicial review.

The application of the doctrine of ultra vires was made wider for the purpose of minimising the effect of ouster clauses by the House of Lords

in the celebrated case of *Anisminic Ltd. vs. Foreign Compensation Commission.*[7]

In this case, the Foreign Compensation Commission rejected a claim for compensation for a property already sold to a foreign buyer on the erroneous ground that the Statutory Order in Council required that the successor in title should have been of British Nationality at a certain date. Upon Anisminic challenging the Commission's decision on the ground that the Commission had misconstrued the relevant 1962 order from which the Commission derived jurisdiction, in that the 1962 order did not require both the applicant and his successor in title to be British to qualify for compensation, the House of Lords held that :

(a) the ouster clause did not protect a determination which was outside jurisdiction ; and

(b) (by a majority) the misconstruction of the Order in Council which the Commission had to apply involved an excess of jurisdiction since they based their decision on a ground which they had no right to take into account and sought to impose another condition not warranted by the order.

The principle deducible from the Anisminic case is that every error of law by a tribunal must necessarily be jurisdictional. This case became the leading example of jurisdictional error by a tribunal in the course of its proceedings.

The majority view of the House of Lords was that the error destroyed the Commission's jurisdiction and rendered the decision a nullity, since on a true view of the law, the Commission had no jurisdiction to take the nationality of the successor in title into account. Therefore, by asking the wrong question and by imposing a requirement which the Commission had no authority to impose, it had overstepped its power. (*Vide Administrative Law* - Wade and Forsyth 8th Edition - page 270)

Thus, a tribunal has in effect no power to decide any question of law incorrectly ; any error of law would render its decision liable to be quashed as ultra vires.

This categorical pronouncement of the law was upheld and confirmed in two subsequent cases namely *O'Reilly vs. Mackman* [8] and *R.* vs. *Hull University Visitor* [9]

In *Reilly* vs. *Mackman* (supra) Lord Diplock stated that :

"The breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination" not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity".

In *R.* vs. *Hull University Visitor* (supra ;) Lord Browne Wilkinson stated that :

".....the decision in Anisminic Ltd. vs. Foreign Compensation Commission (1969 2 AC 147) rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision making power on the basis that it was to be exercised on the correct legal basis ; a misdirection in law in making the decision therefore rendered the decision ultra vires".

Lack of jurisdiction may arise in many ways as enumerated below which would cause a tribunal to step outside its jurisdiction.

(a) the absence of formalities or conditions precedent to the tribunal to clothe itself with jurisdiction to embark on a inquiry ;

(b) where at the end of an inquiry tribunal makes an order that it has no jurisdiction to make ;

(c) where in the course of proceedings tribunal departs from rules of natural justice, and asks itself the wrong question or takes into account matters which it was not directed to take into account. (*Vide Anisminic Ltd.* vs. *Foreign Compensation Commission* at page 195).

In *Maradana Mosque Trustees vs. Mahamud* [10] an appeal from the judgment of the Supreme Court, the Privy Council held that where statutory authority was given to a Minister to act if he was satisfied that a school is being administered in a certain way, he was not given authority to act, because he was satisfied that the school had been administered in that way. It was held that the Minister had asked himself the wrong question and never brought himself within the area of his jurisdiction and therefore, acted without or in excess of jurisdiction.

In the light of the above decisions, the question that arises for consideration in the present case is whether the Board went outside its designated area and outstepped the confines of the territory of its inquiry.

Undoubtedly, the Board asked itself the wrong question to wit; whether the premises were business premises or not. It would be obvious that the proper question to have asked was whether the premises was a 'house' within the meaning of Section 47 of the C. H. P. Law. In failing to ask the proper question the Board went out of bounds and wandered outside its designated area. Further, the Board erroneously laid the burden of proof on the petitioner to prove that the premises were business premises. This initial misdirection caused the Board to apply the wrong test of user.

It is also evident that the misconstruction of the provisions of Section 47 of the C. H. P. Law, led the Board to rely on irrelevant considerations namely ;

(a) that the tenant had continued to be in uninterrupted occupation for a long period ; and

(b) that the premises had been assessed as a house in 1980.

On a careful examination of the above material, it is manifest that the Board had digressed away from its allotted task and outstepped the confines of the territory of its inquiry and thereby exceeded its jurisdiction.

Learned Counsel for the petitioner contended that in any event ouster clause in Section 39(3) of the C. H. P. Law read with Section 22 of the Interpretation Ordinance (as amended) is inoperative in view of the constitutional implications flowing from Article 140 of the Constitution.

Article 140 of the Constitution provides :

"Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the Judge of any Court of First Instance or tribunal or other institution or any other person :

....."

Article 168(1) of the Constitution permits the continued operation of legislation in force immediately before the commencement of the Constitution :

"Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution shall mutatis mutandis, and except as otherwise expressly provided in the Constitution, continue in force".

The Supreme Court in *Atapattu vs. People's Bank* [11] in interpreting Article 168(1) expressed the view that ouster clause would be operative only "except as otherwise expressly provided" in Article 140 and held that language used in Article 140 is broad enough to give the Court of Appeal authority to review even on grounds excluded by ouster clause. This case held further that constitutional provisions being the higher norm will prevail over the ordinary statutory provisions.

In *Sirisena Cooray vs. Tissa Bandaranayake* [12] the Supreme Court upheld and confirmed the view expressed in *Atapattu vs. People's Bank.* This view was reiterated in *Wijepala Mendis vs. P. R. P. Perera.* [13]Thus, the aforesaid decisions firmly establish the view that the ouster clause does not operate to exclude the jurisdiction conferred on the Court of Appeal by Article 140 of the Constitution.

In the circumstances, the impress of finality set out in Section 39(3) of the C. H. P. Law read with Section 22 of the Interpretation Ordinance has no application to the impugned decision of the Board. Accordingly, I hold that the Court of Appeal had jurisdiction to review the decision of the Board and a writ of certiorari would lie to quash it.

For the above reasons, I set aside the decision of the Board dated 23.10.1998 and the Order of the Court of Appeal dated 09.02.2001 and allow this appeal with costs fixed at Rs. 5,000/= payable by the 1st respondent to the petitioner.

FERNANDO J.—I agree.

WIGNESWARAN J.—I agree.

Appeal allowed.

SOBHANI
VS
CHAIRMAN, URBAN COUNCIL, CHILAW AND OTHERS

COURT OF APPEAL
IMAM, J. AND
SRISKANDARAJAH, J
CA 1825/2003 (WRIT)
4TH JULY, 2005

Writ of certiorari - Urban Development Authority Act, sections 3, 28A and 3(A) - Amended by Act, No. 4 of 1982, section 8(J) - Building plan tendered for approval - Should he be the owner or should he have got permission from the owner to build ? - Is there a duty to consider title ?

The respondent refused to consider the application of the petitioner for a building permit as the petitioner is not the owner of the land nor has he got permission from the owner.

The petitioner contends that there is no duty cast on the respondent to look into the title and the refusal has no legal or valid basis.

Held:

(i) The Urban Development Authority (UDA) has considered it necessary to have a *prima facie* documentation to prove the ownership of the land or the consent of the owner of the land to grant building permits to develop a particular land. This requirement is embodied in the building permit application form.

(ii) It is not an irrelevant or unreasonable requirement in considering development activities in a land. Act, No. 4 of 1982 empowers the UDA to grant a building permit subject to such terms and conditions the Authority may consider necessary.

APPLICATION for a writ of certiorari.

Sunil Cooray with *C. Wijesuriya* for petitioner.

Lakshman Perera for 1st and 2nd respondents.

Yuresha de Silva, State Course for 3rd respondent.

04th August, 2005,
SRISKANDARAJAH. J

The Petitioner in this application has sought an order in the nature of writ of certiorari to quash the decision made by the 1st Respondent refusing to consider the building application of the Petitioner and a mandamus to command the 1st Respondent to entertain the application of the Petitioner and proceed according to law.

The Petitioner submitted that she came into occupation of the premises bearing asessment No. 94, Bridge Street, Chilaw in 1990 and carried on her business initially as a "Cool Spot" and later a textile shop after putting up a temporary structure in the said premises. The Petitioner subsequently developed the said premises and constructed the building in the said premises up to the condition, as it stands today. From the year 1999 she said that she had been paying rates to the Urban Council to date and also paying revenue license tax for carrying on a trade at the said premises. The Petitioner further submitted that she received summons on 07.12.2001 for an action filed in terms of section 28A 3(a) of the Urban Development Authority Act as amended. This action was filed by the 1st Respondent on the basis that the building standing on the said premises is an unauthorized building. The Petitioner submitted that pending the afore said action Petitioner has tendered a building plan for approval to the 1st Respondent in respect to the same premises complying with all the requirements. Thereafter the 1st Respondent by his letter dated 29.07.2002 P5 requested the Petitioner to establish title to the said premises and

stated that until she does so, her application for building permit could not be considered. The Petitioner once again on 08.09.2003 submitted an application for a building permit to the same premises to the 1st Respondent through his attorney at law. This application too had been rejected since the title to the said premises had not been confirmed by the Petitioner. The Petitioner submitted that the 1st Respondent the chairman of the 2nd Respondent has a public statutory duty in terms of Housing and Town Improvement Ordinance as amended or Urban Development Authority Law as amended to entertain every application for building permit and further submits that in this application the 1st Respondent has refused to entertain the application of the Petitioner without any legal or valid basis. The Petitioner also submitted that there is no duty whatsoever cast on the 1st Respondent to look into the title of the applicant to the property on which the proposed building construction is to take place for the purpose of entertaining applications for building permit.

The Respondents submitted that in terms of Gazette No. 100/4 of August, 1980 the Minister of Local Government, Housing and Construction has gazetted the Chilaw Urban Council as a Development Area under Section 3 of the Urban Development Authority Act.

The Respondent admitted that the Petitioner has made two building plan approval applications in the prescribed forms one in 2002 and the other in September, 2003. But both these applications are incomplete as the Petitioner has neither declared himself as the owner of the land on which he is seeking to build nor he has not annexed any document to show that he got permission from the owner of the land to construct a building. Respondents submitted that from their records the land in which the Petitioner is seeking permission to construct a building is a state land owned by the Ceylon Government Railway Department.

The Urban Development Authority (Amendment) Act, No. 4 of 1982 in Section 8J provides as follows :

> 8J. (1) Notwithstanding the provisions of any other law, no government agency or any other person shall carry out or engage in any development activity in any development area or part thereof, except under the authority and in accordance with the terms and conditions of a permit issued in that behalf by the Authority.

(2) An application for a permit to carry out or engage in any development activity within a development area or part thereof shall be made to the Authority in such form, shall contain such particulars and be accompanied by such fees as may be prescribed by regulations made under this law.

(3) A permit under subsection (1) shall be granted by the Authority under that sub-section subject to such terms and conditions as the Authority may consider necessary if the Authority is satisfied that –

(a) ....

(b) ...

(4) ...

(5) ...

(6) ...

Under Section 8J(2), an application for a permit to carry out or engage in any development activity within a development area shall be made to the Urban Development Authority (UDA) in such form and shall contain such particulars. One of the particulars that is required by the UDA in the application is to declare the status of the applicant in relation to the land in which he is seeking to develop. If he is the owner he has to support the same with documentation and if he is not the owner then he has to annex a consent letter from the owner. According to the Respondent these requirements are not fullfilled by the Petitioner; therefore the application of the Petitioner was not entertained. The Petitioner has failed to annex a copy of the completed application which was submitted to the UDA by him to show that he has given all the relevant particulars that were required to be given in the said application. On the other hand the Petitioner's submission that the ownership of a land is an irrelevant consideration when a building permit is sought to build a building in that land cannot be accepted. As the above sections empower the UDA to grant a building permit subject to such terms and conditions the Authority may consider necessary. The UDA has considered it necessary to have a prima-facie documentation to prove the ownership of the land or the consent of the owner of the land to grant building permits to develop a particular land. This requirement is embodied in the Building Permit Application Form

which was submitted to this court by the Respondent on the request of this court. The Court does not think that it is an irrelevant or unreasonable requirement in considering development activities in a land. Therefore the Court rejects the appilcation of the Petitioner to issue a writ of certiorari to quash the decision made by the 01st Respondent refusing to consider the building plan of the Petitioner. For these reasons the application of the Petitioner is dismissed without costs.

IMAM - I agree.
Application dismissed.

A. R. PERERA AND OTHERS
vs
CENTRAL FREIGHT BUREAU OF SRI LANKA AND ANOTHER

COURT OF APPEAL
MARSOOF J. (P/CA) AND
SRI SKANDARAJAH, J.
CA 999/2003
JULY 13
AUGUST 23 AND SEPTEMBER 17, 2004

Writ of certiorari - Locus standi - Traditional view, conservative view and liberal view - Companies Act, No. 17 of 1982 - Who are busy bodies ?- Constitution Articles 12, 141, 17, 126, and 140 - Rationale for expanding canvas of locus standi.

The 1st and 2nd petitioners - the Chairman and Secretary General of the Ceylon Association of Ships Agents (CASA) consisting of 113 members who are shipping agents and the 3rd petitioner who is a member of the Executive Committee of CASA and a director/shareholder of Malship Ltd., which company is engaged in the business of a shipping agent, challenged the order made by the 1st respondent imposing certain levies and service charges.

The Executive Committee of the CASA had determined and resolved that it is imperative that CASA, through the petitioners file an application on behalf of its membership with a view to obtaining relief and redress. The petitioners also claimed that the resolution/determination of the CASA was ratified at an extraordinary general meeting of CASA. When the matter was taken up for argument the respondent took up a preliminary objection that the petitioners

lack *locus standi*, as CASA is a company limited by guarantee incorporated under the Companies Act with the power to sue and be sued in its corporate name.

Held :

(i) The petitioners are all persons whose interests are affected by what is alleged to have been done by the respondents. The 1st and 2nd respondents have sufficient interest in the matter as office bearers of CASA, the 3rd respondent as a member of the Executive Committee and an authorized representative of Malship, a corporate shipping agent, have sufficient interest in the matter in question. Even if the petitioners are to be treated as mere members of the public, they have sufficient interest in the matter to distinguish them from the esteemed category of "busy bodies".

***Per* Marsoof, J. P/CA,**

> "Time and again our courts have repeated that the fact that the irregularity or the grievance for which redress is sought is shared by a large number of people or society as a whole would not prevent one of many affected persons from seeking relief from courts.
>
> There can be no doubt that the petitioners are all persons whose interests are affected by what is alleged to have been done by the respondents. Sri Lankan courts have been quick to recognize standing of any citizen to seek relief against public authorities that stray outside their legitimate bounds."

APPLICATION for a writ of certiorari.

Cases referred to :

1. *Durayappa* vs *Fernando* 69 NLR 265
2. *R* vs *Paddington Valuation Office* (1996) 1 QB 380 at 401
3. *Premadasa* vs *Wijewardena & Others* (1991) 1 Sri LR 333 at 343.
4. *R* vs *Greater London Council exparte Blackbum* (1968) 2 QB 118
5. *Mc Whirter* vs *Independent Broadcasting Authority* (1973) QB 629
6. *R* vs *Inland Revenue Commissioners ex p. National Federation of Self Employed and Small Industries* (1982) AC 617.
7. *Bandaranayake* vs *De Alwis & Others* (1982) 2 Sri - LR 664 at 682

8. *Meril* vs *Dayananda de Silva* (2001) 2 Sri LR at 41-42
9. *Forbes & Walier Tea Brokers* vs *Maligaspe and others* (1998) 2 Sri LR 378.
10. *Mediwake and others* vs *Dayananda Dissanayake, Commissioner of Elections and others* (2000) 1 Sri LR 177
11. *Sunila abeysekera* vs *Ariya Ruabasinghe* (2001) 1 Sri LR 315
12. *Leader Publications* vs *Ariya Rubasinghe* (2001) Sri LR
13. *Lilanthi de Silva* vs *Attorney General* (2003) Sri LR 155
14. *Bulankulame and others* vs *Secretary, Ministry of Industrial Development and others* (2000) 3 Sri LR 243
15. *D. U. M. Jayatilake and others* vs *Jeevan Kumaranatunga and others* CAM 29.7.2004.
16. *S. P. Gupta* vs. *Union of India* (1982) ARI (SC) 149
17. *Akhila Bharatiya Grahak Panchayat* vs *A. A. S. E. Brand* (1983) AIR (Andre Pradesh) 283
18. P. *Nella Thamby Rosa* Vs. *Union of India* (1984) AIR (SC) 74

Shibly Aziz, P. C. with *P. Gunaratne* and *S. Ahamed* for petitioners.

S. Kanag-Iswaran, P. C. with *Nigel Bartholomeuz* for 1st respondent.

M. R. Ameen, State Counsel for 2nd respondent.

Cur.adv.vult

January 10, 2005

SALEEM MARSOOF, J. P/CA

The 1st and 2nd Petitioners purport to be respectively the Chairman and Secretary-General of the Ceylon Association of Ships' Agents (CASA) consisting of 113 members who are shipping agents, and the 3rd Petitioner purports to be a member of the Executive Committee of CASA and a Director and shareholder of Malship Ceylon Limited, which company is engaged in the business of a shipping agent. The Petitioners state in their petition that the members of CASA have been concerned with, and aggrieved by, the imposition of certain levies and service charges by the 1st Respondent, and as such, the Executive Committee of CASA determined and resolved that it is imperative that CASA through the Petitioners file

this application on behalf of its membership with a view of obtaining relief and redress. The Petitioners claim that the said determination and resolution of the Executive Committee of CASA were ratified by the members of the Ceylon Association of Ships' Agents (CASA) at an Extraordinary General Meeting of CASA held on 29th May 2003.

In paragraph 6 of their petition, the Petitioners expressly state that they are invoking the jurisdiction of this Court in terms of Article 140 of the Constitution in their individual capacities as well as on behalf of the members of the CASA respectively as President, Secretary General and Member of the Executive Committee and as representatives of the CASA. In addition the 3rd Petitioner, as the representative of Malship Ceylon Limited, which is engaged directly in the business of shipping agent, claims that he has become party to this application on behalf of the said company in addition to his capacity as a member of the Executive Committee of CASA.

When this case was taken up for argument learned Counsel for the 1st Respondent took up a preliminary objection based on paragraph 1 of the Statement of Objections filed by the 1st Respondent that the Petitioners cannot have and maintain this application as they do not have any right in themselves or the *locus standi* to institute and maintain this application, in that, the Ceylon Association for Ships' Agents (CASA), is a company limited by Guarantee, incorporated under the Companies Act, No. 17 of 1982 on 18th October 2000 with the power to sue and be sued in its corporate name. After hearing submissions of learned President's Counsel for the Petitioners and the learned President's Counsel for the 1st Respondent on this preliminary objection, Court granted time for learned Counsel to file written submissions. At the instance of State Counsel appearing for the 2nd Respondent, Court also made an order discharging the 2nd Respondent from these proceedings as no relief had been prayed for against the said Respondent in the petition.

Learned President's Counsel for the 1st Respondent submits that this application has to be dismissed *in limine* as the petitioners cannot have and maintain this purported application for the relief prayed for by them, as they do not have any right in themselves or the *locus standi* to institute and maintain this application. He submits that the lack of *locus standi* has been recognised as a fundamental limitation in the granting of prerogative

remedies in terms of Article 140 of the Constitution. He states that the Ceylon Association for Ships' Agents (CASA), is a company limited by guarantee incorporated under Section 21(1) of the Companies Act, No. 17 of 1982 on 18th October 2000, with the power to sue and be sued in its corporate name as evidenced by the Memorandum of Association and Articles of Association marked 'IR' annexed to the Statement of Objections of the 1st Respondent. He submits that CASA is a distinct corporate body consisting of shipping agents having corporate status and is not made up of individuals, and in any event it possesses a legal personality distinct from its members or office bearers. Section 21 (1) of the Companies Act, No. 17 of 1982 provides that-

> "Where it is proved to the satisfaction of the Registrar that an association whether of recent origin or otherwise about to be formed as a limited company is to be formed for promoting commerce, art, science, religion, charity, sport, or any other useful object, and intends to apply its profits, if any, or other income in promoting its objects and to prohibit the payment of any dividends to its members, the Registrar may by license direct that the association may be registered as a company, with limited liability, without the addition of the word "limited" to its name, and the association may be registered accordingly and shall on registration enjoy all the privileges and (subject to the other provisions of this section) be subject to all the obligations of a limited company".

It is submitted theretofore that it was only CASA, as a limited company and a body corporate, that could have instituted this application as it possesses the necessary corporate status to sue and be sued in its name and on behalf of its members who are shipping agents and have been called upon to pay the charges and commissions in terms of the Central Freight Bureau Law. It is further submitted that the 1st and 2nd Petitioners as office bearers of CASA have no right or status in their individual capacities and cannot have and maintain this application. Similarly, it is submitted that the 3rd Petitioner as a member of the Executive Committee of CASA and a Director and shareholder of Malship Ceylon Limited does not have any right or status in his individual capacity and cannot have and maintain this application on behalf of CASA or Malship Ceylon Ltd. It is further submitted that in the circumstances the law would consider them "meddlesome busybodies" for they have no right in their individual capacities distinct and different from that of CASA or Malship.

Although the learned Counsel for the 1st Respondent does not cite any case law in his written submissions in regard to the question of locus standi which he has chosen to argue on first principles, he could easily have relied on the classic decision in *Durayappa V. Fernando*[1] in which the Privy Council held that the Mayor of a Municipal Council cannot seek redress from courts with respect to a legal wrong or injury caused to a Municipal Council. Lord Upjohn expressed the opinion of the Court at page 274 in these words-

> "Their Lordships therefore are clearly of opinion that the Order of the Minister on 29th May 1966 was voidable and not a nullity. Being voidable it was voidable only at the instance of the person against whom the Order was made, that is the Council. But the Council has not complained. The appellant was no doubt Mayor at the time of its dissolution but that does not give him any right to complain independently of the Council."

It is noteworthy that in the case before us, as much as in *Durayappa v. Fernando*, no explanation has been offered by any of the Petitioners as to why CASA and/or Malship have not sought to invoke the jurisdiction of this Court.

Learned President's Counsel for the Petitioner submits that our law relating to locus standi has developed a great deal from the days of *Durayappa v. Fernando, (Supra)* and in view of the liberal attitude towards standing adopted by the Courts, the Petitioners in the present case are in fact entitled to have and maintain this application. He submits that the law has moved forward and become progressive, and relies on the following dictum of Lord Denning, in *Rv Paddington Valuation Office*[2] –

> "The Court would not listen, of course to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done."

Our courts too have applied same test in regard to standing. For instance, in *Premadasa v Wijewardena and others*[3] Tambiah CJ observed that-

> "The law as to *locus standi* to apply for *certiorari* may be stated as follows : The writ can be applied for by an aggrieved party who has a

grievance or by a member of the public. If the applicant is a member of the public, he must have sufficient interest to make the application."

There can be no doubt that the Petitioners are all persons whose interests are affected by what is alleged to have been done by the Respondents. The 1st and 2nd Petitioners have sufficient interest in the matter, as office bearers of CASA, and the 3rd Respondent as a member of the Executive Committee of CASA and authorized representative of Malship, a corporate shipping agent, have sufficient interest in the matter to be regarded as aggrieved parties who have a genuine grievance. Even if the Petitioners are to be treated as mere members of the public, they have sufficient interest in the matter to distinguish them from the esteemed category of 'busybodies'.

In fact, in recent times English Courts have shown great latitude in regard to standing in the context of prerogative remedies such as *certiorari* and *mandamus*. In *R V. Greater London Council ex. parte Blackburn*[4] an applicant was permitted to pursue the prerogative writ of mandamus in proceedings brought against the Police, even though his interest was no greater than the interest of other persons in general. Lord Denning in *Mc. Whirter V. Independent Broadcasting Authority*[5] referring to the Blackburn case (supra) page 649 observed that-

"Mr. Blackburn had a sufficient interest even though it was shared with thousands of others.....We heard Mr. Blackburn in his own name. His intervention was both timely and useful".

As Lord Denning noted in *R v Inland Revenue Commissioners ex p. National Federation of Self Employed and Small Business Ltd.*,[6] English Courts have orchestrated the generous view that "if there is good ground for supposing that a government department or public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the court of law and seek to have the law enforced". In the course of his judgment in the same case, Lord Diplock observed as follows-

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited tax

payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of court to vindicate the rule of law and get the unlawful conduct stopped."

The change in legal policy reflected in the decision of the House of Lords in this case was considered by Lord Diplock to be a major step "towards a comprehensive system of administrative law" which he regarded as the greatest achievement of the English Courts during his life time.

The rationale for the expanding canvas of locus standi in the context of *certiorari* and prohibition was explained by H. W. R. Wade – *Administrative Law* (8th Edition) pages 362 to 363 in the following words-

"The prerogative remedies, being of a 'public' character as emphasized earlier, have always had more liberal rules about standing than the remedies of private law. Prerogative remedies are granted at the suit of the Crown, as the titles of the cases show ; and the Crown always has standing to take action against public authorities, including its own ministers, who act or threaten to act unlawfully. As Devlin J said: Orders of certiorari and prohibition are concerned principally with public order, it being the duty of the High Court to see that inferior courts confine themselves to their own limited sphere". In the same sense Brett J had said in an earlier case that the question in granting prohibition "is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed". Consequently the court is prepared to act at the instance of a mere stranger, though it retains discretion to refuse to do so if it considers that no good would be done to the public."

Wade further goes on to observe at page 683 that-

"....the House of Lords is clearly now determined to prevent technicalities from impeding judicial review so as to protect illegalities and derelictions committed by public authorities".

Sri Lankan Courts too have been quick to recognize standing of any citizen to seek relief against public authorities that stray outside their legitimate bounds. In *Bandaranaike v. de Alwis and Others*[7] at 682 Wimalaratne J. observed that "every citizen has standing to invite the

Court to prevent some abuse of power, and in doing so he may claim to be regarded not as a meddlesome busybody, but as a public benefactor." In *Meril vs. Dayananda de Silva*[8] at 41-42 Gunawardana J observed "I strongly feel that.....denying *locus standi* to an applicant for judicial review for no better reason than that his interest or grievance is shared by many others in common with the applicant is as illogical and irrational as refusing to treat any one member of the public for a disease which has assumed proportions and has affected virtually the entire community". In *Forbes & Walker Tea Brokers v. Maligaspe and Others*[9] Gunawardana J went on to trace the developments in the law in this field and observe at page 406 that-

> "The traditional view is that an applicant for *certiorari* must show some interest before being accorded standing.....The older, rather the conservative, view is that applicant must show that he has legal capacity to challenge the act or decision by means of prerogative writs in that he is an "aggrieved person" in the sense that there is some harm personalized to the applicant. In other words, the applicant is required to establish or prove some individual harm over and above that of the general community or the public at large-although the waning of the rigid reliance on the concept that an applicant must have an interest of his own at stake, seems to be a universal trend. A necessary corollary of the rule that the applicant ought not to be accorded standing because his (applicant's) requirement or grievance is one which is complained of in common with the rest of the public is to deny to the applicant access to court for no other or better reason than that governmental irregularity or illegality does affect a large number of people. This seems irrational for as Craig (tutor in law-Worcester College - Oxford) had said : To deny access in such a case seems indefensible. If the subject matter of the case is otherwise appropriate for judicial resolution.....to erect a barrier of "no standing" would be to render many important areas of governmental activity immune from censure for no better reason than that they do affect a large number of people. One might be forgiven for thinking that the common sense of the reasonable man would indicate the opposite conclusion ; that the wide range of people affected is a positive reason for allowing a challenge by someone".

In Sri Lanka there has been considerable progress in the public interest litigation arena, and the courts have liberalized rules relating to standing

or *locus standi,* and permitted not only persons aggrieved but also others to challenge violations of fundamental rights. Cases such as *Mediwake and Others v Dayananda Dissanayake, Commissioner of Elections and* Others[10] 177, *Sunila Abeysekera V. Ariya Rubasinghe*[11] *leader Publications V Ariya Rubasinghe*[12] *Lilanthi De Silva V. Attorney General*[13] are landmark decisions of our Supreme Court which reflect this liberal approach. As Amerasinghe J observed in *Bulankulama* and Others *V. Secretary, Ministry of Industrial Development and others*[14] (better known as the Eppawala case) at page 258 –

> "The Court is concerned in the instant case with the complaints of individual petitioners. On the question of standing, in my view, the petitioners, as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka - rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners' fundamental right ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lankans, becomes relevant".

Time and time again, our courts have repeated that the fact that the irregularity or the grievance for which redress is sought is shared by a large number of people or society as a whole would not prevent one of the many affected persons from seeking relief from the Courts. In the recent case of *D. U. M. Jayatilleka and others V. Jeevan Kumaratunge and others*[15] it was observed by Sriskandarajah J. that -

> "The standing rules applicable to applications for prerogative writs have to be considered in the light of the developments taking place in this sphere of relevant law."

Similarly, when one looks across the Palk Straits, one cannot help but notice the landmark decision of the Indian Supreme Court in *S. P. Gupta V. Union of India* [16] holding that lawyers have a vital interest in the independence of the judiciary, and therefore have standing to agitate before

courts important issues affecting the judiciary, This decision has since been followed in several other cases involving consumer concerns, such as *Akhila Bharatiya Grahak Punchayat v A. P. S. E. Board*[17] in which a Consumer Council was held to have *locus standi* to challenge the action of an electricity board for increasing the rates of electricity, and *P. Nella Thampy Thera v Union of India*[18] in which the Supreme Court of India entertained a petition at the behest of a railway commuter against the Indian Railways for improving the railway services.

In the present application before this Court, the Petitioners, being office bearers of the Ceylon Association of Ships' Agents as well as some of them being associated with companies upon whom the purported fee was imposed, clearly have a sufficient interest in challenging the imposition of the purported fee, and are not 'mere busybodies' who are trying to fish in troubled waters. It has been specifically pleaded and averred in the petition that the Petitioners have come to Court on behalf of the members of the CASA as well as in their personal capacities.

I do not see any merit in the preliminary objection raised on behalf of the 1st Respondent and have no alternative but to overrule the same.

SRISKANDARAJAH, J. - I agree.

Preliminary objection overruled ; matter set down for argument.

SPORTSMAN TEA (PVT) LTD.,
vs
COMMISSIONER GENERAL OF LABOUR AND OTHERS

COURT OF APPEAL
SRIPAVAN, J. AND
SRI SKANDARAJAH, J.
C. A. 335/2002
SEPTEMBER 19, 2004

Employees Provident Fund Act, sections 31 and 32 - Payment of arrears-Inquiry-Opportunity not given to peruse documents-Breach of natural justice-Reasons for decision-Is it necessary ?

The 3rd respondent former Director of the petitioner company, complained to the 1st respondent that a certain sum being arrears of E. P. F. dues has not been paid to him. An inquiry was held by the Assistant Commissioner of Labour, 2nd respondent and after written submissions were filed, the 2nd respondent (Assistant Commissioner of Labour) sought certain clarifications from the petitioner company. The company informed the 2nd respondent that as the inquiry is concluded, order could be made on the material submitted. The 2nd respondent thereafter requested the company to pay a certain sum as E.P.F. dues and the surcharge.

The petitioner company contended that the 2nd respondent has failed to give the petitioner an opportunity to examine the documents on which the 2nd respondent is said to have made the order, and that he has not given reasons for his order.

Held :

(i) The documents that are relied upon by the Commissioner of Labour and the decision of the Board of Directors, at the meeting held on 28.02.1995 to arrive at this decision are not new documents ; the originals, of these documents are in the possession of the petitioner.

(ii) The powers of the Commissioner of Labour under the EPF Act are not only to determine claims but also to call for documents (Section 31) and to examine any record or documents relating to any provident fund or scheme (section 32). In this instance, the 2nd respondent having the material necessary in his possession had called for the originals which were in the possession of the petitioner, but the petitioner had failed and neglected to produce same.

(iii) The 2nd respondent in his affidavit had stated that he has relied on the marked documents, and the reasons are in the departmental file, which was disclosed to court.

(iv) In the absence of a statutory requirement to give reasons there is no requirement to give reasons.

(v) However, if the Commissioner fails to give his reasons to court exercising judicial review, an inference may well be drawn that the impugned decision is ultra vires and relief granted on this basis.

APPLICATION for a writ of certiorari.

Cases referred to :

1. *Ceylon Printers and another* vs. *Commissioner of Labour and Others* - (1998) 2 Sri LR 29

2. *Kusumawathie & Others* vs. *Aitken Spence Co. Ltd and Another* (1996) 2 Sri LR 19

Percy Wickremasekera for petitioner.

M. Fernando, Senior State Counsel for 1st and 2nd defendants.

Cur.adv.vult.

SRISKANDARAJAH, J.

The petitioner is a limited liability company. In this company the 3rd respondent was functioning as a Director from 1993 to 20th of September 1998. The position of the petitioner is that the 3rd respondent resigned from the company after the chairman had detected some alterations in bills submitted by the 3rd respondent for reimbursement of money. During this period the 3rd respondent was not paid a salary but he was only entitled to a share of profit. 3rd respondent thereafter made a claim through his lawyer a sum of Rs. 5,000,000 or 4.3 million plus a vehicle for him to completely sever his connection with the company (P1). The petitioner company arrived at a settlement with the 3rd respondent to pay a total sum of Rs. 780,870 out of which 225,000 for transfer of his shares in the company to the chairman and Rs. 555,870 for his services to the company. The respondent accepted these sums and gave a letter that he has no further claims from the company (P4). Thereafter the Assistant Commissioner of Labour Mr. M. R.. Kannangara by his letter of 22nd May 2000 called upon the petitioner company to pay a sum of Rs. 245,000 being arrears of Employment Provident Fund dues to the 3rd respondent and the surcharge. The petitioner company took up the position that the 3rd respondent was never an employee of the company and that therefore, the question of paying him provident fund dues does not arise (P6 & P8). The 2nd respondent summoned the parties for an inquiry and after several dates of inquiry oral and written submissions were made. Thereafter the 2nd respondent by his letter of 05.11.2001 sought certain clarifications regarding the basis on which monthly payments have been made to the

Directors, the statement of salaries paid to the other Directors and the decision made at the board meeting on 28.02.1994 to increase the monthly salary of Directors. The petitioner company in response to the above letter informed the 2nd respondent that the inquiry has been already concluded and the decision may be given on the material before him. The 2nd respondent by his letter of 15.01.2002 conveyed his order to the petitioner company requesting the company to pay the 3rd respondent Rs. 123,000 as Employees Provident Fund dues and the surcharge. The petitioner submitted that the 2nd respondent has failed to give the petitioner an opportunity to examine the material on which the 2nd respondent was said to have made this order and this is a breach of the rules of natural justice.

The 2nd respondent submitted that an inquiry commenced with the complaint (P11) and the reply (P12). Written submissions of both parties were tendered and they made oral submissions on two days. He further submitted that as certain matters needed further clarifications, he dispatched (P15) requesting the petitioner to tender further documents. As the petitioner refused to tender further documents he considered the available documents and having been satisfied that the 3rd respondent had been remunerated monthly and also been satisfied that the Employment Provident Fund contribution with regard to the 3rd respondent has not been forwarded to the department of Labour by the petitioner made order to pay the Employees Provident Fund dues and the surcharge. Under these circumstances the petitioner cannot complain that he was not given a fair hearing. The Senior State Counsel who appeard on behalf of the 1st and 2nd Respondents produced the Department file in court and submitted that the copy of the minutes of the Board of Directors meeting held on 28th February 1994 containing the decision that the monthly salary of the Directors had been increased is filed of record.

The powers of the Commissioner of Labour under the Employees Provident Fund Act is not only to determine claims but also to call for documents (Section 31) and to examine any records or documents relating to any provident fund or pension scheme (Section 32). In this instant case the 2nd respondent having the materials necessary in his possession had called for the originals which were in the possession of the petitioner but the petitioner failed and neglected to produce the same.

The Petitioner complained that he was not given an opportunity to peruse the documents on which the 2nd respondent relied upon to arrive at his decision. He relied on the judgment in *Ceylon Printers Ltd and Another* v *Weerakoon, Commissioner of Labour and others*[1] where Gunasekara J held ;

> "In view of the failure by the Commissioner to give the appellants an opportunity of challenging the new material on which he acted, the Commissioner is under a duty to give reasons for his decision, particularly in view of the fact that it was not he who held the inquiry and recorded the evidence. In the result, the order of the Commissioner was in breach of the principles of natural justice".

This judgment is not applicable in this instant case as the documents that are relied upon by the Commissioner of Labour namely P 13a, P 13b and the decision of the Board of Directors at the meeting held on 28.02.1995 to arrive at his decision are not new documents. The originals of these documents are in the possession of the petitioner.

The Petitioner further submitted that the 1st respondent has not given reasons for his decision that was communicated to him by letter marked P17. In *Kusumawathe and others v Aitken Spence & Co. Ltd*[2] *and another* the court held ;

> "that in the absence of a statutory requirement to give reasons for decisions or a statutory appeal from a decision, there is no requirement of Common Law or the principles of natural justices that a Tribunal or an Administrative Authority should give reasons for its decision, even if such decision has been made in the exercise of a statutory discretion and may adversely affect the interest of the legitimate or reasonable expectations of other persons.
>
> *Per* Silva, J
>
> "the finding that there is no requirement in law to give reasons should not be construed as a gateway to arbitrary decisions and orders. If a decision that is challenged is not a speaking order, when notice is issued by a Court exercising judicial review, reasons to support it have

to be disclosed. Rule 52 of the SC Rules 1978 - is intended to afford an opportunity to the respondents for this purpose ; the reasons thus disclosed form part of the record and are in themselves subject to review. Thus if the Commissioner fails to disclose his reasons to Court exercising judicial review, an inference may well be drawn that the impugned decision is ultra vires and relief granted on this basis."

The 2nd respondent in his affidavit has stated that he has relied on the documents marked P 13a, P13b (the audit reports which give the monthly remunerations of the Directors) and having been satisfied that the 3rd respondent had been remunerated monthly and also been satisfied that the Employee's Provident Fund contribution with regard to the 3rd respondent had not been forwarded to the Department of Labour he made the order marked as P17. The reasons for the decision are also in the department file of the 2nd respondent which was disclosed to court by the learned Senior State Counsel. Therefore the petitioner cannot complain that there is a violation of the rules of natural justice. The decision of the Commissioner is based on the documents, the originals of which were in the possession of the petitioner and the petitioner had not made any attempt to controvert the facts contained in these documents other than stating that the copies of the documents which were submitted to the Commissioner are not duly signed or authenticated by any person. Therefore the submissions of the petitioner that the decision of the Commissioner is in excess of his jurisdiction and without any material has no merit. Under these circumstances the petitioner is not entitled for the relief claimed for. I dismiss this application without costs.

SRIPAVAN, J. - I agree.

Application dismissed.

COLOMBO DOCKYARD LTD
VS
JAYASIRI PERERA AND OTHERS

COURT OF APPEAL,
AMARATUNGA, J., AND
WIMALACHANDRA, J.
CA 71/2003 (bg)
D. C. COLOMBO 14760/MR
JULY 15 AND
SEPTEMBER 2, 2004

Civil Procedure Code, section 93 (2) - Amendment of caption - Prejudice caused to defendants ? - Amendment not to widen scope or alter character of the action - Names are used to identify persons.

The caption of the plaint refers to the plaintiff as සීමාසහිත කොළඹ නැව් තටාකාංගනය. At the trial it was revealed that the incorporated name of the plaintiff was "Colombo Dockyard Ltd.,". The defendant took up the position that there is no incorporated body by the name of "සීමාසහිත කොළඹ නැව් තටාකාංගනය" and that the action should be dismissed. In the course of the trial the certificate of incorporation of the plaintiff company was allowed to be marked. At the trial the plaintiff's witness said that the plaintiff Company is called "Colombo Dockyard Ltd.," as well as "සීමාසහිත කොළඹ නැව් තටාකාංගනය". Thereafter the plaintiff moved to amend the caption to read the plaintiff's name as "Colombo Dockyard Ltd.," The defendant objected and the court upheld the objection.

Leave being granted, on appeal-

Held:

(1) It appears that although the plaintiff company is registered as "Colombo Dockyard (Pvt) Ltd" it is also called and known in Sinhala as "සීමාසහිත කොළඹ නැව් තටාකාංගනය". Since the 1st defendant has been in the company for more than 12 years he should have known that the plaintiff company is also called by the name" "සීමාසහිත කොළඹ නැව් තටාකාංගනය".

(2) Names are used to identify persons; whether the plaintiff company is called either by "සීමාසහිත කොළඹ නැව් තටාකාංගනය" or "Colombo Dockyard (Pvt) Ltd.," is immaterial. The names are there to designate persons.

(3) It seems that the proposed amendment to the caption could only refer to the plaintiff and nobody else, and by allowing the amendment no prejudice would be caused to the defendants. The effect of the amendment is merely to show that the plaintiff company called "කීමාකඩිය කොළඹ හැව් තටාකාංගනය". is also called "Colombo Dockyard (Pvt) Ltd.". By this amendment it is not the intention of the plaintiff to substitute another in place of the plaintiff company.

(4) Under section 93 (2) court may allow an amendment of any pleadings if the court is satisfied that the plaintiff would suffer grave and irremediable injustice if the amendment is not allowed and the plaintiff has not been guilty of laches.

(5) By this amendment the plaintiff is not seeking to widen the scope or alter the character of the action and he is not trying to bring in a new cause of action. He is merely seeking to give the court a description of the name of the plaintiff. It is to be observed that "කීමාකඩිය කොළඹ හැව් තටාකාංගනය". is the Sinhala translation of "Colombo Dockyard Ltd". The acceptance of the amendment does not cause prejudice to the defendants.

APPLICATION for leave to appeal with leave being granted.

Cases referred to :

1. *Mohinudeen and another* vs *Lanka Bankuwa, York Street, Colombo 1* (2001) 1 Sri LR 290
2. *Bank of Ceylon* vs *Ramasamy* (1985) 1 CALR 481
3. *Davis* Vs *Elsby Bros Ltd* (1960) 3 ALL ER 672
4. *W. M. Mendis & Co.* Vs *Excise Commissioner* (1999) 1 Sri LR 351
5. *Charles Vs Samarasinghe,* Bar Journal (1998) Vol. VII, Part II Page 21
6. *Shammari Vs Premier Airline Agencies (Pvt) Ltd.*, (1988) 2 Sri LR 162

L. C. Seneviratne, P. C. with Anuraddha Dharmaratne for petitioner.

Rohan Sahabandu for respondent.

Cur.adv.vult.

December 15, 2004
WIMALACHANDRA, J

This is an appeal against the order dated 20.02. 2003, made by the learned Additional District Judge of Colombo, refusing the application of the plaintiff - appellant to amend the caption of the plaint.

Briefly, the facts relevant to this appeal are as follows:-

The caption refers to the plaintiff in Sinhala as "සීමාසහිත කොළඹ නැව් තටාකාංගනය". At the trial it was revealed that the incorporated name of the plaintiff was Colombo Dockyard Limited. The defendants' position is that there is no incorporated body by the name of "සීමාසහිත කොළඹ නැව් තටාකාංගනය" and that the plaintiff's action should accordingly be dismissed. In the course of the trial, it was moved to mark the Certificate of Incorporation of the plaintiff company on behalf of the plaintiff which was objected to by the defendants. The learned Additional District Judge delivered her order dated 3.5.2000, wherein she allowed the said document to be marked on the ground that the said document establishes the fact that the plaintiff is a duly incorporated company and that it has been pleaded in the plaint. On 17. 01. 2002 the plaintiff's witness said under cross examination that the plaintiff company is called "Colombo Dockyard Limited" as well "සීමාසහිත කොළඹ නැව් තටාකාංගනය." After the conclusion of the evidence of the said witness, the plaintiff moved to amend the caption of the plaint to read the plaintiff's name as Colombo Dockyard Limited. In the caption of the plaint the plaintiff is described as "සීමාසහිත කොළඹ නැව් තටාකාංගනය". The defendants opposed this application. Thereafter the learned Judge directed the parties to file written submissions in respect of the said application. The learned Additional District Judge delivered her order on 20. 02. 2003 refusing the application to amend the caption and fixed the case for further trial. It is against this order the appellant has filed this appeal.

Admittedly, the 1st defendant (respondent) was employed with the plaintiff from 1979. It is also admitted that the 1st defendant vacated his post in the plaintiff - company on or about 10. 08. 1992. The question that arises is, was the 1st defendant as a person who was employed in the plaintiff, company aware that the plaintiff - company was also called in Sinhala as "සීමාසහිත කොළඹ නැව් තටාකාංගනය" and that both names namely, The Colombo Dockyard and "සීමාසහිත කොළඹ නැව් තටාකාංගනය". were used to identify the plaintiff - company. The 1st defendant cannot say he is not aware that the plaintiff - company is registered under the

Companies Act as the "Colombo Dockyard (Pvt) Limited" as evident by the agreement marked P1(a) where the 1st defendant was a party to the said agreement. In the answer filed by the 1st defendant, in paragraph six he has stated that Colombo Dockyard (Pvt) Limited has terminated his services.

The documents produced marked "A1 " to "B1" and "C1" to "C5" show that the plaintiff - company is also called "සීමාසහිත කොළඹ නැව් තටාකාංගනය" In "A1" to "B1" and "C1" to "C13" the address stated is identical to the address given in the plaint.

In these circumstances it appears to me that although the plaintiff - company is registered as "Colombo Dockyard (Pvt) Limited" it is also called and known in Sinhala as "සීමාසහිත කොළඹ නැව් තටාකාංගනය" Since the 1st defendant had been in the plaintiff company for more than 12 years, he should have known that the plaintiff company is also called by the "සීමාසහිත කොළඹ නැව් තටාකාංගනය" (Vide "C1", "C2", "C3", "C4" and "C5").

The learned President's Counsel for the plaintiff appellant cited the Supreme Court case of *Mohinudeen and another* Vs. *Lanka Bankuwa York Street, Colombo 1* [1]. In this case the plaintiff bank, incorporated under the Bank of Ceylon Ordinance, instituted action against the defendants for the recovery of a sum of Rs.19,811,503/92. In the caption of the plaint, the plaintiff was referred to as "Lanka Bankuwa". At the trial the parties raised 26 issues. Of the issues raised, two issues were tried as preliminary issues. They are issues No. 14 and No. 16,. What is relevant for the present case before us is issue No. 14. It reads as follows: "(read with Paragraph 7 (a) of the answer); whether the plaintiff had *locus standi* to institute legal proceedings in that no legal person had been incorporated (in terms of the Bank of Ceylon Ordinance) under the name of "Lanka Bankuwa."?

It was held *inter alia* by the Supreme Court that the use of the name "Lanka Bankuwa" did not mislead the defendants. Hector Yapa, J. who delivered the judgment made the following observation at pages 294 - 295:

> "There is no doubt that the legislature by the Bank of Ceylon Ordinance has created a body corporate called the "Bank of Ceylon"

which is empowered to carry on the business of banking with the right to sue and be sued in its corporate name. Therefore, when the plaint is filed in Sinhala on behalf of the institution called the Bank of Ceylon, it would be fair and logical to use the name "Lanka Bankuwa" the term used in Sinhala by the Bank of Ceylon itself. Besides, the Bank of Ceylon over the years has continued to use the term "Lanka Bankuwa" in their dealings with the public and today the term "Lanka Bankuwa" is synonymous with the term Bank of Ceylon. Hence it would appear that the learned High Court Judge has correctly held that the Bank of Ceylon has the locus standi to file actions using the Sinhala name of the Bank of Ceylon namely the Lanka Bankuwa. Besides, the appellants would have received their bank statements and other documents from the Bank of Ceylon on the letter heads giving the name of the Bank of Ceylon in Sinhala as Lanka Bankuwa and therefore there is no question of the appellants or any one else for that matter being misled that the reference was not to the Bank of Ceylon."

In the instant case it appears that the plaintiff - appellant is called by both names, namely, "සීමාසහිත කොළඹ නැව් තටාකාංගනය"and "Colombo Dockyard (Pvt) Limited". As stated above this is borne out by the documents produced marked "A1" to "A5". "B1" and "C1" to "C5". Moreover, the 1st defendant respondent who was employed with the plaintiff - appellant from 1979 to 1992 would have known that the plaintiff - appellant " Colombo Dockyard Ltd" is also called "සීමාසහිත කොළඹ නැව් තටාකාංගනය"

In the case of *the Bank of the Ceylon Vs. Ramasamy* [2] at page 481 the Court of Appeal considered the question whether misnomer of a defendant is fatal to an action brought against him. In this case the plaintiff respondent instituted action in the District Court against the Manager, Bank of Ceylon Agricultural Service Centre, Kilinochchi and proxy was filed on behalf of the Manager. Thereafter proxy was revoked and proxy of the Bank of Ceylon was filed by another attorney at law. The learned District Judge held that it was necessary to add the Bank of Ceylon as a party defendant. The petitioner, the Bank of Ceylon, appealed from that order. It was held in this case that the description given to the defendant could only refer to the Bank of Ceylon and that the insertion in the plaint of the Manager, Bank of Ceylon as defendant was a misnomer which could be corrected. It is clear that a mistake can be corrected where the mistake is in the name, description or designation of a defendant which

does not mislead the parties on the question of identity of the person intended to be sued and even where in such circumstances, the person described as the defendant is non - existent, the mistake can be corrected.

Moonemale, J. at 487 in *Bank of Ceylon vs. Ramasamy* (supra) cited the test to be applied in cases of misnomer prescribed by Devlin, L. J. in *Davis Vs. Elsby Bros* [3] *Ltd.* It reads as follows:

> "The test must be; How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he could say to himself, 'of course it must mean me, but they have got my name wrong,' then there is a case of misnomer. If on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not. I shall have to make inquires,' then it seems to me that one is getting beyond the realm of misnomer. One or the factors which must operate on the mind of the recipient of the document and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer."

It is to be noted that the names are used to identify persons. Whether the plaintiff - company is called either by "සීමාසහිත කොළඹ නැව් තටාකාංගනය" " or "Colombo Dockyard (Pvt) Ltd." is immaterial. The names are there to designate persons.

In the case of *W. M. Mendis & Co. Vs. Excise Commissioner*[4] it was held that names in the caption of a plaint are used only to designate persons, and that the action is not instituted against names but against persons designated thereby.

In this case the plaintiff - petitioner instituted action against the defendant - respondent to recover a certain sum of money. The defendant was named in the plaint as the "Excise Commissioner". The attorney at law for the defendant filed the proxy of the defendant and the said proxy was signed by N. N. F. Chandraratna. The answer filed by the defendant stated that the defendant named therein is neither a natural person nor a juristic person and pleaded that the plaintiff cannot maintain the action. The trial in this case was fixed for 4. 12. 1996. After the trial was fixed the plaintiff filed a motion seeking permission to amend the plaint to read as W. N. F.

Chandraratne Excise Commissioner, now known and designated as "Commissioner - General of Excise". The defendant objected to the amendment. J. A. N. de Silva, J. at page 356 made the following observations :

> "..... One has to be alive to the often quoted legal maxim, namely, *Falsa demonstration non nocet cum de corpore vel persona constat* (a false description does not harm if there be sufficient certainty as to the subject matter or the person) and *Falsa demonstratio non nocet cum de corpore vel persona constat* (any inaccuracy in description is to be over - looked if the subject matter or person is well known.)"

The 1st defendant who was employed with the plaintiff company for a period of 12 years should have known that the plaintiff is also called by the name "සීමාසහිත කොළඹ නැව් තටාකාංගනය" In the circumstances I cannot see any prejudice that would be caused to the 1st defendant by allowing the amendment to the caption sought by the plaintiff. the 2nd and 3rd defendants' liabilities flow from the 1st defendant, and hence there would be no prejudice caused to them as well, by this amendment.

It seems to me that the proposed amendment to the caption could only refer to the plaintiff and nobody else any by allowing this amendment no prejudice would be caused to the defendants. The effect of the amendment is merely to show that the plaintiff - company is called "සීමාසහිත කොළඹ නැව් තටාකාංගනය" and is also called "Colombo Dockyard (Pvt) Ltd." By this amendment it is not the intention of the plaintiff to substitute another in place of the plaintiff - company.

Another objection taken by the defendant is that the plaintiff is not entitled to amend the caption of the plaint after the case has been fixed for trial. This objection is based on Section 93 (2) of the Civil Procedure Code.

Section 93 (2) of the Civil Procedure Code (as amended) states thus:

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

Accordingly, the Court may allow an amendment of any pleadings if the Court is satisfied that the plaintiff would suffer grave and irremediable injustice if the amendment is not allowed and the plaintiff has not been guilty of laches.

When the plaintiff's witness was giving evidence, he said that the name of the plaintiff - company is "සී/ස කලම්බු ඩොක් යාර්ඩ් "and he sought to produce the Certificate of Incorporation of the plaintiff -company which was objected to by the 1st defendant. The learned District Judge allowed to produce the document. The witness continued to give evidence on the next day, and he said the plaintiff is called and known as "Colombo Dockyard (Private) Ltd." as well as "සීමාසහිත කොළඹ නැව් තටාකාංගනය".

The witness stated (proceedings of the District Court dated 17. 1. 2002 at page 5) that the plaintiff is called "Colombo Dockyard Ltd." as well as "සීමාසහිත කොළඹ නැව් තටාකාංගනය". " Thereafter the plaintiff sought to amend the caption from "සීමාසහිත කොළඹ නැව් තටාකාංගනය" to "Colombo Dockyard Ltd".

By this amendment the plaintiff is not seeking to widen the scope or alter the character of the action and he is not trying to bring in a new cause of action. He is merely seeking to give the correct description of the name of the plaintiff, the "Colombo Dockyard Limited". It is to be observed that "සීමාසහිත කොළඹ නැව් තටාකාංගනය" " is the Sinhala translation of "Colombo Dockyard Limited".

I am of the view that if the Court allows the amendment, no prejudice would be caused to the 1st defendant and the 2nd 3rd defendants. On the other hand if the proposed amendment is refused, grave injustice would be caused to the plaintiff.

The need for the amendment sought by the plaintiff arose unexpectedly, and the acceptance of the amendment does not cause prejudice to the defendants. Hence, the amendment should be allowed. *(See Charles Vs. Samarasinghe* [5].

The fact that the plaintiff is called by both names, namely "සීමාසහිත කොළඹ නැව් තටාකාංගනය" and "Colombo Dockyard Ltd". was first disclosed at the trial whilst the plaintiff's witness was giving evidence. In the

circumstances it appears that the delay in seeking this amendment is not a deliberate delay.

In the case of *Shammari Vs. Premier Airline Agencies (Pvt) Ltd.*, [6] Weerasuriya, J. held that the question of laches cannot be determined only by considering the number of trial dates or the period of time that had elapsed, as delay *per se* does not amount to laches and the circumstances of the particular case have to be taken into account.

In these circumstances, it is my considered view that the amendment to the caption of the plaint sought by the plaintiff does not violate the provisions of Section 93 (2) of the Civil Procedure Code. The amendment would cause no prejudice to the defendants.

For these reasons, the order of the learned Additional District Judge dated 20. 02. 2003 is set aside. The application is accordingly allowed, but without costs.

AMERATUNGA, J - I agree.

Appeal allowed.

RATNAYAKE
VS
TIKIRI BANDA AND OTHERS

COURT OF APPEAL
WIMALACHANDRA, J.
CA 1882/2004
DC KANDY 13301/P
26TH APRIL, 2005

Civil Procedure Code, sections 189, 754(4), 755, 755(3) and 839 - Can the trial judge reject a petition of appeal on the ground that the order is not an appealable order ?

Held :

(i) It is not for the trial judge to decide that the order or judgement appealed against is not an appealable order - that question is for the Court of Appeal.

(ii) If the petition of appeal is in accordance with the provisions of section 755(3), it is mandatory for the District Judge in terms of section 755(4) to forward the petition of appeal with the opinion of the judge as to whether or not there is a right of appeal against the judgment.

(iii) The District Judge erred in refusing to accept the petition of appeal which amounts to the rejection of the appeal.

APPLICATION in revision from the order of the District Court of Kandy.

J. C. Boange for 8th defendant appellant petitioner.

Plaintiff respondent respondent absent and unrepresented.

01st August, 2005,

L. K. WIMALACHANDRA, J.

The 8th defendant-appellant-petitioner (petitioner) has filed this application in revision from the order of the District Judge of Kandy dated 06.08.2003. By that order the learned judge rejected the petition of appeal filed by the petitioner.

Briefly the facts as set out in the petition of appeal are as follows :

The plaintiff-respondent-respondent (plaintiff) instituted the partition action to partition a land called Hitinagederawatte *alias* Gamagederawatte about two pelas in extent. When the case was taken up for trial, the parties intimated to Court that there was no contest as to the pedigree and the evidence of the plaintiff was led and there was no cross-examination. Thereafter the judgment was delivered allotting 84/160 shares to the plaintiff, 20/160 to the 3rd defendant, 20/160 shares to the 5th, 6th, 7th, 9th to 14th defendants and 36/120 shares to the 8th defendant. The 8th defendant discovering an error in the calculation of the shares and the computation of shares according to the evidence led, moved to have the errors corrected in terms of sections 189 and 839 of the Civil Procedure Code. The Court, after an inquiry into the application made by the 8th defendant, corrected the error of 36/120 to 36/160, but held that the other error, that is the computation of the share of the 8th defendant was not an arithmetical error and refused to consider the correction of the error alleged to have been made in the computation of shares. Being aggrieved with the judgment of the court

dated 21.11.2003 in refusing to correct the computation of shares according to the evidence led at the trial, the 8th defendant filed a notice of appeal and a petition of appeal. The plaintiff objected to the said appeal. The Court held an inquiry and made order on 06.08.2004 rejecting the petition of appeal of the 8th defendant. It is against this order the 8th defendant has filed this application in revision.

The 8th defendant's position is that the learned District Judge had no power to reject the petition of appeal. The learned counsel for the 8th defendant in his written submission, submitted that the notice of appeal and the petition of appeal were in conformity with the provisions of section 755 of the Civil Procedure Code, as the notice of appeal and the petition of appeal were filed within the prescribed time period in terms of sections 754(4) and section 755(3) of the Civil Procedure Code. In the impugned order the learned judge has not faulted with the 8th defendant that her notice of appeal and the petition of appeal are not in confirmity with the provisions of sections 754 and 755 of the Civil Procedure Code, but he has rejected the petition of appeal on the sole ground that the said order dated 06.08.2004 is not an appealable order.

Section 755(4) of the Civil Procedure Code states that upon the petition of appeal being filed, the Court shall forward the petition of appeal together with all the papers relevant to the judgment appealed against, as speedily as possible to the Court of Appeal, retaining however an office copy of the judgment for the purpose of execution if necessary. Hence, if the judge is of the view that the judgment appealed from or the impugned order is not an appealable order, he must, with his opinion as to whether or not there is a right of appeal against the judgment or order, forward the petition of appeal to the Court of Appeal as speedily as possible in terms of section 755(4) of the Civil Procedure Code.

In the circumstances, I am of the view that it is not for the learned District Judge to decide that the order or judgment appealed against is not an appealable order and that question is for the Court of Appeal to decide. Accordingly, if the petition of appeal is in accordance with the provisions of section 755(3), it is mandatory for the District Judge in terms of section 755(4) of the Civil Procedure Code to forward the petition of appeal with the opinion of the judge as to whether or not there is a right of appeal against the judgment appealed against. Hence I am of the view that the learned

District Judge erred in refusing to accept the petition of appeal of the 8th defendant, which amounts to the rejection of the petition of appeal.

For these reasons I allow the application in revision and set aside the order of the District Judge dated 06.08.2003 and direct the learned District Judge to forward the petition of appeal to this Court in terms of section 755(4) of the Civil Procedure Code. The application is allowed with costs fixed at Rs. 7,500.

Application allowed ; District Judge directed to forward the appeal to the Court of Appeal.

WELGAMA
VS.
WIJESUNDERA AND ANOTHER

SUPREME COURT
S. N. SILVA, CJ,
BANDARANAYAKE, J AND
JAYASINGHE, J
SC APPEAL 2/2003
CA L. A. 24397
D. C. COLOMBO NO. 31166/T
MAY 20, JUNE 17, JULY 11, AUGUST 29 AND NOVEMBER 3, 2003
AND FEBRUARY 17, 2004

Testamentary Action — Determining the date of death for purpose of deciding. date when estate passed to heirs and for grant of letters of administration - Presumption of life - Evidence Ordinance, section 107 - Presumption of death - Evidence Ordinance, section 108 - Interpretation Act, No. 10 of 1988 amending the period for presumption of death from "seven years" to "one year' - How may court decide the date of death as a fact - Does the amendment date back to the day deceased disappeared, viz. 13.02.1983 or should one year be counted from the date of the amending Act, viz. 02.04.1988? - Intermeddling with the estate on the basis of deceased's power of attorney - Effect of intermeddling on the date of death.

The appellant is the widow and the respondents are the two sisters of Upali Wijewardena who disappeared on his way to Colombo from Kuala Lumpur in his private lear jet on 13.02.1983. Neither the air craft nor the remains of Wijewardena were traced. At the time of his disappearance neither the appellant nor the respondents sought to institute testamentary proceedings, but on 07.10.1987 the respondents filed DC Colombo Case No. 30927/T. They complained that the appellants acting on the power of attorney issued by Wijewardena (deceased) intermeddled with the estate "while he was alive" and sought letters of administration *pendente lite* under section 539A of the Civil Procedure Code (then in force) on the basis that Wijewardena died on 13.02.1983. The court did not publish order nisi but ordered that the appellant's objections be issued to the respondents.

When the matter was taken to the Court of Appeal by the respondents, the appellant explained that the respondents were estopped from pleading death on 13.02.1983 and that as on the date of his disappearance the deceased's liabilities exceed his assets. He owed Rs. 50 million to the Revenue Department and Rs. 200 million to the People's Bank; steps were taken to settle these debts on the basis of the power of attorney and the respondents acquiesced in restructuring the companies and in fact accepted office as directors of separate companies.

In the meantime on 21.04.1988, section 108 of the Evidence Ordinance was amended by Act, No. 10 of 1988 substituting the words "seven years" with " one year" for the purpose of reducing the period of presumption of death. Consequently the Court of Appeal litigation in DC Colombo No. 30927/T was withdrawn by the respondents who also consented to letters of administration being granted to the appellant in DC Colombo No. 31166/T filed on 28.04.1988. In that action court ordered final accounts to be filed on 08.03.1993.

Notwithstanding the settlement reached regarding DC Colombo No. 309271/ T which was withdrawn of consent, respondents insisted in Case No. 31166/ T that the court should hear the matter as if Wijewardena died on 13.02.1983. The appellant contends that she filed action on the basis that the decreased died on 21.04.1988, the date of the amending Act, No. 10 of 1988. The District Judge held that on the basis of the evidence and documents the date of the death was 13.02.1983. The Court of Appeal affirmed the order of the District Judge that the date of death has to be established on evidence and not in terms of section 108 of the Evidence Ordinance, as amended.

HELD:

(Bandaranayake, J. dissenting)

The date of the death for purpose of the estate should be taken as 21.04.1988.

***Per* S. N. SILVA , CJ**

"..... The question is from which date the period of one year should be computed? Is it one year immediately preceding 21.04.1988 as contended by the President's Counsel for the appellant or one year from the date of disappearance as contended in particular by Counsel for the 2nd respondent.? I am inclined to agree with the President's Counsel for the appellant for two reasons.

Firstly the amendment to the Evidence Ordinance is procedural in nature. It applies prospectively and a party could avail of it only after it comes into force. Therefore, the earliest date on which a party could establish the fact of death on the basis of the presumption is the date on which the law comes into operation. *A fortiori* the relevant period within which it should be proved that the person was not heard is the period of one year immediately preceding that year.

Secondly, if the presumption of death is to relate back to one year after 13.02.1983 as contended by Counsel for the 2nd respondent or to 13.02.1983 as contended by President's Counsel for the 1st respondent, it would lead to the incongruous result as noted above, in which the person will be presumed to be alive as well as dead during the same period.".

Per **BANDARANAYAKE, J.** (dissenting)

1. "Section 107 of the Evidence Ordinance could be regarded as a provision which considers the burden of proof of the death of a person known to have been alive within thirty years and section 108 refers to the burden of proof regarding a person who is alive and had not been heard of for seven years".

2. "It would be necessary according to Pulle, J (in *Davoodbhoy* v. *Farook*) (1959) 63 NLR 97) to prove such death in terms of section 101 of the Evidence Ordinance".

3. "The period of seven years referred to in section 108 was amended by Act, No. 10 of 1988 by reducing the period of seven years to one year."

4. "That section (108) does not create a presumption as to the *time of death* of a person in question".

5. ....."Although the deceased was not seen after 13.02.1983, the appellant had dealt with his property as he was alive and living elsewhere.".

" The respondents have continued to state that the appellant was last seen or heard on 13.02.1983. The appellant has not disputed this fact nor has taken any steps to prove anything to the contrary. Therefore there could not be any dispute between the parties that the deceased was last seen or heard on 13.02.1983.".

6. "I cannot see any basis for the date of the amended section 108, which came into force to be regarded as the date of the death of the deceased and in my view the contention that the date is to be presumed as at 21.04.1988 is not only contradictory and untenable, but also is an attempt to give an artificial and baseless interpretation to the amended section ."

Cases referred to :

1. *Silva* v. *Silva* 10 NLR 234 (FB)
2. *Amalgamated Investment and Property Company Ltd.* v. *Texas Commerce International Bank Ltd.* 1984 QB 84 at 122
3. *Doe* v. *Nepeani*(1833) Reports of cases of the Court of Kings Bench Vol. IIP. 219 at P226
4. Re Benham's Trusts (1867) Law Times Reports Vol. XVI P349
5. Re Phenes Trust (1870) Law Time Reports Vol. Xxi - p 107 (1870)5CH App. 139
6. *Re Rhodes* vs. *Rhodes* (1888) Law Times Reports Vol. LVII p. 652
7. *Rex* v. *Taylor* (1950) Kings Bench Division P. 368
8. *Warkins* v. *Warkins* (1953) 2 AER P. 1113
9. *Thompson* v. *Thompason* (1956) 1 AER P. 603
10. *Davoodbhoy* v. *Farook* (1959) 63 NLR 97
11. *Pattison* v. *Kalutara Special Criminal Investigation Bureau* (1970) 73NLR 399
12. *Assistant Government Agent* v. *Fernando* (1909) 12 NLR 83
13. *Doe* v. *Nepean* (1833) 5 B & Ad 86
14. *Nepean* v. *Doe* (1837) 2 M & W 894
15. *Re Rhodes* (1887) 36 Ch.D. 586
16. *Hamy Vel Muladeniya* v. *Siyatu* (1945) 46 NLR 95
17. *Tikiri Banda* v. *Ratwatte* (1894) 3 CLR 70

18. *Prins* v. *Peiris* (1901)4 NLR 353
19. *Silva* v. *Salman* (1916) 19 NLR 305
20. *Lal Chand Matwari* v. *Mahant Ramrup Gir and Another* TLR Vol XLII 1925-26 P159
21. Re Green's Settlement (1865) LR 1 p. 288
22. *Dowley v. Winfield* (1844) 14 sim 277
23. *Wing v. Angrave* (1860) 8 HLC 183
24. *Hickman v. Upsali* (1876) 4 CH. D. 145

APPEAL from the judgement of the Court of Appeal.

Nihal Jayamanne P. C. with *Ronald Perera*, V. *Choksy*, *Noorani Amarasinghe*, *Uditha Collure* and *Dilan de Silva* for appellant.

Wijeyadasa Rajapakse, PC with *Navin Marapana* for respondents.

Cur.adv.vult.

April 1st 2005

SARATH N. SILVA, C. J.

This is an appeal from the Judgment dated 11.01.1999 of the Court of Appeal. By that Judgment the Court of Appeal dismissed the application of the appellant for leave to appeal from order dated 28.11.1997 of the District Court.

The hearing of the application for Special Leave to Appeal before this Court and of this appeal were adjourned for considerable periods of time to enable the parties to arrive at a settlement of the dispute. Upon the failure to arrive at a settlement, Counsel made submissions and thereafter tendered extensive written submissions.

The dispute relates to the administration of the estate of the late Philip Upali Wijewardena, leading public figure and a businessman. He embarked from the Kuala Lumpur International Airport in his private Lear Jet on 13.02.1983 with the recorded destination being Colombo. The aircraft failed to give a position report overhead Medan to the Kuala Lumpur Air Traffic Control Centre and did not regain contact with any Ground Control Center, thereafter. Neither the remains of Wijewardena nor of any of the passengers have been found. It is reported that some fishermen in

Indonesia have found a wheel of an aircraft and a part which could be related to that aircraft. The heirs are his widow, the present appellant and his two sisters, being the Respondents. Although, Wijewardena disappeared in the circumstances stated above on 13.02.1983, neither the Appellant nor any of the Respondents sought to institute Testamentary proceedings for Letters of Administration in terms of Section 530(1) of the Civil Procedure Code (which was then applicable) on the basis that he died on 13.02.1983 being the day on which the aircraft he was in disappeared. Wijewardena had appointed one Ramalingam Murugiah as his Attorney and his affairs were carried out on the basis of the said Power of Attorney. Subsequently, the said Murugiah gave a substituted Power of Attorney in favour of the Appellant.

On 07.10.1987, the two Respondents filed a petition in the District Court of Colombo (No. 30927/T), seeking Letters of Administration in respect of the estate of Wijewardena. It was pleaded in the petition (paragraph 7) that the Petitioners have reason to believe that the Respondent (the present appellant) has been willfully asserting that the deceased is still alive for the unlawful and illegal purpose of administering wrongfully, intermeddling and to do what she solely wishes with the considerable assets of the deceased, without any authority or supervision from this Court. They also pleaded that the action taken by Murugiah and the Appellant on the power of attorney referred to above is unlawful. They applied to administer the estate on the basis that Wijewardena died on 13.02.83 and sought inter alia Letters of Administration pendente lite in terms of Section 539A of the Civil Procedure Code (which was then applicable). The District Court refused to grant Letters of Administration pendente lite. However, the Court issued Order Nisi on 08.10.1987. On 19.10.1987 the Appellant filed papers and made an application to recall the Order Nisi that had been issued. The District Court then noted that the Order Nisi had not been signed and made order that no Order Nisi be published. It was further directed that Notice of objection be issued on the present Respondents. The Respondents filed an application for Leave to Appeal to the Court of Appeal from the order made by the District Court on 19.10.1987. They also filed an application in Revision and a Final Appeal from the same Order.

On 28.04.1988, the Appellant filed petition in the District Court (Case No. 31166/T) seeking Letters of Administration. The application was filed on the basis of the amendment to Section 108 of the Evidence Ordinance

made by Act, No. 10 of 1988, which came into force on 21.04.1988. The District Court issued Order Nisi on the basis of this application, in terms of Section 531 of the Civil Procedure Code and directed service on the Respondents.

At this juncture, when cases were pending in the District Court and Court of Appeal as aforesaid, the parties entered into a settlement on 18.01.1989. The settlement has been signed by the appellant and the Respondents on the basis of which the Respondents withdrew the Applications for Leave to Appeal, Revision, and the Final Appeal referred to above. A schedule to the Settlement Agreement specifies the Companies in respect of which the deceased had interests and the Appellant agreed on her part to the appointment of the Respondents and their children to positions in the Boards of Directors of specified Companies and to make certain payments as fees. It is specifically provided that subsequent to the execution of the agreement and the appointment of Directors, as referred to, the Respondents will consent to Letters of Administration in respect of the estate of the deceased being issued to the Appellant in the District Court case No. 31166/T, as the widow of the deceased without her providing any security for this purpose other than a personal bond. The Respondents also agreed to withdraw the testamentary action No. 30927/ T filed by them in the District Court. It was specifically agreed that the Respondents will withdraw the allegations made against the Appellant in paragraph 7 of the petition filed in that action, the contents of which paragraph have been referred to above.

On the basis of the foregoing settlement Appellant was issued with Letters of Administration.

On 26.11.1992 the Letters of Administration were signed by the Addl. District Judge who directed that the inventory and the final account be filed on 08.03.1993. In clause 3 of the settlement Agreement it is specifically stated that the Appellant, "undertakes to furnish accounts in respect of each and every year of her administration of the said Estate of the deceased to the Parties of the First Part (Respondents) before the Thirty First day of December in each and every year commencing from 31st March, 1990"

The dispute was rekindled by the failure on the part of the Appellant to file the inventory and final account as directed by Court or to render accounts as agreed to in clause 3 of the Agreement referred above. The Respondents

filed a petition and affidavit on 02.04.1997 in case No. 31166/T (being the application filed by the Appellant in which Letters of Administration had been issued.), allgeging inter alia, that the deceased died on 13.02.1983 and the Appellant intermeddled and/or dealt with the assets of the deceased for her own benefit on the basis of a Power of Attorney which was null and void, for her own benefit in fraud of the Respondents. They sought an order against the Appellant from the District Court to file a further inventory and valuation of the deceased's property at the date of his death, namely 13.02.1983 and a final account of the administration of the estate on or before a date to be fixed by Court.

The Appellant filed objections on 29.07.1997 stating that the Respondents are estopped from asserting that the deceased died on 13.02.1983 after they withdrew case No. 30927/T filed by them and consented to Letters being granted to her in case No. 31166/T filed by her on the basis that death took place on 21.04.1988 being the date on which the amendment to the Evidence Ordinance came into force. She further stated that as at the date of disappearance the liabilities of Mr. Wijewardena exceeded his assets, with about Rs. 50 Million due to the Inland Revenue Department and nearly Rs. 200 Million due to the People's Bank on debts of his companies covered by personal guarantees. That, action was taken on the Power of Attorney to avoid a bankruptcy situation in which the Peoples Bank would have taken over the assets. The debts were settled and the assets were restructured. That, the Respondents acquiesced in such restructuring which was done on the basis that Wijewardena was alive and on the authority of the power of attorney by accepting Directorship in Companies that came into existence after 13.02.1983, in terms of Settlement Agreement referred to above.

The Additional District Judge, in the first part of his Order dated 28.11.1997, came to a finding that the Appellant has delayed in filing the final account and inventory. In the second part of his Order the Judge has noted that for the purpose of filing the final account and inventory it is necessary to decide on the date of death and on the documentary evidence adduced as to the disappearance of the aircraft he held that the date of death was 13.02.1983. The Appellant was accordingly directed to file the inventory and final account within 6 months on the basis that the death took place on 13.02.1983. The Court of Appeal dismissed the application for Leave to Appeal on the basis that the date of death cannot be decided

in terms of Section 108 of the Evidence Ordinance. That, the date of death should be established on evidence and on the documentary evidence the District Court correctly held that death took place on 13.02.1983.

At the stage of granting Special Leave both parties were permitted to raise questions on which the appeal will be considered. The questions raised by the Appellant are based on the premise that the direction made by the District Court to file the inventory and final account with effect from 13.02.1983 is erroneous and that the date of the inventory and commencement of the accounting should be taken as one of the following.:

(i) in view of section 553 of the Civil Procedure Code which requires a final account of the "executorship or administration", the point of commencement should be the date on which an order was made to issue Letters of Administration to the Appellant being 24.04.1989;

(ii) in view of the Settlement Agreement which requires the Appellant to furnish an account of her administration of the estate, commencing 31st March 1990, (clause 3), that should be taken as the date operative between the parties,

(iii) in view of the Appellants application for Letters of Administration being filed on 28.04.1988 on the basis of the amendment to Section 108 of the Evidence Ordinance which came into force on 21.04.1988, that date should be taken as the date on which the estate came into being and the operative date for the inventory and the accounting.

Submissions of President's Counsel for the Appellant relate mainly to the premise formulated in (iii) above.

The Respondents raised the question that the Appellant should account from the date she began to intermeddle with the estate of the deceased being the date of disappearance of the deceased and that the presumption operative in terms of Section 108 of the Evidence Ordinance and/or that Letters of Administration issued, should relate back to that date. Initially, only one set of submissions were filed on behalf of both Respondents. Later, a separate submission was filed on behalf of the 2nd Respondent in which it has been contended that even assuming that the Amendment to

Section 108 of the Evidence Ordinance applies, the date of death should be taken as one year after the date of disappearance *viz.* 13.02.1984. In the joint submission made on behalf of the Respondents it was contended that the Settlement Agreement was void.

The question raised by the parties relate to the principal fact in issue, being the date of death of Wijewardena, which has been addressed from different aspects of fact and the application of principles of Law. It is to be borne in mind that we have to examine the issue solely from the perspective of a testamentary action. We are here, not concerned with the circumstances relevant to the disappearance of the ill-fated aircraft but, with the estate of Wijewardena. The dispute is, to state it plainly, as to the property of Mr. Wijewardena and the manner in which it should be accounted for; if as at 13.02.1983, being the date of disappearance, Mr. Wijewardena owned no property, there would have been no dispute.

From the perspective of the Law, property is identified only with reference to rights and obligations in relation to such property. I use the words rights and obligations to include all the jural co-relatives identified in jurisprudence that may relate to property. For example, if we take an immovable property such as a block of land, from the perspective of the Law, we are not concerned whether it is fertile or infertile, flat of steep but, only with the rights of ownership, possession, use enjoyment and so on. These rights are identified in relation to property, as being vested with a person or other legal entity that can hold such rights. The same applies to all forms of movable property and legally recognized relationships, be it in contract or otherwise. Since property and legal relationships are identified with reference to persons who are vested with rights and obligations, it is essential for the legal system that such persons be clearly identified, at any given point of time.

The death of a person, in physical or material terms means, the cessation of life. In legal terms, it means the passing of the dead persons rights and obligations that survive, to the heirs or the persons who inherit his property.

For the purpose of testamentary proceedings, at the moment of death the property of the deceased (the bundle of rights and obligations) become the estate and pass without interval to the heirs. This basic premise

of the law has been clearly stated in a decision of the Full Bench of the Supreme Court in the case of Silva vs. Silva (1) Grenier A. J. stated as follows :

> ".....On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the dominium vests in them. Once it so vests they cannot be divested of it except by the several well-known modes recognized by law ."

The Law does not and cannot recognize an interval between the death and the passing of property, since rights and obligations, from which perspective only, property and legal relationships are identified in law, have to be, at any given point of time vested or reposed in a person or a legal entity.

Moving from the general propositions stated above, to the specific facts of the case; when the aircraft in which Wijewardena was travelling disappeared on 13.02.1983, and he was not heard of thereafter; the obvious question that arose in relation to his property rights and obligations was whether they could be dealt with on the basis Wijewardena was alive or on the basis he was dead. The preceding analysis reveals that from a legal perspective as to property rights and obligations, there could be no intermediate situation.

The question whether a person is dead or alive, is one of fact and in this instance the fact in issue is the date of death since the estate for purpose of Testamentary proceedings came into existence on that date and the property rights and obligations thereupon pass to the heirs. There is no direct evidence as to the death of Mr. Wijewardena. However, this does preclude the proof of that fact with circumstantial evidence. Although, a basic premise of our Law of Evidence, it is relevant to state here the standard of proof that would apply. Section 3 of the Evidence Ordinance states as follows :

> *" A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."*

Documentary evidence was adduced by the Respondents with their petition dated 02.04.1997 filed in the District Court seeking an accounting from 13.02.1983, alleging that on a balance of probability that Mr. Wijewardena died on that date. Upon an acceptance of the evidence the impugned orders have been made by District Court and the Court of Appeal. However, it is obvious that this evidence was available to them as far back as 1983. The significant matter is that neither the Respondents, nor the Appellant nor any of the persons who had claims against Mr. Wijewardena, sought to assert that the death took place on 12.02.1983 and to institute Testamentary proceedings, at that stage, on this material. They all chose to go along with what is generally described as the "presumption as to life and death" as contained in Section 107 and 108 of the Evidence Ordinance. These two sections that appear in the part dealing with the burden of proof, prior to the amendment to Section 108 effected by Act, No. 10 of 1988 read as follows :-

107. "When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it".

108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Coomaraswamy in his book on the Law of Evidence (Vol. II book I at page 429) describes the operation of the presumption of life thus :

"When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. In other words, the court has to presume that the man is alive until the contrary is proved by those who affirm that he is dead. If not so proved, those who affirm that he is alive will succeed. This is known in English Law as the presumption as to continuance of life. It derives its authority from the presumption of continuance recognized in Section 114(c), but it appears to be obligatory, whereas Section 114(c) is discretionary. It is a rebuttable presumption."

These two sections do not lay down inflexible principles of law. They are only rules of evidence that state the burden in a proceeding before any

Court in which the fact in issue is whether a person is dead or alive. In terms of Section 107 where it is shown that the person was alive within thirty years, it is presumed for evidentiary purposes that the person continues to be alive and the fact of death has to be proved by the person who alleges it, on a balance of probability as noted above. Section 108 is a proviso which comes into operation in the background of the presumption of life as contained in Section 107. The manner in which the proviso works, could be stated in practical terms as follows :

The presumption of life continues to apply since the person has been alive within thirty years and a party not being possessed of evidence to prove the fact of death, adduces evidence short of that by proving that the person has not been heard for seven years (prior to the amendment) by those who would naturally have heard of him if he had been alive, then the presumption shifts and it is presumed that the person is dead. In such circumstances the party who alleges that the person is alive has to prove that fact on a balance of probability. The presumption of life is no longer operative.

It is now necessary to apply these presumptions to the facts of this case.

As at 13.02.1983 being the date of disappearance of Wijewardena had been alive within thirty years. Therefore, Mr. he is presumed to be alive. The Appellant and others who dealt with his property, rights and obligations functioned on the premise that he was alive and the Appellant acted for and on his behalf. Section 107 which lays down the presumption of life does not debar any person from adducing evidence and proving the fact of death. The Respondents did not avail of this option. By Act, No. 10 of 1988, Section 108 was amended by substituting a period one year in place of the period of seven years. The amendment was certified on 21.04.1988 and within one week on 28.04.1988 the Appellant filed the present case for Letters of Administration pleading specifically that Wijewardena should be presumed to be dead in terms of Section 108 of the Evidence Ordinance as amended. The present Respondents who were cited in that application accepted that basis and agreed to the grant of Letters of Administration.

The question to be considered is whether in this state of things, the Respondents could nearly nine years later, in April 1997 file papers alleging

that, Mr. Wijewardena died on 13.02.1983. To my mind the following points militate against this belated change of position on the part of the Respondents, which found favour with the District Court and the Court of Appeal. They are :

(i) After the disappearance of Mr. Wijewardena on 13.02.1983 the Appellant acting on the presumption of life dealt with his affairs in terms of the power of Attorney as stated above. The Respondents who knew of this course of action, did not seek to stop it by instituting a Testamentary proceeding on the documentary evidence as to the disappearance which according to them establish on a balance or probability that Mr. Wijewardena, died on 13.02.1983.

(ii) On 07.10.1987 the Respondents filed case No. 30927/T for Letters of Administration on the premise that Mr Wijewardena died on 13.02.1983. It is significant that they relied on the same documentary evidence adduced with the petition dated 02.04.1997 to prove the fact of death and also made the same allegation that the Appellant fraudulently and wrongfully dealt with the affairs on the basis of the Power of Attorney. The Respondents later withdrew this application and all proceeding in the court of Appeal, filed from the order of the Additional District Judge refusing to sign the Order Nisi in their favour, without any reservation of their right to reagitate the same matter;

(iii) In the Settlement Agreement, the Respondents specifically withdrew the allegation in paragraph 7 of their petition dated 07.10.1987 filed in case No. 30927/T which reads as follows :

"The Petitioners (present Respondent) have reasons to believe that the Respondent (present Appellant) has been willfully asserting that the said deceased is still alive for the unlawfully and illegal purpose of administering wrongfully intermeddling and to do what she solely wishes with the considerable assets of the deceased without any authority or supervision from this Court and also completely disregarding the rights and interests of the Petitioners who are the sisters of the late Upali Wijewardena (deceased)" Thereby, they accepted the validity of the action taken by the

Appellant on the basis of that Wijewardena was alive by virtue of the power of attorney. Their acquiescence in the course of action taken by the Appellant is confirmed by the acceptance of Directorships in companies formed after 13.02.1983 in terms of that Power of Attorney.

(iv) The Respondents consented to Letters of Administration being granted to the Appellant in her application in which the fact of death is asserted in terms of Section 108 of the Evidence Ordinance, as amended. The Respondents did not contest this position at that stage and seek to establish that the death took place on 13.02.1983. On the contrary, they withdrew their application for Letters filed on that basis as noted in (ii) above.

The Respondents have thus acquiesced in the course of action taken by the Appellant after 13.02.1983 in attending the affairs of Mr. Wijewardena in terms of the Power of Attorney. On the basis of their conduct itemized above including the Settlement Agreement and the two Testamentary cases, they are estopped in law from asserting in 1997 that Mr. Wijewardena's date of death, for the purpose of the administration of his estate, should be taken as 13.02.1983. The operation of the doctrine of estoppel is stated in Section 115 of the Evidence Ordinance as follows :

"When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief , neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. "

In England the doctrine of estoppel has been stated as a general principle by Lord Denning M. R. in the following statement made in Amalgamated Investment and Property Co. Ltd., *vs.* Texas Commerce International Bank Ltd. (2)

"The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become over loaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been

sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth, All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption-either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

Although, certain doubts have been expressed in England or to the Application of a unified doctrine of estoppel, the statement of Lord Denning could be read in harmony with the principle in Section 115 of our Evidence Ordinance.

The Appellant applied for Letters of Administration on the basis of the presumption in Section 108 of the Evidence Ordinance, as amended. The Respondents who had previously applied for Letters on the basis of circumstantial evidence that the death took place on 13.02.1983 dropped that premise and acquiesced in the position taken by the Appellant. The Court has to decide the fact in issue as to date of death in relation to the parties and then apply it to property, obligations and so on, as noted above. There is no question of the date of death being decided as a matter of general or public importance, in which event different considerations may have to be taken into account. Between the parties, based on their conduct, as analysed above, the date of death must necessarily be decided on the basis of the application of the presumption in Section 108 of the Evidence Ordinance, as amended. This process of reasoning may not be amenable to common sense or logic but, from the perspective of the Law, the reasoning has to be applied so that at any given point of time, it produces a clear and unambiguous answer as to whether a person is considered as alive or dead. There cannot be any intermediate period of doubt or ambiguity. The preceding analysis shows that rights and obligations in relation to property and transactions are workable only on a clearly defined line of demarcation in which a person is considered to be alive upto a specified date and dead thereafter. As at the date of death thus determined, the estate comes into being and the rights and obligations in

relation to property and transactions that survive after death, pass to the heirs or persons to whom they are devised or bequeathed.

The presumption of death in Section 108 is a proviso to the general presumption of continuity as contained in Section 107. The general presumption as to continuity of life is couched in wide terms for obvious reasons. In the absence of specific evidence as to the fact of death, the law has to presume that the person who was alive continues to be alive. In this background of a presumption of continuity of life, the presumption of death as contained in the proviso operates only where it is "proved" that the person "has not been head of for seven years (prior to the amendment) by those who would have naturally heard of him, if he had been alive." On the reasoning set out above, the question can now be narrowed down to its core. On what date does the presumption of death begin to operate? Does it relate back to the date the person was not heard of as contended by the Respondents? Or, is it at the end of the period as contended by the Appellant?

If the answer is based on the principle of relation back as contended by the Respondents, the person will now be presumed to be dead during the period he was presumed to be alive in terms of Section 107. As noted above, for rights and obligations in relation to property and transactions to be worked, there has to be a clear dividing line, A person cannot be presumed to be alive and dead during the same period. If so, all transactions entered on the basis that the person is alive would be put asunder and there would be uncertainty as to their validity. Furthermore, in terms of Section 108, the presumption arises only when it is "proved that he has not been heard of for seven years (prior to the amendment) by those who would naturally have heard of him if he had been alive...." The fact could be said to be 'proved' only at the end of the period.

The conclusion arrived at pursuant to the preceding analysis, flowing from the Law of Property, to succession and the application of Section 107 and 108 of the Evidence Ordinance is supported by the series of judgments in England which relate to trusts, legacies, prescription and bigamy cited by President's Counsel for the Appellant. In all these cases the evidence was that the person in question disappeared and it has been consistently held that the absence of evidence as to the date of death, the fact of death has to be presumed at the end of the period of seven years.

In a chronological order the cases are as follows :

1. Doe vs. Nepean (3) Judgment of Denman C. J.
2. Re. Benham's Trusts (4)
3. Re. Phenes Trust (5)
4. Re. Rhodes; Rhodes vs. Rhodes (6)
5. Rex vs. Taylor (7)
6. Warkins vs. Warkins (8)
7. Thompson vs. Thompson (9)

A further complication arises in this case from the amendments to section 108 of the Evidence Ordinance effected by Act, No. 10 of 1989 certified on 21.04.1988. The amendment simply substitutes three words "for one year" in place of the words "for seven years" in Section 108. I would reproduce the comment made by Coomaraswamy with regard to this amendment with which I am in entire agreement:

> *"Prior to the 21st April, 1988, when Amendment Act, No. 10 of 1988 was certified, the Ordinance, following the wisdom of more mature systems like the English Law very properly fixed this period at seven years. But the Amendment drastically reduced the period to one year. It is submitted that this is a retrograde step which will lead to many complicated and anomalous situations and should be rectified forthwith. To depart from a provision which has worked satisfactorily and which was based on the wisdom of the ages and to amend the law in this way, perhaps in order to benefit one individual or more, is not in the best interests of justice and can do violence to the symmetry of the law. It imposes an unnecessary heavy burden on those who seek to show that the person is alive. It will also result in the fouling of title to property. It certainly shows the wisdom of the legislature in a very poor light. " (Vol. II Book 1, P.430)*

When the amendment came into force on 21.04.1988 a period of 5 years and 2 months had elapsed from the date of disappearance. Therefore, the presumption of life was operative. With the amendment the fact of death could be presumed after one year. The question is from which date should the period of one year be computed. Is it one year immediately preceding 21.04.1988 as contended by President's Counsel for the Appellant or one year from the date of disappearance as contended in

particular by Counsel for the 2nd Respondent. I am inclined to agree with the submission of President's Counsel for the Appellant for two reasons:

Firstly, the amendment is to the Evidence Ordinance is procedural in nature. It applies prospectively and a party could avail of its provisions and institute proceedings only after it comes into force. Therefore, the earliest date on which a party could establish the fact of death on the basis of the presumption is the date on which the law came into operation. A fortiori, the relevant period within which it should be proved that the person was not heard is the period of one year immediately preceding that date.

Secondly, if the presumption of death is to relate back to one year after 13.02.1983, as contended by Counsel for the 2nd Respondent or to 13.02.1983 itself as contended by Presidents Counsel for the 1st Respondent, it would lead to a incongruous result, as noted above, in which the person would be presumed to be alive as well as be dead during the same period.

For these reasons I uphold the submission of President's Counsel for the Appellant that the date of death for the purpose of the estate should be taken as 21.04.1988 as being the earliest date on which it could be established in terms of Section 108 of the Evidence Ordinance that the presumption of death applies.

President's Counsel for the 1st Respondent has submitted that the Appellant should be considered as an *Executor de son tort* from the date on which she started to intermeddle with the estate of the deceased being the date of disappearance. He cited the following passage from Wharton's Lexicon and from Executors and Administrators by N. E. Mustoe :

"Executor de son tort,..... If a stranger takes upon himself to act as executor or administrator (see. 14 Halsbury's L of E, 2nd edn. Para 282), without any just authority (as by intermeddling with the goods of the deceased, and any other transactions), he is called in law an executor of his own wrong, de son tort, and is liable to the extent of the assets which have come to him and to all the trouble of an executorship without any of the profits or advantages ...."

An executor de son tort can discharge his liability by obtaining probate if he is entitled, or by accounting to the personal representative, or to the Court, in an administration by the Court."

(Whartons Lexicon 14th edition page 390)

"Any person who is not an executor or an administrator , but who intermeddles with the deceased's property, may make himself liable to the obligations of an executor de son tort (by his own wrong). Very slight acts on intermeddling, will make a person an executor de son tort, e.g. advertising for claims, paying or receiving payment of debts, or carrying on the deceased's business." (Executors and Administrators by N. E. Mustoe 4th Ed. page 6)

The preceding analysis reveals that from the perspective of the Law the property of a person has to be dealt with on the basis that he is alive or dead with a clear dividing line. As at the date of disappearance, the presumption of life was operative and the affairs of Mr. Wijewardena were carried on, on the basis he was alive. The finding stated above is that, the presumption of death operates from 21.04.1988 being the earliest date on which the matter could have been established in Court. It is a sine qua non for a person to be considered an *Executor de son tort*, that it be established in the first instance that the person is dead and there is an estate. Therefore the liability of an *Executor de son tort* cannot be attributed to the Appellant in the manner contended for by Counsel. If at all, the Appellant could be considered an *Executor de son tort* from 21.04.1988. This would be unnecessary since the doctrine of relation back relied on by the Respondents would apply and the letters granted subsequently would relate to the date of death as determined. In this connection I would cite the following passage from Whartons Law Lexicon - 4th Edn. - Page 858 relied on by the Respondents -

"Relation, where two different times or things are accounted as one, and by some act done the thing subsequent is said to take effect 'by relation' from the time preceding. Thus letters of administration relate back to the intestate's death, and not to the time when they were granted."

Accordingly I allow the appeal and set aside the order dated 28.11.1997 of the District Court and the judgment dated 11.01.1999 of the Court of Appeal. The Appellant being the Administratrix of the Estate is directed to file the inventory and final account on the basis of that the Eatate of the deceased came into being on 21.04.1988. Since the Administratrix has failed to file any account either in compliance of the Settlement Agreement

or in compliance with the order made by the District Court, she is directed to file the said inventory and account finally within 3 months of the date of this Judgement.

No costs.

JAYASINGHE , J.,— I agree.,

Appeal allowed.

SHIRANI A. BANDARANAYAKE, J. (Dissenting)

I have had the benefit of reading, in draft, the judgment of His Lordship the Chief Justice. Whilst I am in agreement with the factual position considered in the said draft, I regret very much that I am unable to agree with His Lordship's answer to the question as to the exact date of the presumption of death begins to operate, in connection to the estate of the deceased coming into being to the appellant for the purpose of inventing and accounting. The reasons for my inability to agree with the draft judgment are as follows :

At the stage of granting Special Leave to Appeal, both parties were permitted to raise questions on which the appeal was to be considered and consequently three questions were so raised. However, learned President's Counsel for the appellant made submissions mainly on question No. 3, which was in the following terms:

> "In view of the appellant's application for letters of administration being filed on 28.04.1988 on the basis of the amendment to section 108 of the Evidence Ordinance, which came into force on 21.04.1988, that date should be taken as the date on which the estate came into being and the operative date for the inventing and the accounting.".

Having considered the aforementioned question, it has been narrowed down in the draft judgment to read as follows:

"On what date does the presumption of death begin to operate? Does it relate back to the date of the person was not heard of as contended by the respondents? Or is it at the end of the period as contended by the appellant?"

The appeal was chiefly considered on the basis of Sections 107 and 108 of the Evidence Ordinance. These two sections are contained in Part III, which deals with the burden of proof. Section 107 of the Evidence Ordinance could be regarded as a provision which considers the burden of proof of the death of a person known to have been alive within thirty years and Section 108 refers to the burden of proof regarding a person who is alive and has not been heard of for seven years. Having said that, it is also necessary to be borne in mind that both these sections are also referred to as sections dealing with the presumption of death and the presumption of continuance of life. Considering this aspect, E. R. S. R. Coomaraswamy, (The Law of Evidence, Vol. II, Book I, pp. 428-429) is of the view that,

"The fact is that rules as to burden of proof and presumptions are so involved together that it is artificial to separate a given situation and to state that it is a pure rule of the burden of proof and not of a presumption. Every rebuttable presumption in favour of one party necessarily involves a rule as to burden of proof in the other and *vice versa*. It is, therefore, proposed to consider the rules in sections 107, 108, 109, 110 and 111 as giving rise to the contrary presumptions which a court shall draw.".

At the same time it would be necessary to be borne in mind that there is a school of thought that Sections 107 and 108 of the Evidence Ordinance do not enact a presumption of law or fact, but enact rules governing the burden of proof. In fact Basnayake, C. J. , in *Davoodbhoy* v. *Farook* [10] observed that,

"It is essential to bear in mind that Sections 107 and 108 do not enact a presumption of law or fact, but enact rules governing the burden of proof like any one of the other rules that precede them.".

A similar view was taken by Pulle, J., in the same decision to the effect that,

"A rule of evidence as to burden of proof does not generate a presumption of fact."

The view that has been taken by Pulle, J., thus emphasizes the fact that one cannot always discharge the burden that the person in question is dead by leading evidence to indicate that the said person had not been heard of for seven years by those who would naturally have heard from him. It would be necessary according to Pulle, J., to prove such death in terms of Section 101 of the Evidence Ordinance. In Pulle, J.,'s words :

> "In my view there is nothing in section 108, which compels a Court to hold, upon proof that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, that the fact of that person's death has been established by him on whom the burden lies under Section 101 to prove such death.".

Sections 107 and 108 of the Evidence Ordinance, No. 14 of 1895 reads as follows:

> "Section 107-
> When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.
>
> Section 108 -
> Provided that, when the question is whether a man is alive or dead, and it is proved that he is not being heard of for seven years by those who would naturally have head of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.".

The Period of seven years referred to in Section 108 was amended by Act , No. 10 of 1988 by reducing the period of seven years to one year. This amendment was certified on 21.04.1988.

According to Section 108 of the Evidence Ordinance, when the question as to whether a person is alive or dead is taken into consideration, and it is proved that the person referred to has not been seen or heard of for, earlier seven years and since April 1988, for one year, by those who would have naturally have heard from him, in the event if he was alive, the burden of proving that the said person is alive is shifted to the person who relies on it.

A careful consideration of the contents in sections 107 and 108, indicate that both sections should be read together as the latter is a proviso to the

earlier Section. Whilst section 107 creates a legal presumption, of continuance of life if nothing is shown to the contrary, section 108 provides for the burden of proving that a person to be alive by shifting it to the person asserting it by denying the death. Considering the operation of section 108 of the Evidence Ordinance, H. N. G. Fernando, C. J., in *Pattison* v. *Kalutara* Special *Criminal Investigation Bureau* [11] stated that,

> "Section 108 of the Evidence Ordinance provides that when a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to them who affirm that he is alive."

However, it is to be borne in mind that section 107 does not create a presumption as to the time of death of a person in question. Therefore this section will not be applicable to a case where the question is not whether a person is alive or dead, but whether a person died on a specific date. Considering this position, E.R. S.R. Coomaraswamy is of the view that,

> "A party who asserts that a person was alive at a certain date must prove such fact."

In fact in *Assistant Government Agent* v. *Fernando* [12] Wendt J., considering the provision in section 107 stated that, there is no presumption as to the continuance of life or of an admitted marriage. A party who asserts that a person was alive at a particular date must prove it. In Wendt, J.'s words :

> "Section 107 of the Evidence Ordinance is not applicable, because, as pointed out by Lascelles, A. C. J. on October 11, 1906, in the case No. 4,365, C. R. Kalutara brought by Siman Perera's widow, the question here is not whether Justina is alive or dead, but whether she (known to have been dead in 1855) died before or after July, 1852."

Wharton's Law Lexicon, (4th Edition pg. 796) defines the presumption of life or death and the details are given in the following form:

> "When a person is once shown to have been living, the law will in general presume that he is still alive, unless after a lapse of time considerably exceeding the ordinary duration of human life; but if there be evidence of his continued unexplained absence from home and if

the non-receipt of intelligence concerning him for a period of seven years, the presumption of life ceases and he is presumed to be dead at the end of seven years. **But the law raises no presumption as to the time of his death.** And therefore, if any one has to establish the precise time during those seven years at which such person died, he must do so by evidence."

In support of this position Law Lexicon refers to the decisions in *Doe* v. *Nepean (13) Nepean* v. *Doe (14) and Re Rhodes* (15).

The appellant's contention is that she conducted the affairs of the business and properties of the deceased until after the expiry of the period applicable for the presumption in terms of section 108 and thereafter filed the testamentary action. Her submission was that the estate of the deceased came into existence on the day where the period of 7 years is expired. Therefore although the deceased was not seen after 13.02.1983, the appellant had dealt with his property as if he was alive or living elsewhere. According to Coomaraswamy (Supra, Pg. 429-430) there is no presumption of law in favour of or against the continuance of life for any given period unless contained in a particular enactment.

The respondents have continued to state that the deceased was last seen or heard on 13.02.1983. The appellant has not disputed this fact nor has she taken any steps to prove anything to the contrary. Therefore there could not be any dispute between the parties that the deceased was last seen or heard on 13.02.1983.

Considering sections 107 and 108 of the Evidence Ordinance, it is abundantly clear that in terms of section 108 if a person has not been heard of for seven years (presently one year) by those who would normally have heard of him, had he been alive, the presumption of continuance would cease and the burden of proving the person to be alive shifts to the person who asserts the said presumption by denying death. This position was taken in *Re Phene's Trusts* (Supra) where it was stated that,

"If a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption, but of evidence and the onus of proving that the death took place at any particular time within the seven

years lies upon the person who claims a right to the establishment of which that fact is essential.".

The question that arises at this juncture is whether it is necessary to ascertain the exact date of death of the deceased. The answer to this question is that the need would depend on the circumstances of each instance and therefore it would vary from case to case. For instance in a case where the court has to adjudicate a claim of prescription by a third party, the date of death may become important. Similarly, in an instance where letters of administration or probate is granted the need to know the exact date of the death of the deceased could arise. In fact it appears that one of the most important situations that could arise along with the circumstances under consideration would be with regard to matters pertaining to the deceased person's estate.

In *Hamy Vel Muladeniya* v. *Siyatu* (16) the Court held that when a person is presumed to be dead in accordance with the provisions of section 108, his property has to be divided among his heirs. Further, it is to be borne in mind that there cannot be an interval between the death of a person and passing of his property to the heirs. In fact in *Silva* v. *Silva* (Supra) a full Bench held that on the death of a person, his estate, in the absence of a will, passes at once by operation of law to his heirs, and that the *dominium* vests in them. This has been an accepted principle and that in *Tikiri Banda* v. *Ratwatte* (17) a case decided in 1894, Lawrie, J. and Withers, J. had held that the succession of the estate of an intestate, devolved immediately upon his death. Accordingly as a safeguard and chiefly to prevent any injury occurring to the deceased person's estate, the English Courts have adopted the doctrine of relation back in testamentary proceedings.

Halsbury's Laws of England (4th Edition, Vol. 17(2), Pg. 26 Para. 35) refers to the doctrine of relation back. With regard to the relation back of administrator's title, it is stated that,

> "In order to prevent injury being done to deceased person's estate without remedy, the courts have adopted the doctrine that on the grant being made the administrator's title relates back to the time of death. This doctrine has been consistently applied in aid of an administrator seeking to recover against a person who has dealt wrongfully with the deceased's chattles or chattles real. It is also applicable against a person dealing wrongfully with the deceased's real estate .".

Wharton's Law of Lexicon (Supra, at Pg. 858) also refers to the doctrine of relation back and defines the said doctrine in the following terms:

> "Relation, where two different times or other things are accounted as one, and by some act done the thing subsequent is said to take effect 'by relation' from the time preceding. **Thus letters of administration relate back to the intestate's death, and not to the time when they were granted** (See *Re Pryse* 1904 Pg. 301. *Foster* v. *Bates* (1843) 12 M & W 226) (emphasis added)".

As referred to earlier there is no such presumption as to the date or time of a person's death. If the question in issue is the date and/or the time of the death that is to be taken up as a matter that has to be proved by evidence. The respondents had contended that the deceased died on 13.02.1983 and this has not been challenged by the appellant. In fact the appellant concedes that she had last heard from him on 13.02.1983.

In such circumstances, the estate of the deceased, in the absence of a will, have to pass at once by operation of law to his heirs and no one other than the executor or an administrator could intermeddle with such property. Infact N. E. Mustoe (Executors and Administrators, 4th Edition, Pg. 6) observed that,

> "Any person, who is not an executor or an administrator, but who intermeddles with the deceased's property, may make himself liable to the obligations of an executor *de son tort* (by his own wrong). Very slight acts of intermeddling will make a person an executor *de son tort, e.g.*— advertising for claim, paying or receiving payment of debts' or carrying on the deceased's business.".

Actions based on the English Law as to an executor *de son tort,* has been recognised by our Courts, as Bonser, C. J., as far back as in 1901 had stated in *Prins* v. *Peiris* (18) that —

> "Then, Mr. Walter Pereira argued, as I understand him, that the English Law as to an executor *de son tort* was not in force in this island. It seems to me rather late in the day to argue that : there have been numerous cases in which such actions have been recognized by this Court."

This position is applicable to the estate of a spouse. In *Silva* v. *Salman* (19) Wood Renton, C. J., had clearly stated that,

> "Had she applied for administration of her husband's estate, she was the natural person to have obtained it; not having and done so and having intermeddled with the estate by paying off the debts, she is in the position of an executrix *de son tort*,".

There are two other matters I wish to consider in connection with the matter in issue. Firstly, it was the contention of the learned President's Counsel for the appellant that the appellant is liable to account on the basis of an Administratrix only from the date on which the estate came into being, namely 21.04.1988. The significance of the date is that the amendment to the Evidence Ordinance, which amended section 108 of the Evidence Ordinance came into force on that day. Therefore the date suggested is not a date, which was arrived at, either according to the provisions of the Evidence Ordinance, or in terms of the provisions of the amended section. It is also important to be borne in mind that, the appellant did not wait for a period of one year from the date of the amendment, but filed her action seven days after the amendment Act came into operation. In the circumstances, I cannot see any basis for the date of the amended section 108, which came into force to be regarded as the date of the death of the deceased and in my view the contention that the death is to be presumed as at on 21.04.1988, is not only contradictory and untenable, but also is an attempt to give an artificial and baseless interpretation to the amended section.

Secondly, seeking the advantage of the presumption in terms of sections 107 and 108 could be for a variety of reasons. A sudden disappearance of a person may bring in numerous kinds of issues that would have to be looked into. The complexities could be on the basis of marriage, retirement benefits, payments on an insurance policy or as in this appeal the question of administering the estate, which includes the accounting and inventing. As has been stated earlier, there is no presumption as to the time of a person's death, which has to be proved by evidence and clearly the presumption of death does not extend to the date of death. In English Law, as Coomaraswamy points out (Supra Pg. 431) the presumption of death has been used to repel a charge of bigamy, to justify remarriage and to justify a divorce.

Considering the totality of the aforementioned circumstances and the legality of the situation, it would appear that in a situation where as in the present case, the following aspects would have to be taken into account :

a. when there is a situation arising out of a disappearance of a person, there is no presumption as to the date or the time of the death of a person;

b. on the death of a person, who had died intestate, his estate passes at once, by operation of law, to his heirs;

c. any person who is not an executor or an administrator, but intermeddles with the deceased's property, may make himself liable to the obligations of an executor *de son tort* ;

d. as has been referred to in Halsbury's Laws of England (Volume 17(2), 4th Edition, Pg. 38) referring to the effects of acts of executor *de son tort,* the lawful acts done in the professed administration of the estate by a person purporting to act as personal representative which a rightful executor would have been bound to perform in due course of administration would bind the estate; and

e. considering the injuries that could be done to a deceased person's estate without remedy, the English Law recognizes the doctrine of relation back that would apply to testamentary proceedings. Thereby when the grant is made, the administrator's title relates back to the time of death.

In a series of cases (*Lal Chand Marwari* v. *Mahant Ramrup Gir and another* (20) Re Green's Settlement (21) *Dowley v. Winfield* (22) *Wing v. Angrave* (23) the courts have taken the view that if a person has not been heard of for a term of not less than seven years, there is a presumption of law that he is dead, but the onus of proving the death of a person at any particular date must rest with the person to whose title that fact is essential.

On the question of the time of the death based on the presumption an example was cited in *Hickman v. Upsall* (24) where circumstantial evidence of the time of the death was taken into consideration. The example was as follows:

"Suppose a person intending to return home at ten o'clock at night does not appear, there is no presumption that he is dead. But if after a week he is found with his skull broken in a wood, you can then conclude that he was killed before ten o'clock on the night on which he disappeared.".

The respondent's position was that the aircraft in which the deceased was a passenger disappeared after it left Kuala Lumpur at 21.09 Hrs. on 13.02.1983. Later it was reported that some fishermen in Indonesia had found a wheel of an aircraft and a part of a plane, which could be related to the ill-fated aircraft. None of these had been challenged by the appellant and she had not taken any steps to discharge the burden of establishing any other date other than 13.02.1983, the date suggested by the respondents on which the death of the deceased to have occurred. In fact the appellant contended that the deceased was in Malaysia on 13.02.1983 and he boarded his aircraft to fly back to Sri Lanka; but he never arrived in the country.

It is therefore not disputed that the deceased was expected to return to Sri Lanka after 21.09 Hrs. on 13.02.1983 and considering the aforementioned circumstances on the basis of the example given in *Hickman* v. *Upsall* (supra) the conclusion should be that the deceased met his death in or around the said time en route from Kuala Lumpur to Sri Lanka.

For the aforementioned reasons, I am of the view that 21.04.1988 cannot be taken as the date on which the estate of the deceased came into being as on the disappearance and the death of the deceased which apparently had occurred on 13.02.1983, in the absence of a will, the deceased person's estate passed at once by operation of law to his heirs on 13.02.1983, and such date should be taken into consideration as the date for the inventory and the accounting.

This appeal is accordingly dismissed and the order of the District Court dated 28.11.1997 and the judgment of the Court of Appeal dated 11.01.1999 are affirmed. The appellant being the administratrix of the estate is directed to file the inventory and final account on the basis of that the estate of the deceased came into being on 13.02.1983, within three months from today. There would be no costs.

Appeal dismissed.

By majority decision appeal allowed.

VIACOM INTERNATIONAL INC.
VS.
MAHARAJA ORGANISATION LTD. AND OTHERS

SUPREME COURT
S.N. SILVA, CJ.
UDALAGAMA, J AND,
FERNANDO, J
CASE No. SC (APPEAL) NO. 40/99
HIGH COURT (CIVIL) 21/93(3)
31ST SEPTEMBER AND 19TH OCTOBER 2004

Intellectual Property - Code of Intellectual Property Act, No. 52 of 1979 as amended - Registering of "MTV Music Television" and "Maharaja Television" - Sections 90 and 100 of the Code - Avoidance of confusion by viewers - Side by side comparison of the two marks.

The appellant objected to the registering of "MTV" as a trade mark by the 2nd respondent (Registrar of Patents and Trade Marks) The Maharaja mark was registered after the registration of the appellant's mark, "MTV Music Television". The appellant urged that the impugned registration would create confusion in the minds of viewers of television. A condition imposed by the 2nd respondent that neither party has the monopoly of the letters M. T. V. was of no avail. The 2nd respondent and the High Court both allowed the registration. The appellant appealed to the Supreme Court.

The respondents filed no affidavits of objection, whilst the 2nd respondent Registrar was prepared to abide by the decision of the court. The 2nd respondent also did not file an affidavit of objections.

HELD :

(I) The High Court's contention was that the way letters "MTV" are written in the two marks are different and therefore, one could clearly distinguish the two marks. The High Court came to this conclusion by a close, side by side comparison of the two marks ignoring previous decisions to the contrary.

Per Raja Fernando, J

"What is important is to consider the prominent parts of both marks and decide whether the prominent parts of the two marks taken as a whole with the

design/get up, closely resemble one another as to confuse the consumer..... The court should not compare the two marks meticulously"

2. A preliminary objection to the appeal that only the 2nd respondent, Registrar should have been made a party respondent was in error and ought to be rejected.

Cases referred to :

1. *Toklon v Davidson* 1915 32R pages 133-136
2. *Bacadi Company Limited* v *Vigal Kardi (Ahuja's Intellectual* Property Case) (1959) Vol 3 No. 3 Page XII
3. *N STLE SA* v *Multitech Lanka (Pvt) Ltd* (1999) 2 SLLR 298
4. *Arumugam* v *Seyed Abbas Air* 1964 Mad 206

APPEAL from the judgment of the High Court

K. Kanga - Iswaran, P. C. with *Dr. Harsha Cabraal* for plaintiff appellant.

Romesh de Silva, P. C. with *Hiran de Alwis* for 1st respondent.

S. Barrie, State Counsel for 2nd respondent.

Cur.adv.vult

28th April, 2005
RAJA FERNANDO, J.

The Plaintiff - Appellant Viacom International (hereinafter referred to as the Appellant) filed this appeal on 10.11.1999 to set aside the Order of the High Court of the Western Province sitting in Colombo in the exercise of its civil jurisdiction (hereinafter referred to as the Commercial High Court) dated 13th September 1999 and make order in favour of the appellant as prayed for in the plaint dated 11th August 1998.

Preliminary objection :

When this matter came up for hearing the appellant took up a preliminary objection that the 1st defendant - respondent, The Maharaja Organisation Ltd., (hereinafter referred to as the 1st respondent) was not entitled to be heard in this application as it had not taken part in the proceedings in the Commercial High Court. However it was agreed by the parties on 17th May 2004 that the objection to the participation of the 1st Respondent in

these proceedings be considered with the main appeal and that the parties would tender written submissions and further the court could make its order on the written submissions of the parties.

Accordingly the appellant filed his written submissions on 31.08.2004 and the 1st Respondent, his on 19.10.2004. The 2nd defendant - respondent The Director of Intellectual Property, (hereinafter referred to as the 2nd respondent) whose decision the Appellant is seeking to set aside did not file his written submissions.

Before proceeding to consider the main appeal of the Appellant it is necessary to initially make an order with regard to the preliminary objection raised by the Appellant regarding the participation of the 1st respondent in these proceedings.

Firstly, the 1st respondent is a party to the appeal named by the appellant and further the decision the Appellant is seeking to set aside is the decision of the Commercial High Court made affirming the Order of the 2nd Respondent made on 13th September 1998 in favour of the 1st respondent's Trade mark. Therefore it is the 1st respondent who is the party directly affected by the outcome of this appeal. Hence it is the view of the Court that apart from 1st respondent being a party to the appeal he being the party directly affected by the decision of the court he must necessarily be permitted to participate and heard in this appeal.

Accordingly I make order over-ruling the preliminary objection of the Appellant and permit the 1st respondent to participate and be heard in the proceedings of this appeal.

The Main appeal

The main appeal is on the Registration by the Director- General of Intellectual Property the 2nd respondent of the trade mark "MTV" under class 38 of the international classification as the trade mark of the 1st respondent the Maharaja Organisation made on 30th June, 1998.

The Background

The plaintiff - appellant, Viacom Incorporated in U. S. A. the user of the trade mark "MTV Music Television" which has been registered in the US

and in several other countries made an application to register its mark "MTV Music Television" in Sri Lanka on 15th May 1991 under application Nos. TM 61297 and TM 61298 in classes 38 and 41 respectively of the international classification and has prior registration for MTV.

Pursuant to an agreement with Teleshan Network (PVT) Ltd. of Sri Lanka and TNL television station the Appellant has been telecasting MTV Music Television in Sri Lanka, before Maharajah Television Commenced its telecast.

The 1st respondent made an application on 23rd May 1991 under application No. 61332 for the registration of the apiphabetical letters "MTV" in respect of communication in the same class 38 of the International classification. The said mark was accepted and published in terms of section 107 of the Code of Intellectual Property (hearing after referred to as the Code.) in the government gazette No. 830 of 29th July 1994 subject to the condition that the registration did not give the 1st respondent the right to exclusive use of the letters M. T. and V

Upon publication the Appellant filed notice of opposition in terms of section 107(2) of the Code of Intellectual Property on 18th January 1995.

The Applicant's opposition was :

(i) That the 1st Respondent's propounded mark will contravene the provisions of Section 99, 100 and 142 of the code.
(ii) That the Appellant had pending applications under the same class 38 in TM 61297 and class 41 in TM 61298 filed prior to the 1st respondent's application.
(iii) That the 1st respondent's propounded mark is not sought to be registered in good faith
(iv) That the propounded mark is likely to create the erroneous impression that the 1st respondent's services are the services of the appellant
(v) That the 1st respondent's propounded mark will give the impression that there is a connection or association between the 1st respondent's service and of the appellant.

After an inquiry the 2nd respondent made order on 30 th June 1998 allowing the 1st respondent's application for registration.

The appellant being aggrieved by the said order of the 2nd respondent appealed there from to the Commercial High Court under Section 182 of the code. The appeal of the Commercial High Court by the appellant was dismissed by the High Court on 13 th September 1998.

This appeal is to set aside the judgment of the Commercial High Court dated 13th September 1998 and make order in favour of the Appellant as prayed for in the plaint dated 11th August 1998.

Submissions of the parties.

The Appellant submits that the registration of the 1st Respondent's mark "MTV" by the 2nd Respondent is contrary to the provisions of the said Code and the Order of the learned Commercial High Court Judge is replete with irrelevant considerations made without due regard to the law and abundance of Judicial authority relating to Trade Marks.

Further it was submitted by the Appellant that the finding of the 2nd Respondent in registering the mark of the 1st respondent is entirely without merit and misconceived both as a matter of fact and of law.

It was the submission of the Appellant that in the Commercial High Court the 1st Respondent did not file proxy and/or answer or participate in the appeal before the Commercial High Court and the 2nd Respondent, the Director of Intellectual Property, informed court that he is not filing answer and that he will abide by the judgement of court.

In effect the 2nd respondent did not defend his order in the Commercial High Court or before this court.

The Commercial High Court disposed of the appeal solely on the affidavit, answer and written submissions of the appellant.

The 1st Respondent in his submissions filed in this court referring to the host of authorities cited by the Appellant attempts to dismiss them by merely stating that they are irrelevant and causes confusion rather than throw light on the matter.

It is the submission of the 1st Respondent that both Maharaja Television and Music Television made applications to register MTV as the Trade

Mark of each of them and that the Appellant objected to the registration of the 1st Respondent's trade mark and the 1st Respondent objected to the registration of the appellant's trade mark. The Registrar of Trade Marks the 2nd respondent permitted the registration of both marks with a disclaimer that no party is entitled to the exclusive use of the letters MTV.

The 1st Respondent submits that the 2nd Respondent and the learned High Court Judge have both come to the same conclusion that the mark will not cause deception or confusion in the minds of the public and that the viewers will ignore the common denominator of the two marks and will know clearly that one is Music TV and the other is Maharaja TV.

Merits of this Appeal

In terms of the code of Intellectual Property a "Mark" Means a Trade Mark or service mark serving to distinguish the goods or services of one from those of another.

The exclusive right in a mark may be acquired by registration under the Code. Unregistered marks are safeguarded under the provisions relating to unfair competition and the common law, under action for passing off.

Once an application for registration of a mark is received by the registrar, he is required to examine the mark in relation to the provisions of sections 99 and 100.

As submitted by the 1st respondent in his submissions what the 2nd Respondent, the Director of Intellectual Property, has done is to register both marks with a disclaimer that no party is entitled to the exclusive use of the letters MTV. This is contrary to the spirit and substance of the law on Trade marks.

A visible sign capable of distinguishing the goods or services of different enterprises can constitute a mark provided it is not inadmissible under section 99 and 100 of the Code. No trader or service provider should be permitted to monopolise alphabetical letters unless the mark consisting of such letters can constitute a valid mark and not inadmissible under Section 99 and 100.

The two marks have been registered without exclusive rights to the English alphabetical letters M T and V.

This position to my mind can not be valid.

The two letters "TV" is a standard abbreviation used all over the world for the word "Television", as such no party could claim exclusive rights for the use of the letters TV. Then the only letter left in the mark is the letter M. According to the evidence on record the Plaintiff -Appellant has extensively used "MTV" as a mark and acquired a reputation/identity and therefore when the letter M is taken together with the two descriptive letters TV as a whole the three letters MTV can stand as a valid mark. It is settled law that a mark should be taken as a whole. The Plaintiff-Appellant does not receive exclusive rights to the letters TV but he should receive exclusive rights to the combination of letters MTV in this instance. Thus others are not entitled to the use of the combination of letters MTV.

The law attempts to avoid 'confusion' in the minds of the public as to the source of the service. If both *Music* TV and *Maharaja* TV are permitted the use of the mark MTV it is hard to understand how the viewers could know the correct source of the service.

The learned High Court judge's contention is that the way the letters MTV are written in the two marks are different and therefore one could clearly distinguish the two marks. Further he has come to this conclusion by a close, side by side comparison of the two marks.

The learned trial judge has completely ignored the host of authorities which stipulate that, such side by side comparison is not the way to examine Trade marks. What is important is to consider the prominent parts of both marks and decide whether the prominent parts of the two marks taken as a whole with the design/get up, closely resemble one another as to confuse the consumer. Without doubt the prominent parts of both marks included in this appeal are the letters MTV. The court should not compare the two marks meticulously. As Lord Johnson expressed in *Tokalon v. Davidson* (1) "we are not supposed to scan the words and do microscopic inspections. It is a matter of general and casual point of view of a consumer walking into a shop."

When one considers the two marks in that light it is clear that both marks so closely resemble one another and the consumer/viewer is likely to be confused.

The initial question then to be decided is, when a particular programme is said to be telecast on "MTV" whether a viewer will be in a position to know which of the two channels this programme comes on; Music TV or Maharaja TV. If the answer to this simple question is that one cannot decide, then both Marks cannot co-exist and the second registration has to be cancelled.

The learned High Court Judge in deciding that the two marks are diametrically opposed to each other has engaged in a critical side by side examination of the two marks and of their presentation and a minute examination of each letter of the alphabet in the two marks.

It is settled law both in Sri Lanka, India and elsewhere that "In order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two marks are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so whether they are of such a character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such a overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him." *Bacardi Company Limited Vs. Vigal Kardi* (Ahuja's Intellectual property case (2)

In the case of *Nestle SA Vs. MultiTech Lanka (Pvt.) Ltd* (3), Fernando J. has in a trade mark/unfair competition dispute held that such dispute "cannot be decided by simply totting up and weighing resemblances and dissimilarities upon a side by side comparison of the marks".

The issue is whether a person who sees one in the absence of the other and who has in his mind's eye only a recollection of that other would think the two were the same. The mind's impression (idea) of the mark is critically important. The impression (idea) of the mark here is "MTV".

In Arumugam vs. *Seyed Abbas*(4) it has been held that "Striking resemblance between distinctive words of an existing registered trade mark and the proposed trade mark disentitles the latter to be registered."

Further the learned High Court Judge has ignored the phonetic resemblance of the two marks.

It is undisputed that the Plaintiff-Appellant applied to the Registrar of Patents and Trade Marks for the registration of the Trade mark "MTV Music Television" on 15th May, 1991 in applications numbered TM 61297 and TM 61298 in classes 38 and 41 respectively.

Whilst the Appellant's application was pending the 1st respondent Maharaja Organisation also filed an application on 23rd May 1991 for the registration of the alphabetical letters "MTV" with a devise in respect of Communication in Class 38 the same class as the appellant under application No. 61332.

The plaintiff-appellant objected to the registration of the Trade mark of the 1st respondent on the ground that the plaintiff-appellant being the registered owner of the Trade mark "MTV Music Television" under the same class as the 1st Respondent his rights under the Code would be contravened.

It is common ground that the plaintiff - appellant had the Trade mark "MTV Music Television" registered prior to the 1st Respondent in the same class. Therefore, another application to register the same trade mark or a similar trade mark which is likely to mislead or confuse the public as to the source of the service cannot be registered.

Eventhough, the original registration was subject to the condition that he will have no exclusive right to the alphabetical letters MTV, what the law attempts to prevent is confusion in the minds of the public as to the source of the service. As mentioned above the plaintiff-appellant is entitled to letter "M" with the letters T and V under the special circumstances relating to this matter.

The only way in which the same letters MTV could have been used as a trade mark by another is to either show that customers/viewers will not normally regard such letters as indicators of the Origin of the services concerned. it is the contention of the 1st Respondent that the letters combined in an artistic manner used by the 1st respondent is capable of distinguishing the services of the 1st respondent from the plaintiff- appellant.

The learned High Court Judge has come to that same conclusion by a minute and a side by side close scrutiny of the purported Trade mark of the 1st respondent.

As stated earlier in examining Trade Marks such side by side close scrutiny is not the approach to decipher trade marks. One must consider whether the public could without confusion identify the source of the goods or services offered under such trade mark.

In so deciding one invariably has to consider the services offered by the competing parties. Undoubtedly, both the plaintiff-appellant's "Music TV" and the 1st respondent's Maharaja TV are under the same Trade mark "MTV" offering the same services if not identical services. Therefore, the confusion in the minds of the public is more probable.

The learned High Court Judge has failed to properly consider the two marks under the law for the protection against unfair competition. He has not considered whether there has been an appropriation of the benefit of the good name or reputation of one for the commercial advantage of the other. Nor has he considered the use of the two marks concurrently in the same class and in respect of the same service and whether it would cause confusion, as given in Section 142 of the Code, resulting in an act of unfair competition.

It is evident on the affidavits and other documents filed by the appellant before the High Court that the appellant has been telecasting MTV music television in Sri Lanka and elsewhere even prior to the registration of the appellant's Trade mark MTV by the Director of Intellectual Property in Sri Lanka. It is the submission of the appellant that the 1st respondent was aware of the use of the mark by the appellant at the time the 1st respondent made his application for registration of a deceptively similar mark for registration under the same services.

There is merit in the submission of the appellant that their Trade mark MTV Music Television was in use long prior to the 1st respondent filing his application for registration of a similar mark and there would be unfair competition and even passing off.

The phonetic resemblance of the two marks is such that it is almost impossible for a person to distinguish between the two services. The

disclaimer recorded by the 2nd respondent in respect a of the letter M T and V is in the circumstances of this case of no relevance. As I mentioned earlier the use of MTV by both will lead to confusion among the public. Whether or not the 1st defendant-respondent intended such outcome is immaterial. Thus, his registration or use of letters MTV is contrary to the provisions relating to unfair competition and cannot be permitted. The unfair competition law safeguards not only the interest of traders and service providers but also the consumers.

Therefore I hold that the Registration by the 2nd respondent of the trade mark of the 1st respondent is contrary to the provisions of Sections 99, 100 and 142 of the code of Intellectual Property Act, No. 12 of 1979.

Accordingly, I set aside the judgment of the Commercial High Court, dated 13th September 1999 and also set aside the Order of the 2nd respondent dated 30th June 1998 allowing the 1st respondent to register Trade Mark No. 61332.

S. N. SILVA, C. J— I agree.

N. K. UDALAGAMA, J.— I agree.

Appeal allowed.

CHANDRASIRI V.
UNIVERSITY OF RUHUNA AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.
WEERASURIYA J, AND
JAYASINGHE, J.
SC (FR) APPLICATION NO 326/2003
23RD NOVEMBER 2004 AND 10TH JANUARY
AND 18TH MARCH, 2005
Fundamental Rights - "Warning" issued against the petitioner without proper

inquiry and arbitrarily - Arbitrary exercise of discretion by the University contrary to natural justice-Invalidity of warning - Article 12(1) of the Constitution.

The petitioner was a Senior Professor of Forensic Medicine of the Faculty of Medicine, University of Ruhuna. He was a PGIM Board certified JMO and a "Government Medical Officer" within the meaning of section 2 of the Code of Criminal Procedure Act, No. 15 of 1979 competent to hold post mortem examinations, examine persons in police investigation and act as an inquirer Into Sudden Deaths within specified Districts or other parts of the country as directed by Magistrates except the Western Province.

The petitioner and Dr. Ruwanpura who was also a Consultant Judicial Officer noted that paediatricians who were not attached to the Department of Health but attached to the Faculties of Universities were discharging the function of Judicial Medical Officers in child abuse cases. Hence the petitioner and Dr. Ruwanpura informed the Deputy Inspector General, Southern Range that Pediatricians who are not "Government Medical Officers" competent to undertake such work under the Code of Criminal Procedure Act were doing such unauthorized work. That letter was copied to the Attorney - General, Magistrates and the Chairman of the National Child Protection Authority (P4) dated 14.02.2002.

The University of Ruhunu at a Faculty Board meeting referred the said letter P4 to the Sri Lanka Medical Council for action. The council decided that the allegations made against the petitioner for sending that letter did not constitute professional misconduct.

Thereafter, on a decision of the University Council, a Committee was appointed to consider whether disciplinary action may be taken against the petitioner for writing the letter P4. It is to be noted that a preliminary inquiry should be held for that purpose. The Committee held that there was no necessity to hold a disciplinary inquiry against the petitioner but to avoid pain of mind to other members of the Board the petitioner should be warned.

Accordingly by letter dated 21.05.2002(P5) the second respondent (Vice Chancellor) warned the petitioner. The petitioner complained, *inter alia*, of violation of Article 12(1) of the Constitution.

HELD:

1. According to the University Establishments Code warning is not a punishment, but used only after an inquiry upon a charge sheet against the repitition of an act or omission. A copy of the warning letter has to be filed in the personal file of the person concerned.

2. In the circumstances, issue of a warning without a charge sheet and a preliminary inquiry was arbitrary.

3. Even if the Vice chancellor was authorized to issue a warning, the issue of the warning without a charge sheet and a preliminary inquiry was an arbitrary exercise of discretion in violation of Article 12(1) of the Constitution.

4. Discretion of a statutory body is never unfettered. It should be exercised according to law. Here the warning was issued contrary to the principles of natural justice.

5. The Committee could not have recommended the issue of a warning before holding an inquiry as directed by the Vice-Chancellor. The Committee exceeded its powers by recommending the warning and exceeded its jurisdiction.

6. The act of the Committee without jurisdiction and the warning by the Vice Chancellor were void in law, and had no legal effect.

7. For the above reasons, the petitioner's fundamental rights under Article 12(1) were infringed.

Cases referred to :

1. *Ram Krishna Dalmia* v. *S. R. Tendolkar* (1958) Air SC 538
2. *Saman Gupta* vs. *Jammu and Kashmir* (1983) Air SC 1235
3. *Padfield* vs. *Minister of Agriculture* (1968) A. C. 997
4. *Breen v. Amalgamated Engineering Union* (1971)1 All. E. R. 1148

APPLICATION for relief for infringement of fundamental rights

J. C. Weliamuna with *Govinda Jayasinghe* for petitioner.

Wijayadasa Rajapakse, P. C. with *Kapila Liyanagamage* for respondents.

Cur. adv. vult.

06th June 2005

SHIRANI BANDARANAYAKE, J.

The petitioner in this application is a Senior Professor of Forensic Medicine attached to the Faculty of Medicine, University of Ruhuna. According to the petitioner, he is the senior most Professor of Forensic Medicine in service and the senior most PGIM Board Certified (Board of Management of the Post Graduate Institute of Medicine) Consultant in Forensic Medicine in Sri Lanka. The petitioner has obtained several qualifications, has carried out extensive research where he has produced over 45 articles, and has served in several other countries in addition to being a Registered Medical Practitioner in the Sri Lanka Medical Council (p1, p1A-p1H and p2)

The petitioner had commenced his academic career in the University of Peradeniya as a Lecturer in Forensic Medicine in 1971. He had joined the University of Ruhuna on 20.04.1981 as a Professor of Forensic Medicine in the said University (P3).

The petitioner submitted that since 1981, as a Professor of Forensic Medicine of the University of Ruhuna, and a PGIM Board Certified Consultant JMO, he has performed Judicial Medical Services, such as examination of persons produced by the police and the Courts. He had also conducted forensic autopsies on orders of the Inquirors into sudden deaths and Magistrates in relation to sudden deaths within the Police divisions of Galle, Akmeemana, Poddala, Rathgama, Habaraduwa and Hikkaduwa. The petitioner had also conducted several Post Mortem Examinations from other places in the country, except Western Province, where so ordered by the Magistrates.

The petitioner complained that, by letter dated 21.05.2003 (P5), the 2nd respondent had informed him that, on the recommendations of the Committee appointed by the Council of the University, that the petitioner has been warned. Accordingly, he alleged that the decision contained in the document marked P5 has the effect of curtailing the petitioner's right to hold a lawful opinion and/or to express his views on a matter of public importance and therefore the said decision of the Council is violative of Articles 10 and/or 14(1)(a) of the Constitution. He further alleged that the conduct of the members of the Council of the University of Ruhuna and the decision that was contained in P5, is unfair, unreasonable, unlawful and therefore is in violation of the petitioner's fundamental rights guaranteed to him in terms of Article 12(1) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Articles 12(1) and 14(1) (g) of the Constitution.

The petitioner's complaint, is as follows:

At the time where the infringement the petitioner is now complaining took place, he was serving as the Senior Professor of Forensic Medicine at the Faculty of Medicine, University of Ruhuna. According to the petitioner, as a Professor of Forensic Medicine, he was required, *inter alia*, to discharge statutory duties, in addition to his teaching functions. The petitioner submitted that in terms of the provisions of section 122(1) of the Code of Criminal Procedure Act, No. 15 of 1979, where any officer in charge of a Police Station considered that the examination of any person by a medical practitioner is necessary for the conduct of an investigation, he may, with the consent of such person, cause such person to be examined by a Government Medical Officer. Section 2 of the said Code of Criminal Procedure Act defines the term "Government Medical Officers" to include any officer of the Department of Forensic Medicine of any Faculty of Medicine of any University of Sri Lanka.

The petitioner submitted that he and one Dr. P. R. Ruwanpura, who is also a Consultant Judicial Medical Officer, had noted that Paediatricians, who were not attached to the department of Health, but attached to the Faculties of the Universities, were discharging the functions of Judicial Medical Officers in child abuse cases. According to the petitioner, the said Dr. Ruwanpura and he were of the opinion that the peadiatricians who are not attached to the Department of Health do not fall within the definition of "Government Medical Officer" in terms of the provisions in the Code of Criminal Procedure Act, and therefore they are not entitled to examine children for medico-legal purposes and also to submit reports to the Police or to the Department of Probation and Childcare.

The Petitioner and the said Dr. Ruwanpura, by their letter dated 14.02.2002 drew the attention of the Deputy Inspector General of Police, Southern Range, to the said tendency on the part of the Paediatricians who are not attached to the Department of Health. The Petitioner submitted that the said letter was also copied to the officers who are responsible for the administration of criminal justice which included the Hon. the Attorney General, State Counsel who are appearing in the Magistrate's Courts and the Chairman of the National Child Protection Authority of Sri Lanka (P4).

Thereafter, one Dr.T. S. D. Amarasena, a Senior Lecture in Paediatrics at the Faculty of Medicine of the University of Ruhuna ,at a Faculty Board meeting held on 03.10.2002, where the petitioner was also present, informed the members that he has made a complaint to the Sri Lanka Medical Council against the petitioner for professional misconduct by sending the said letter marked as P4. The petitioner submitted that the said complaint made by Dr. Amerasena was considered by the Sri Lanka Medical Council along with the explanation given by the petitioner and it was decided by the Sri Lanka Medical Council that the allegations made against the petitioner do not amount to professional misconduct (P4A and P4B).

On 30.05.2003, to his surprise, the petitioner has received a letter dated 21.05.2003, signed by the 2nd respondent, which stated that , the petitioner has been warned on the recommendations of the Committee appointed by the Council (P5).

The petitioner sepcifically stated that as it transpires from P5, the Council of the University had appointed a sub-Committee to look into the purported allegations made against the petitioner. The petitioner submitted that no explanation whatsoever was sought from the petitioner either by the Council or by the said sub-Committee.

The petitioner's complaint is based on the decision of the Council of the 1st respondent University contained in the letter marked P5 to warn the petitioner. His contention is that, the said decision was taken contrary to the principles of natural justice and contrary to the disciplinary procedure laid down in the Establishments Code of the University Grants Commission and the Higher Educational Institutions (P8) (hereinafter referred to as the Establishments Code.).

The contention of the respondents is that in terms of paragraph 4:4 of Chapter XXII of the Establishments Code, a 'Warning' is not a punishment, but administered to caution the person concerned against the repetition of an act or an omission, which may lead to disciplinary action. Therefore, the submission of the learned President's Counsel for the respondents is that, in warning a person, the disciplinary authority need not follow the procedure and there is no need to hold a preliminary investigation and/or a formal disciplinary inquiry laid down in the Establishment Code. Notwithstanding the above, learned President's Counsel for the respondents

stated that, the Council of the1st respondent University at its 206th meeting held on 16th December 2002 had decided to appoint a sub-committee comprising the 4th, 13th and 15th respondents to held a preliminary investigation on the conduct of the petitioner in writing the letter P4 and sending such letter to several persons including the DIG, Southern Province. The sub-committee had come to the conclusion that in view of the circumstances relating to the writing of P4, there is no requirement to hold a disciplinary inquiry against the petitioner, but to avoid any pain of mind being caused to the other members of the Faculty by such actions in future, that the petitioner should be warned. Such recommendation of the said Committee was considered and approved by the Council at its 208th Meeting held on 24.02.2003 (1R4).

Learned President's Counsel for the respondents, further submitted that in terms of paragraph 8:1:1 of Chapter XXII of the Extablishments Code, a preliminary investigation is purely a fact finding exercise and therefore there is no requirement to seek for explanation from the petitioner. The contention of the respondents is that, even without a preliminary investigation by a sub-Committee, the petitioner could have been warned by the Council as the Council of the 1st respondent University is empowered to warn an acadamic without holding a preliminary investigation.

Further, learned President's Counsel for the repondents submitted that the petitioner had levelled serious allegations against 5 Senior Lecturers in Paediatrics by P4 and the petitioner had failed to substantiate the said allegations when requested to do so by the Dean and/or Faculty Board of the Faculty of Medicine.

Learned President's Counsel for the respondents therefore contended that, by warning the petitioner for the aforementioned incident which brought disrepute to the 1st respondent University, the respondents have acted fairly, reasonably and according to law.

The question in issue, arose due to a letter written by the petitioner and one Dr. Ruwanpura dated 14.02.2002, to the Deputy Inspector General of Police of Southern Range expressing the view they held that the Paediatricians who are not attached to the Department of Health are not entitled to examine children for medico-legal purposes and to submit reports to the police or to the Department of Probation and Childcare (P4).

On the basis of the aforementioned letter, the Faculty Board of the Faculty of Medicine of the University of Ruhuna made a request to the Council of the University to take disciplinary action against the petitioner for writing the letter dated 14.02.2002 (P4). In fact the 8th repondent, the Dean of the Faculty of Medicine has written to the 2nd respondent on 26.08.2002, in the following terms:

"I request you to take urgent steps to institute a formal inquiry against Prof. N. Chandrasiri as recommended by the Faculty Board at its meeting held on 08.08.2002."

When this matter was placed before the Council of the University of Ruhuna at its 206th meeting held on 16.02.2002 (IR2), it was decided to appoint a Committe to consider whether there is sufficient material to hold a disciplinary inquiry against the petitioner. The said decision was in the following terms :

"206.10.01
මහාචාර්ය නිරිඇල්ලගේ චන්ද්‍රසිරි මහතාගේ ක්‍රියා කලාපය සම්බන්ධයෙන් 2000.08.08 දින පැවති වෛද්‍ය පීඨ මණ්ඩලය විසින් කර ඇති ඉල්ලීම : (206.04.22)

මෙම විශ්වවිද්‍යාලයේ වෛද්‍ය පීඨයේ අධිකරණ වෛද්‍ය විද්‍යා මහාචාර්ය නිරිඇල්ලගේ චන්ද්‍රසිරි මහතා විසින් වෛද්‍ය පීඨයේ ළමාරෝග අධ්‍යාතංශයේ ජ්‍යෙෂ්ඨ ආචාර්යවරුන්ට එරෙහිව අසත්‍ය කරුණු ඇතුළත් ලිපි 38 ක් පිටපත් සහිතව දකුණු පළාතේ නියෝජ්‍ය පොලිස්පතිට යවා ඇති බවත්, මේ පිළිබඳව වෛද්‍ය පීඨයේ සාකච්ඡා වූ බවත්, ඒ සම්බන්ධයෙන් මහාචාර්ය චන්ද්‍රසිරි නිරිඇල්ල මහතාට විරුද්ධව විනය පරීක්ෂණයක් පවත්වන ලෙස වෛද්‍ය පීඨ මණ්ඩලය ඉල්ලීමක් කර ඇතැයි වෛද්‍ය පීඨාධිපති ප්‍රකාශ කළේය.

වෛද්‍ය පීඨාධිපති විසින් එවූ ලිපිය දැනට පාලක සභා සාමාජිකයින්ට යවා ඇති බව උපකුලපති ප්‍රකාශ කළේය. මේ සම්බන්ධයෙන් සාකච්ඡා කළ පාලක සභාව මහාචාර්ය චන්ද්‍රසිරි නිරිඇල්ල මහතාට විරුද්ධව විනය පරීක්ෂණයක් පැවැත්වීමට තරම් කරුණු තිබේදැයි සොයා බැලීමට පාලක සභාව විසින් පහත නම් සඳහන් අයගෙන් සමන්විත කමිටුව නම් කරන ලදී.

මෙයට අදාළ ලිපි ලේඛන කමිටුවේ සාමාජිකයින්ට යැවීමට ලේඛකාධිකාරීට උපදෙස් දෙන ලදී.

1. අස්මී තාසිම් මහතා - පාලක සභා සාමාජික(සභාපති)
2. සී. මාලියද්ද මහතා - පාලක සභා සාමාජික
3. මහාචාර්ය ආර්. එන්. පතිරණ මහතා - විද්‍යා පීඨාධිපති"

Thereafter on 24.02.2003, at its 208th meeting, the Council had decided to warn the petitioner. This decision was based on the recommendation of the Committee appointed by the Council on 16.12.2002 . The relevant minute reads as follows :

"208.03.17 (207.03.20) මහාචාර්ය නිරිඇල්ලගේ චන්ද්‍රසිරි මහතාගේ ක්‍රියා කලාපය සම්බන්ධයෙන් 2002.08.08 දින පැවැති වෛද්‍ය පීඨ මණ්ඩලය විසින් කර ඇති ඉල්ලීම : (206.04.22)

මෙම කරුණ සම්බන්ධයෙන් අදහස් දැක් වූ උපකුලපති මහාචාර්ය නිරිඇල්ලගේ චන්ද්‍රසිරි මහතාගේ ක්‍රියා කලාපය සම්බන්ධයෙන් 2002.08.08 දින පැවැති වෛද්‍ය පීඨ මණ්ඩලය විසින් කර ඇති ඉල්ලීම පරිදි පසුගිය පාලක සභාව විසින් පාලක සභා සාමාජික අස්මී තාසිම්, සී. මාලියද්ද සහ විද්‍යා පීඨාධිපති මහාචාර්ය ආර්. එන්. පතිරණ යන මහත්වරුන්ගෙන් සමන්විත කමිටුවක් පත් කරන ලද බවත්, එම කමිටුව විසින් මෙම පරීක්ෂණයට අදාළ ලිපි ලේඛන පරීක්ෂා කොට වාර්තාවක් පිළියෙල කර ඇති බවත්, එම වාර්තාව තමා පාලක සභාවට ඉදිරිපත් කරන බවත් ප්‍රකාශ කළේය. පසුව එම වාර්තාව සභා ගත කරන ලදී.

මෙම වාර්තාව සලකා බැලූ පාලක සභාව මෙම කමිටු වාර්තාවේ නිර්දේශය පරිදි මහාචාර්ය නිරිඇල්ලගේ චන්ද්‍රසිරි මහතාට අවවාද කර ලිපියක් යැවීමටත්, එහි පිටපතක් වෛද්‍ය පීඨාධිපතිට යැවීමටත්, තීරණය කරන ලදී. මෙම කමිටුවේ සේවය කළ මෙම පාලක සභා සාමාජික මහත්වරුන්ට ස්තුතිවන්ත වන බව උපකුලපති ප්‍රකාශ කළේය."

The petitioner was warned by the 1st respondent University based on the aforementioned circumstances and now I would turn to examine whether there was any infringement of the petitioner's fundamental rights, on the aforementioned position taken by the 1st respondent University.

Learned President's Counsel for the respondents drew our attention to paragraph 8:1:1 of Chapter XXII of the University Establishments Code in this respect. Chapter XXII deals with the Disciplinary Procedure of the Universities. Paragraph 8:1:1 of the said Chapter deals with the procedure of a preliminary investigation and states that such an investigation is purely a fact finding process. In terms of the provisions of the said paragraph there is no doubt that the preliminary investigation is meant to be a search for material which may disclose an employee's guilt or provide evidence for any charges that may be framed against the person suspected of the offence.

Be that as it may, it is to be noted that, based on the results of the preliminary investigation a decision would have to be taken as to the procedure thereafter, in relation to the allegation against a person. According to paragraph 8.2, if the preliminary investigation discloses a *prima facie* case against the person who is suspected for an offence, a charge sheet will have to be issued calling upon him to show cause as to why he should not be punished.

The Establishment Code however is silent regarding a situation where at the preliminary investigation it is found that there is no *prima facie* case against the suspected person. In that event, I shall now turn to examine the position, when there is no provision to take action against a person where no *prima facie* case is disclosed.

It is common ground that the Council of the 1st respondent University, at its 206th meeting held on 08.08.2000, decided to appoint a Committee to ascertain whether there is a *prima facie* case to hold a disciplinary inquiry against the petitioner (1R2). Paragraph 8:1 of the Establishment Code deals with appointments of such Committees, and clearly describes under what circumstances that such a Committee could be appointed. The said paragraph is in the following terms :

> **"8.1 When disciplinary action is contemplated against an employee in connection with any offence warranting one of the major punishments listed in sub-para 4.1.2, or for a minor offence in respect of which summary procedure under para 7 is not applicable to the person concerned, the Chairman of the Commission or the Principal Executive Officer of the Higher Educational Institution/Institute will cause to be made such preliminary investigations as are necessary."**

Paragraph 8:1:1 describes the procedure of a preliminary investigation and reads thus :

> **"A priliminary investigation is purely a fact finding process. It is meant to be search for material that may disclose an employee's guilt or provide evidence for any charges that may be framed against the person suspected of the offience..."**

Paragraph 8, which deals with a formal disciplinary inquiry in sub paragraph 8:2 refers to the specific steps that have to be taken where a *prima facie* case is disclosed. This would include furnishing a charge sheet and calling upon the person in question to show cause as to why he should not be punished. However, it is pertinent to note that, there is no such provision to indicate that, if a *prima facie* case against the suspected person is not disclosed at the preliminary investigation, the Principal Executive Officer of the Higher Educational Institution/Institute has the authority to warn the suepected person.

Warning is referred to in paragraph 4:4 of the Establishments Code and it is to be borne in mind that paragraph 4 of the said Establishments Code deals with punishments. It is to be noted that the Establishements Code states that warning is not a punishment. Paragraph 4:4, therefore reads as follows :

> **"A warning" is not a punishment, but is administered to caution the person concerned aginst the repetition of an act or an omission which may lead to disciplinary action. A warning should be administered by the Disciplinary Authority, and a copy of the letter conveying the warning should be filed of record in the personal file of the person concerned."**

The question which arises at this point is whether it is possible to warn an academic without holding any kind of an investigation. The respondents contended that even without the preliminary investigation conducted by the Sub-Committee the petitioner could have been warned by the Council. In terms of the Establishments Code, the Vice Chancellor is the Disciplinary Authority regarding disciplinary matters connected with the Academic Staff. Therefore in terms of paragraph 4:4, it appears that the Vice Chancellor of a University has the discretion to issue a letter of warning.

Article 12(1) of the Constitution states that "all persons are equal before the law and are entitled to the equal protection of the law," and thereby ensures equality and protection for persons who are similarly placed against discriminatory treatment. When the Vice Chanceller is empowered with a wide discretion regarding a warning to be given to a person against whom allegations are being made, it is necessary that there should be certain safeguards in the exercise of such discretion. It is apparent that paragraph 4:4 of the Establishment Code does not give any guidelines as to the

exercise of the power given to the disciplinary authority. In such circumstances, it is clear that the power given to the disciplinary authority is not only arbitary, but also carries uncontrolled discretion. In *Ram Krishna Dalmia v S. R. Tendolkar* (1) it was clearly stated that the vesting of discretion with officials in the exercise of power under a statute alone will not contravene the equal protection clause. What is objectionable is the conferment of arbitrary and uncontrolled discretion without any guidelines for the exercise of that discretion. By allowing an official to exercise his authority, without adhering to any guidelines, norms or principles, and only according to his wishes , a situation is created for decision to be taken arbitrarily. Absolute or uncontrolled discretion given to an authority would nagate equal protection, as such authority could be exercised arbitrarily infringing the equal rights guaranteed in terms of Article 12(1) of the Constitution. Considering this kind of a situation, in *Saman Gupta v Jammu and Kashmir*[2] the Court was of the view that,

> **"The exercise of all administrative power vested in public authority must be structured within a system of controls, informed by both relevance and reason- relevance in relation to the object which it seeks to serve, and reason in regard to the manner in which it attempts to do so. Wherever the exercise of such power affects individual rights, there can be no greater assurance protecting its valid exercise than its governance by these twin tests."**

The rejection of the concept of unfettered discretion was vividly described with reference to the landmark decision in *Padfield v Minister of Agriculture* (3) by Lord Denning, in *Breen* v *Amalgamated Engineering Union* (4) in the following terms :

> **"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this : the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by *Padfield* v *Minister of Agriculture, Fisheries and food,* which is a landmark in modern administrative law."**

Considering the several steps that were taken by the 1st respondent authority, regarding the complaint made against the petitioner, it is clear that the Council had decided to appoint a Committee to ascertain whether there is material to hold a preliminary investigation against the petitioner. The minutes of the 206th meeting of the University Council of 16.12.2004 is quite clear that the mandate given to the Committee was to ascertain whether there is material to hold a preliminary investigation against the petitioner (1R2). The Committee had after several discussions and on perusal of all the available material had come to the conclusion that there is no material to hold a disciplinary inquiry against the petitioner. Paragraph 7 of the letter dated 10.02.2003 (1R3) thus stated that,

"ඉලක්ක කර ඔප්පු කළ හැකි චෝදනාවක් ගොනු කිරීමට තරම් ප්‍රමාණවත් කරුණු නොමැති නිසා තමන්ගේ අභිමතයට අනුව සමාජයේ යහපතට පුරවැසියෙකුට හෝ විශේෂිත කනතුරක් දරන කෙනෙකුහට හෝ සාධාරණ ක්‍රියාමාර්ගයක් ගත හැකි නිසාත් මහාචාර්යවරයාට විරුද්ධව විශේෂ විනය පරීක්ෂණයක් පැවැත්වීම අනවශ්‍ය බවත්."

Having said that the said Committee had proceeded to recommend that the petitioner should be served with a letter of warning. The question which arises at this juncture is whether the said Committee had the mandate to make such recommendation.

It is quite clear that the mandate given to the said Committee by the Council of the 1st respondent University was" to ascertain whether there is material to hold a preliminary investigation against the petitioner" (1R3). Accordingly, in terms of the mandate given to the Committee, they only had to inform the Council of the 1st respondent University the outcome of the inquiry. This would have included an answer in the affirmative or in the nagative to the questing directed at them.

Thus when the Committee recommended that the petitioner be warned, it had, in my view, acted without any authority or jurisdiction. It is trite law that when a Committee acts beyond the mandate/terms of reference on which it was appointed, it clearly lacks jurisdiction and such decisions have no legal validity or effect as the Committee has acted outside its given power. Referring to acts which have been carried out with excess of power, Wade (Administrative Law, 9th Edition, pp. 36-37) states that,

"Any administrative act or order which is ultra vires or outside jurisdiction is void in law, *i. e.* deprived of legal effect.

If it is not within the powers given by the Act, it has no leg to stand on. The situation is then as if nothing had happened, and the unlawful act or decision may be replaced by a lawful one."

Therefore, the decision of the Committee to warn the petitioner is not a lawful one which has any validity and the action taken by the Council on the basis of the said decision and/or recommendation of the Committee is without any legal effect. The said Committee therefore had clearly acted outside their terms of reference and thereby their actions become arbitrary as well as discriminatory and is violative of the provisions of Article 12(1) of the Constitution.

It is also to be borne in mind that petitioner was never heard by the Committee or by the Council in respect of the allegations made against him. Although the respondents claim that an explanation was called from the petitioner, it is to be noted that such direction came from the faculty Board of the Faculty of Medicine and the Dean of the Faculty of Medicine of the 1st respondent University and not from the disciplinary authority or from the Committee which was appointed to look into the allegations against the petitioner. Also, it is important to take into account that at no stage a charge sheet was issued against the petitioner.

Since that landmark decision in *Ridge v Baldwin* (5) (1964) A. C. (40) it is now a well accepted concept that rules of natural justice and fairness in procedures should be applicable to administrative actions. There are no universally accepted principles or norms as to the type of procedure that would be followed in different kinds of inquires. However, what is necessary is that the inquiry should be carried out according to the basic norms of the rules of natural justice and fairness in procedure. Referring to this question, Tucker L. J. in *Russell* v *Duke of Norfolk* (6)(1949) 1 All E. R. 109) stated that.

"There are..... no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject- matter that is being dealt with, and so forth."

The 1st respondent University , bearing in mind the concepts of good administration and governance, should have acted fairly towards the petitioner, who was one of its Senior Professors. Even if there was no requirement to conduct an adversarial hearing before reaching a decision, the rules of natural justice required the University to act fairly towards the petitioner.

In view of the aforementioned finding it would not be necessary to consider the infringement in terms of Article 14(1)(g) of the Constitution.

On a consideration of the totality of the circumstances in this application and for the aforementioned reasons, I declare that the 1st respondent University had acted arbitrarily and unreasonably and thereby had violated the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution. The decision of the 1st respondent University contained in the document dated 21.05.2003 (P5) is therefore declared as *null and void*. I make order that the 1st respondent University shall pay the petitioner a sum of Rs.25,000 as compensation and costs. This amount to be paid within 3 months from today.

T. B. WEERASURIYA, J. — I agree.

NIHAL JAYASINGHE, J. — I agree.

Relief granted.

SOYSA
VS.
R. C. PERERA

SUPREME COURT
S.N. SILVA, CJ
YAPA, J AND
JAYASINGHE, J
SC APPEAL 34/2003
CA 630/88(F)
D. C. PANADURA CASE NO. 18734/RE
8TH 19TH AND 28TH OCTOBER, 2004

Landlord and Tenant-Deterioration of the house let- Relevant time of deterioration for ejectment.

The plaintiff sued the defendant for ejectment of the defendant from premises No. 309, main street Panadura on the ground of arrears of rent and deterioration of the premises let. The plaintiff abandoned the 1st cause of action and pressed the 2nd cause of action on the basis that the defendant tenant had made an opening of the wall in premises No. 309 to reach the adjoining premises No. 307 of which the defendant was also the tenant.

The defendant averred that the said opening was effected in 1970 with the consent of the plaintiff's father whereas the notice to quit was given in October 1983. The District Judge dismissed the action and the plaintiff appealed to the Court of Appeal.

It was revealed that as *per* two plans No. 254 dated 24.05.1983 and No.745 dated 15.12.1980, the alleged opening of the wall had been effected after 1980. By that opening the defendant had converted premise Nos. 307 and 309 into one premises and obtained access to premises No. 307. The Court of Appeal allowed the appeal and gave judgment for the plaintiff appellant. The defendant appealed to the Supreme Court.

HELD :

On the basis of the available evidence there was no merit in the appeal of the defendant.

Case referred to :

1. *De Silva* v *Seneviratne* (1981) 2 Sri LR 7

APPEAL from the judgment of the Court of Appeal.

L. C. Seneviratne, P. C. with *Ranjan Gunaratne* for defendant-appellant

R. de Silva, P. C. with *Harsha Amarasekara* for plaintiff -respondent.

Cur.adv.vult.

November 22, 2004
JAYASINGHE, J.

The plaintiff- appellant - respondent hereinafter referred to as plaintiff, the owner and land lady of the premises bearing assessment No. 309 Main Street, Panadura instituted action in the District Court of Panadura against the defendant - respondent-appellant hereinafter referred to as the defendant for ejectment on the ground that the defendant was

1. in arrears of rent and

2. for causing deterioration of the premises in suit in terms of section 22 (1) (d) of the Rent Act by making an opening in the common wall that separates the said premises from premises No. 307.

It appears that at the trial the plaintiff abandoned the first ground as above and relied only on the second ground for ejectment.

The defendant was also the tenant of the adjoining premises bearing Assessment No. 307.

It was the position of the defendant that the said opening on the said wall was effected in the year 1970 with the consent and approval of the plaintiff's father. Plaintiff however, came to court on the basis that the opening was made between 1980-1983 and that she sent the defendant notice to quit in October 1983, no sooner she became aware of the structural

alteration causing a deterioration of the premises. The learned District Judge dismissed the plaintiff's action and the plaintiff appealed to the Court of Appeal. Their Lordship's having considered the reasoning laid down in *De Silva* vs. *Seneviratne* 1981[1] took the view that it was a fit case for the Court of Appeal to interfere with the findings on questions of fact since the learned District Judge failed to make a proper evaluation of the facts placed before him at the trial. On a reappraisal of the evidence disclosed before the District Court, the Court of Appeal rejected the finding that the opening on the wall was made in 1970 with the knowledge and consent of the plaintiff's father. Court observed that the defendant failed and neglected to respond to the quit notice and replied five months after the death of the plaintiff's father. That approval was obtained from the plaintiff's father. The Court of Appeal was also influenced by the fact that one Daya Liyanage who owned premises No. 307 was not called as a witness even though he was available to support the defendant's contention that the said opening was made in 1970. The plaintiff relied on Sirisena Liyanage, a surveyor who prepared plan No. 254 dated 24.05.1985 on a Commission issued by Court. He had stated in his evidence that he had used plan No. 748 dated 15.12.1980 prepared by B. L. D. Fernando marked P3, which did not indicate any entrance in the wall which separated premises No. 309 from 307. This evidence established that the entrance in the wall came into existence only after 08.12.1980.

Having rejected the contention of the defendant that the opening was made in 1970, the Court of Appeal thereafter considered whether the opening made in the common wall caused deterioration of the premises in suit. The Court of Appeal on a evaluation of the evidence disclosed in the District Court held that the strength of the wall was diminished as a result of the opening; that the two separate premises owned by two distinct owners namely 307 and 309 in effect was converted into one premises and the opening providing access from one premises to another. These factors taken together Court held, that opening caused deterioration of the condition of the premises.

Having carefully considered the findings of the Court of Appeal, I see no merit in this appeal of the defendant-respondent appellant. The appeal is accordingly dismissed with costs.

S. N. SILVA, C. J. — I agree.

YAPA, J. — I agree.

Appeal dismissed.