THE
Sri Lanka Law Reports

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

[2006] 1 SRI L. R. - Part 11

PAGES 281 - 308

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at the Department of Government Printing, Sri Lanka

Price : Rs. 12. 50

DIGEST

CIVIL PROCEDURE CODE —

(1) Sections 86(2), 241, 245 and 247 - Claim under section 241-Claimant absence on the day of inquiry - Counsel not ready to proceed with the case-Can the claimant seek redress from Court of Appeal ?- Is there a specific remedy available in him?

Marikkar vs. Vanik Incorporation Ltd and Others 281

(2) Section 16 — Non compliance — Is it fatal ?— Failure of plaintiff to take steps initially — Court ordering plaintiff to publish a notice of the institution of the action — Nunc pro tunc — Actus curiae neminem gravabit – Permissibility

Ranjith de Silva vs. Dayananda and Others 305

CONTEMPT OF COURT - Affirmant not told that the affidavit would be tendered to court - Does the District Court have jurisdiction to charge those who obtained the signatures to the affidavit - Signatures obtained in the absence of the Justice of Peace-Contempt of Court - Constitution Article, 105(3) - Judicature Act, section 55 (1)-Civil Procedure Code, sections 183 and 183 (B) - In faciae curiae and ex facie curiae.

Metthananda vs. Kushan Fernando 290

CUSTOMS ORDINANCE, sections 47 and 125- Sri Lanka Standards Institution Act, No. 6 of 1984 - Importation of sugar- Classification of sugar into white and brown-Void - Basis of levy of customs duties - Who determines - Are the customs bound by standards set by Sri Lanka Standards Institution (SLSI) ? - Misinterpretation and suppression of material facts.

Kala Traders (Pvt) Ltd and Another vs. Director General of Customs and Others 295

PARTITION LAW - Section 26(2) b - Sale of corpus - Apartment Ownership Law, No. 11 of 1973, section 23 - Applicability - Old building - Condominium plan - Duty of court

Yanoos vs. Ziard and Others 285

CM 6650– 2,500 (2006/09)

MARIKKAR
VS
VANIK INCORPORATION LTD AND OTHERS

COURT OF APPEAL
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CALA 326/2004
D. C. MT. LAVINIA No. 258/03/CL
APRIL 20, 2005

Civil Procedure Code, sections 86(2), 241, 245 and 247 - Claim under section 241-Claimant absent on the day of inquiry - Counsel not ready to proceed with the case-Can the claimant seek redress from the Court of Appeal ?- Is there a specific remedy available to him?

HELD:

(i) A person whose claim was dismissed for default of appearance must bring an action under section 247; he should not move to re-open the claim inquiry by explaning the default on the ground that the order was made *ex parte.*

(ii) An order disallowing a claim, in the absence of the claimant on the date fixed for inquiry, of which the claimant had notice is an order for which conclusive character given by section 245 attaches.

APPLICATION for leave to appeal from an order of the District Court of Mt. Lavinia.

Cases referred to :

1. *Muthu Menika vs. Appuhamy* 14 NLR 329
2. *Marikkar vs. Marikkar* 22 NLR 438
3. *Isohamine vs. Munasinghe* 29 NLR 277

Manohara R. de Silva for petitioner - petitioner
Harsha Amaraskera for plaintiff respondent

Cur.adv.vult.

June 14, 2005
WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the learned Additional District Judge of Mount Lavinia dated 19.08.2004.

The facts relevant to this application are briefly as follows :

The 1st to 4th defendant - respondent - respondents (1st to 4th defendants) are partners of the firm called and known as *Sari Kingdom*. The defendants sought and obtained a bill purchasing facility from the plaintiff- respondent - respondent (plaintiff). However the defendants defaulted in making the payments. Thereafter the plaintiff filed action jointly and severally against the1st to 4th defendants for the recovery of a sum of Rs.1,091,339.03 from the 1st to 4th defendants. The Court issued summons on the 1st to 4th defendants and on the summons returnable date the defendats were absent and unrepresented. Thereafter the Court fixed the case for *ex-parte* trial.

On 05.03.2002 the learned Additional District Judge of Colombo entered *ex-parte* judgment in favour of the plaintiff and the Court ordered that the *ex parte* decree be served on the defendants. The decree was served on the defendants. Consequently, the 1st defendant filed an application to vacate the *ex-parte* judgement in the District Court of Colombo. The inquiry into the said application made under section 86(2) of the Civil Procedure Code was pending in the District Court of Colombo. Despite the *ex-parte* decree being served on the 2nd to 4th defendants, they made no attempt to have the *ex-parte* judgment entered against them vacated. The plaintiff then made an application for the execution of the decree against the 2nd to 4th defendants and the Court issued a writ of execution against them. Upon receiving the writ, the fiscal seized the goods belonging to the aforesaid partnership business of the 1st to 4th defendants, the *Sari Kingdom*, on 29.10.2003 from its show rooms at Majestic City, Liberty Plaza and Wellawatte. The 1st defendant made a claim in the District Court of Mount Lavinia under section 241 of the Civil Procedure Code, claiming the goods seized from the Majestic City show room. The said application was given the number 258/3/CL by the District Court of Mount Lavinia. The plaintiff filed objections to the said application and the Court fixed the matter for inquiry to be held on 19.08.2004. On that day a lawyer appeared for the claimant, the 1st defendant and moved for a postponement of the inquiry on the ground that the 1st defendant's senior counsel had by

mistake taken down the said date in his diary as a calling date for the plaintiff to file objections. Even the 1st defendant who was the claimant was absent. The learned judge after hearing the submissions made by the counsel dismissed the 1st defendant's application on the basis that it is an imperative requirement for the claimant to be present in Court on the date of the inquiry, and that in this instance the counsel who was present in Court was not ready to proceed with the inquiry.

The question that arises is, when the claimant's application is dismissed due to want of appearance of the claimant and his counsel, what is the remedy available to the claimant. Can he seek redress from the Court of Appeal by filing an application for leave to appeal from the said order when the Civil Procedure Code has provided a specific remedy under section 247? The answer to this question is found in the well considered judgment pronounced by Wood Renton, J. in the case of *Muttu Menika Vs. Appuhamy*[1] In this case the Supreme Court held that, a person whose claim was dismissed for default of appearance must bring an action under section 247 ; he should not move to re-open the claim inquiry (by explaining the default) on the ground that the order was made *ex-parte*. It was also held that when the legislature has enacted a particular remedy for a grievance in terms which show that it intended that remedy to be the only one open to an aggrieved party, redress cannot be sought by any other form of proceedings.

Section 247 of the Civil Procedure Code states thus :

"The party against whom a order section 244, 245 or 246 is passed may institute in action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour, subject to the result of such section, if any, the order shall be conclusive."

In *Muttu Menika* Vs. *Appuhamy* (Supra) Wood Renton, J. at page 328 observed thus :

"There can be no doubt but that an *ex-parte* order within the meaning of this group of sections, and I think, therefore, that in terms of section 247 it is conclusive, unless the party aggrieved by it brings the action for which that section provides."

The learned Counsel for the plaintiff referred to the Supreme Court case of *Marikkar* Vs. *Marikkar* [2]. In this case, De Sampayo, J. after examining the local and Indian authorities, and upon a consideration of the principles involved in the procedure laid down in sections 241 to 247, held that when the date of the inquirty has been notified and the proceedng is otherwise regular, and where therefore it is the duty of the claimant to appear and adduce evidence in support of his claim but he fails to do so, the Court is within its powers in disallowing his claim, and that an order so made is equivalent to an order after investigation under section 245 of our Code and is conclusive against the claimant, unless he brings an action under section 247.

In the case of *Isohamine* Vs. *Munasinghe* [3] It was held that an order disallowing a claim, in the absence of the clamant on the date fixed for inquiry, of which the claimant had notice, is an order to which conclusive character given by section 245 of the Civil Procedure Code attaches.

In the circumstances, it is my considered view that recourse must be first sought in terms of section 247 of the Civil Procedure Code and not by way of appeal. On this ground alone the application for leave to appeal should be dismissed.

In the light of the above mentioned decisions, it appears to me that the order of dismissal of the 1st defendant's claim action filed under section 241 of the Civil Procedure Code, for want of appearance of the claimant and his counsel on the date of the inquiry, tantamounts to an order made under section 245 of the Civil Procedure Code. The 1st defendant has not resorted to the remedy provided by section 247 of the Civil Procedure Code. As no proceedings were taken under section 247 the order made by the learned judge on 19.08.2004 has conclusive effect. Hence no appeal lies to this Court from such order. Accordingly, the 1st defendant cannot maintain the application for leave to appeal made to this Court.

For these reasons we refuse to grant leave to appeal and dismiss the 1st defendant's application for leave to appeal with costs.

SOMAWANSA, J. — I agree.

Application dismissed.

YANOOS
VS
ZIARD AND OTHERS

COURT OF APPEAL
SOMAWANSA, J (P/CA) AND
WIMALACHANDRA, J,
CALA 450/2004
D. C. COLOMBO 18591/99P

Partition Law, section 26(2) b - Sale of corpus - Apartment Ownership Law, No. 11 of 1973, section 23 - Applicability ? - Old building - Condominium plan – Duty of court

The plaintiff-respondent sought to partition the land and premises which consisted of a four storeyed building. At the trial as there was no contest, the plaintiff respondent invited court to act in terms of section 26(2) b - sale of corpus. The trial judge directed the sale of the corpus. The 4th defendant petitioner after obtaining a report from a Licensed Surveyor, moved court to act under the provisions of the Apartment Ownership Law. It was contended that the provisions of this Law was not brought to the notice of Court and sought the possibility of dividing the corpus amongst the co-owners. The trial judge rejected the application - On leave being sought -

HELD:

(i) The property sought to be partitioned is not a building registered under Law, No. 11 of 1973 and no application had been made to register a condominium plan. Therefore section 23 of the said Law is not applicable.

(ii) In any even the possibility of registering the building under the Law is very remote as the building in suit is more than 75 years old.

Per Somawansa, J. P/CA.,

"As the land and the building is not registered as a condominium property under the Apartment Ownership Law the District Judge was not obliged to go on a voyage of discovery on his own to consider the applicability of the said Law."

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

Sanath Jayatilake for 4th defendant petitioner.
M. Farook Thahir for plaintiff respondent.

June 22, 2005,
SOMAWANSA, J.(P/CA),

This is an application for leave to appeal against the order of the learned District Judge of Colombo dated 10.11.2004 refusing and rejecting the application of the 4th defendant-petitioner to inquire into the possibility of having the corpus partitioned amongst the parties to the action in terms of the Apartment Ownership Law, No. 11 of 1973 as amended.

The relevant facts are the plaintiff-respondent instituted the instant action in the District Court of Colombo seeking to partition the land and premises which consisted of a four storeyed building situated at Prince Street, Pettah, Colombo 11 morefully described in the schedule to the plaint.

When the trial was taken up all parties were represented by counsel and all of them informed Court that there was no dispute as to title or the identity of the corpus among the parties and sought permission of Court to lead evidence of the plaintiff-respondent and accordingly no points of contest were raised and the plaintiff-respondent's evidence was led. The plaintiff-respondent having given evidence as to the chain of title invited Court to act in terms of Section 26(2) (b) of the Partition Act and sought an order of sale of the corpus. There was no cross examination by any party on any point. Accordingly the learned District Judge by his judgment dated 13.05.2004 directed the sale of the corpus in terms of Section 26(2) (b) of the Partition Law. He further directed the entering of interlocutroy decree in terms of the judgment and the issue of a commission to auction the corpus.

It is the position of the 4th defendant-petitioner that being perturbed with this order he sought advice and was advised that all parties had made a genuine mistake in coming to the conclusion that there was no alternative to the sale of the property but that there was an alternative in that in terms of Apartment Ownership Law, No. 11 of 1973 as amended there was a possibility of dividing the corpus amongst the parties which angle had not been examined as none of the parties nor the learned District Judge lent their minds to this aspect of the matter. The 4th defendant-petitioner thereafter obtained a report from a Licensed Surveyor who expressed the opinion that the corpus could be dealt with under the terms of Apartment Ownership Law, No. 11 of 1973 as amended. Accordingly the 4th defendant-filed a motion dated 16.08.2004 marked X2 and on direction from Court filed a petition and affidavit dated 25.08.2004 whereby he brought to the notice of Court that the possibility of dividing the corpus amongst the co-owners has not been considered by the parties and hence not considered by Court. The existence of Apartment Ownership Law, No. 11 of 1973 as amended has not been brought to the notice of Court and hence the possibility of having a building plan approved under the said law had not been considered and that the market price of the building will be adversely effected by the presence of so many tenancies and the price would be very much less than if it was otherwise. He further alleged that grave and irreparable loss and damage will be caused to the parties if the matter of the possibility of the approval of a condominium plan is not considered.

At the inquiry into this application, the learned District Judge had directed parties to tender written submissions if they so desired but the record does not indicate that the 4th defendant-petitioner sought to lead evidence of an expert or that the learned District Judge expressed the view that there was no need for oral evidence as the matter in issue is purely a question of law. The learned District Judge having considered the written submissions tendered by both parties by his order dated 10.11.2004 dismissed the aforesaid application of the 4th defendant-petitioner. It is this order that the 4th defendant-petitioner is seeking to set aside and vacate.

As stated above it is to be noted that at the trial all parties were present and were represented by counsel and all of them including the 4th defendant-petitioner and his counsel informed Court that there was no contest as to

shares or any other matter. It was also agreed by all parties that the property sought to be partitioned cannot be divided. The plaintiff-respondent in her evidence stated that the four storeyed building is more than 75 years old and is not possible to be divided or partitioned amongst the co-owners and prayed that the property be sold in terms of Section 26(2) (b) of the Partition Law. The plaintiff-respondent was not cross-examined by the counsel for the 4th defendant-petitioner or for that matter by any other counsel. The learned District Judge in his judgment refers to the preliminary survey report prepared by P. W. Fernando, Licensed Surveyor wherein he states that the building is very old which cannot be partitioned. The 4th defendant-petitioner was present when the Surveyor came for the survey.

The 4th defendant-petitioner in his application to the original Court as well as to this Court refers to the Apartment Ownership Law, No. 11 of 1973 as amended and states that there was a possibility of dividing the corpus. However it is common ground that the property sought to be partitioned is not a building registered under the Apartment Ownership Law, No. 11 of 1973 as amended and no application had been made to register a condominium plan. Therefore Section 23 of the Apartment Ownership Law, No. 11 of 1973 has no application to the property sought to be partitioned and in any event the possibility of registering the building under the aforesaid Apartment Ownership Law, No. 11 of 1973 as amended is very remote for the simple reason that the building in suit is more than 75 years old.

It is also contended by counsel for the 4th defendant-petitioner that parties had made a genuine mistake in agreeing to sell the property. However it is to be noted that the plaintiff-respondent and the other defendants-respondents do not concede that they have made a genuine mistake nor do they consent to the application made by the 4th defendant-petitioner. It is only the 4th defendant-petitioner who seeks to have the building registered under the Apartment Ownership Law, No. 11 of 1973 as amended and partitioned.

The 4th defendant-petitioner has in order to support his belated claim obtained a report from S. Rasappa, Licensed Surveyor who has expressed an opinion that the corpus could be dealt with under the terms of the Apartment Ownership Law which I must say appears to be a self serving document specially obtained by the 4th defendant-petitioner and not made available to this Court. In the circumstances, I have no opportunity

of examining this report. In any event, neither the plaintiff-respondent nor the other defendant-respondents have contested the validity of the interlocutory decree entered by Court or sought a variation of it.

It appears that only the 4th defendant-petitioner who at the trial had agreed to a sale of the property is now seeking a variation of the judgment as well as the interlocutory decree that has been entered in the action. I might say in this respect that if Courts were to entertain this type of application made by a party to a partition action simply because he has changed his legal advisors and has been advised to take a different stand to that what he agreed upon at the trial would in effect result in eradicating the fianlity given to the interlocutory decree as well as opening the flood gates for parties to canvass the judgment on flimsy grounds based on after thought or on ill advice received and to go back on the stand taken at the trial.

The counsel also submits that the failure to consider the Apartment Ownership Law, No. 11 of 1973 as amended makes the judgment of the learned District Judge to be a judgment *per incurium*. There is no merit at all in this submission for the learned District Judge has based his judgment on the evidence placed before him and no party wanted the corpus to be partitioned, but all were in agreement that the corpus should be sold. In any event as the land and the building is not registered as a condominium property under the Apartment Ownership Law the learned District Judge was not obliged to go on a voyage of discovery on his own to consider the applicability of the Apartment Ownership Law, No. 11 of 1973. The allegation that the learned District Judge has failed in his statutory duty and that alone is sufficient for this Court to intervene is without any merit.

For the foregoing reasons, I have no hesitation in rejecting the application for leave to appeal. Accordingly the leave to appeal application will stand dismissed with costs fixed at Rs. 20,000.

WIMALACHANDRA, J. - I agree.

Application dismissed.

METTHANANDA
VS
KUSHAN FERNANDO

COURT OF APPEAL
BALAPATABENDI, J AND
IMAM, J,
CA 570/2003 (CONTEMPT),
D. C. HOMAGAMA 533/SPL,
DECEMBER 19,2003,
JANUARY 30, 2004 AND
AUGUST 2 AND 4 2004.

Contempt of Court - Affirmant not told that the affidavit would be tendered to court - Does the District Court have jurisdiction to charge those who obtained the signatures to the affidavit? - Signatures obtained in the absence of the Justice of Peace-Contempt of Court - Constitution Article, 105(3) - Judicature Act, section 55 (1) - Civil Procedure Code, sections 183 and 183 (B) - In faclae curiae and ex facie curiae.

The plaintiff-petitioner alleging that the 1st and 5th defendant -respondents have obtained the signature of 3 persons to an affidavit in the absence of the Justice of Peace and without explaining or disclosing that the said affidavit is to be tendered to court, filed an application in the Court of Appeal for contempt of court.

The 1st and 5th respondents contended that the application cannot be maintained taking into consideration Article 105(3) of the Constitution read with section 55 of the Judicature Act and section 183 (B) of the Civil Procedure Code.

HELD:

(i) Article 105(3) of the Constitution gives the Supreme Court/Court of Appeal the power to punish for contempt of itself whether committed in the Court or elsewhere ; the power would include the power to punish for contempt of any Court, Tribunal or Institution whether committed in the presence of such court or otherwise.

It is provided that the provisions of Article 105(3) would not affect or prejudice the rights now or hereinafter vested by any law in such court etc., to punish for contemp of court.

(ii) Section 55(1) confers specific jurisdiction on every District Court, Magistrate's Court and Primary Court to deal with every offence of contempt of court committed in the presence of the court or committed in the proceedings in the said court.

(iii) Section 183 (B) of the Civil Procedure Code utilizes the said power conferred by section 55(1) and lays down the procedure to deal with the contempt of court arising out of giving false statements by way of an affidavit or otherwise.

Per Imam, J.,

"When the legislature has laid down a specific provision to deal with the contempt of court arising out of giving false evidence in the course of any of its proceedings, the petitioner should proceed under section 55(1) of the Judicature Act read with section 183 of the Code rather than seek redress from this court.

APPLICATION under Article 105(3) of the Constitution on a preliminary objection raised.

Cases referred to :

1. *A. M. E. Fernando vs Attorney General* (2003) 2 Sri LR at 53
2. *Regent International Hotels Ltd., vs Cyril Gardiner and 8 others* (1978-79-80) 1 Sri LR 278 (SC)
3. *Mansoor and another vs OIC Avissawella Police and another* - (1991)2 Sri LR 75.

Edward Ahangama for plaintiff petitioner.
Manohara, R. de Silva with *Govinda Jayasinghe* for 1st and 5th defendants respondent.

Cur. adv. vult.

July 25, 2005,
IMAM, J.,

This is an application filed by the Plaintiff-Petitioner (hereinafter referred to as the Petitioner) seeking that the 1st and 5th Defendant-Respondents (hereinafter referred to as the Respondents) be dealt with appropriately for Contempt of Court committed by them. On counsel for the Plaintiff-Petitioner making oral submissions to Court on 19.12.2003, counsel for the 1st and 5th Defendant-Respondents took up a preliminary objection on 30.01.2004.

The facts of the case are briefly as follows. The Plaintiff-Petitioner alleges that the 1st Defendant-Respondent and the 5th Defendant-Respondent obtained signatures for the affidavit marked XI from K. D. M. M. Bandara, Arachchige Don Wijeratne and Latha Gamage without explaining or disclosing that the aforesaid document marked XI is an affidavit which is to be tendered to Court. Furthermore it is alleged by the Plaintiff-Petitioner that when the aforesaid signatures were obtained a Justice of the Peace was not present.

The preliminary objections taken up by counsel for the 1st and 5th Respondents was that this application cannot be maintained, taking into consideration Article 105(3) of the Constitution read with section 55(1) of the Judicature Act and section 183(b) of the Civil Procedure Code. Counsel further submitted that the 5th Defendant-Respondent does not intend to avoid facing trial, with regard to the complaint of the Petitioner, but contends that the District Court in which this case was tried would be the best forum to adjudicate the complaint made by the Petitioner. The position of the Petitioner is that the 1st and 5th Rtespondents obtained the signatures of the aforementioned Bandara, Don Wijeratne, and Latha Gamage between 8.00-9.00 p.m. without disclosing the fact that XI was to be construed as an Affidavit to be tendered to the District Court of Homagama in the absence of a Justice of the Peace to attest X1, which act amounted to a Contempt of Court, and sought that the Respondents be dealt with accordingly. The Respondents referred to a judgment of His Lordship Chief Justice G. P. S. De Silva in *A. M. E. Fernando* vs *Attorney General*[1] where His Lordship held that "Article 105(3) of the Constitution vests the Supreme Court, which is a Superior Court of record, in addition to the powers of such Court, the power to punish for contempt itself whether committed in the

Court itself or elsewhere, with imprisonment or fine or both as the Court may deem fit." This provision it was pointed out by the Petitioner is based on the common law, which draws a distinction in which is described as criminal contempt between those acts committed in the face of the Court " in faciae curiae" and those committed outside Court "ex facie curiae". The inherent jurisdiction of the Supreme Court of England to impose punishment summarily in respect of contempt 'in facie curiae' is mentioned in Oswald's Contempt of Court 3rd Edition as follows. "It is now the undoubted right of the Supreme Court to commit for contempts..... "

It was further averred on behalf of the Petitioner that in *Regent International Hotels Ltd.* Vs *Cyril Gardiner and 8 others* [2] the Bar Association Law Journal that His Lordship Chief Justice Nevile Samarakoon held that the Court of Appeal has all the powers under Article 105(3) of the Constitution of punishing for contempt whenever it is committed 'in facie curiae' (within the well of the Court) or 'ex-facie curiae' (those committed outside the Court). It was further held by Basnayake, CJ in SC 559/62 which dealt with an Application for a Rule Nisi for Contempt of Court on S. M. A. Cader and Assanar Lebbe Hameed Umma, that where an injunction granted by a District Court was disobeyed the Supreme Court had power to punish the offender for Contempt of Court. On hearing counsel for both sides, documents tendered and related matters, I have come to following conclusion.

Article 105(3) of the Constitution reads as follows :

"The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a Superior Court of record and shall have all the powers of such Court including the power to punish for contempt of itself whether committed in the Court or elsewhere with imprisonment or fine or both as the Court may deem fit. The power of the Court of Appeal shall include the power to punish for Contempt of any Court, Tribunal or Institution referred to in paragraph 1(c) of this Article, whether committed in the presence of such Court or otherwise.

Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereinafter vested by any law in such other Court, Tribunal or Institution to punish for Contempt of Court."

However section 55(1) of the Judicature Act confers specific jurisdiction to every District Court, Magistrate's Court and Primary Court to deal with every offence of Contempt of Court committed in the presence of the Court or committed in the proceeding in the said Court.

Section 55(1) of the Judicature Act states as follows.

"Every District Court, Family Court, Magistrate's Court and Primary Court shall, for the purpose of maintaining its proper authority and efficiency, have a special jurisdiction to take cognizance of, and to punish with the penalties in that behalf as hereinafter provided, every offence of contempt of Court committed in the presence of the Court itself and all offences which are committed in the course of any Act or proceeding in the said Courts respectively, and which are declared by any law for the time being in force to be punishable as Contempts of Court."

Section 183(B) of the Civil Procedure Code utilizes the said power conferred by section 55(1) on the District Court and lays down the procedure to deal with the Contempt of Court arising out of giving false statements by way of an affidavit or otherwise.

Section 183(B) of the Civil Procedure Code specifically states that where any person wilfully makes any false statement by affidavit or otherwise, in the course of any of the proceedings aforesaid he may be punished as for a contempt of Court, besides his liability to be tried and punished under the Penal Code for the offence of giving false evidence, where such statement is on oath or affirmation.

Furthermore on examination of a true photocopy of X1, there is no apparent signature of a JP nor a seal affixed.

Thus when the legislature has laid down a specific provision to deal with Contempt of Court arising out of giving false evidence in the course of any of its proceedings, the Petitioner should proceed under section 55(1) of the Judicature Act read with section 183 of the Civil Procedure Code, rather than seek redress from this Court.

It is manifestly clear that by taking up this preliminary objection the 1st and 5th Defendant-Respondents do not intend to avoid facing trial, but

only seek the indulgence of this Court to direct the Petitioner to institute this action in the proper forum for it to be concluded expeditiously. Hence as the evidence of the witnesses is incomplete, the District Court would be the best forum to decide whether the evidence of the witnesses is true or false, and hence the District Court would be the appropriate forum to adjudicate upon the complaint made by the Petitioner.

With this regard the case of *Mansoor and another* vs *OIC Avissawella Police and another*[3] is relevant. In this case it was held that where a statute creates a specific right and gives a specific remedy or appoints a specific Tribunal for its enforcement, a party seeking to enforce must resort to that Tribunal.

For the aforesaid reasons we dismiss the Petitioner's application, and direct the Petitioner to institute this action in the District Court, where the alleged complaint is said to have been committed.

BALAPATABENDI, J. — I agree.

Preliminary objection upheld. Petitioner directed to institute action in the District Court, where the alleged complaint is said to have been committed.

KALA TRADERS (PVT.) LTD. AND ANOTHER
VS
DIRECTOR GENERAL OF CUSTOMS AND OTHERS

COURT OF APPEAL
WIJEYARATNE, J AND
SRIPAVAN, J,
CA 2034/2004,
FEBRUARY 8, 9, 10, 2005,
APRIL 26, 27, 2005 AND
JUNE 15, 2005.

Customs Ordinance, sections 47 and 125- Sri Lanka Standards Institution Act, No. 6 of 1984-Importation of sugar- Classification of sugar into white and brown-Void - Basis of levy of customs duties - Who determines ? –Are the customs bound by standards set by Sri Lanka Standards Institution (SLSI) ? - Misinterpretation and suppression of material facts.

The petitioner is a sugar importer who imported a consignment of sugar described as plantation white sugar. The petitioner having made the customs declaration (cus-dec) for 4,000MT of sugar had discharged 324MT on the basis of the cus-dec. The petitioner contends that when it has taken delivery of 324MT, the 1st respondent demanded the petitioner not to discharge the sugar cargo, as the cargo was not entitled to the duty free concessions as the 1st respondent has taken a decision to classify white sugar as being sugar that contains a maximum colour of 200 ICUMA units and any sugar above 200 ICUMSA units would be classified as brown sugar. The petitioner contended that, the SLSI (4th respondent) had set a standard that plantation white sugar should contain a minimum polarization value of 99.2 degrees and its colour should be maximum of 500 ICUMA units and sugar less than 500 ICUMA units be classified as white sugar. The petitioner contended that the sugar imported had a colour of 400 ICUMSA units containing a minimum polarization value of 99.4 degree. The petitioner also contended that the decision of the 1st respondent to classify white sugar as sugar containing colour of 200 ICUMA units and sugar about the number of ICUMA units being described as brown sugar is totally arbitrary, illegal and ultra vires.

The respondent's contention was that, the basis of levy of customs duties is under the Customs Ordinance and its determination according to tariff guide according to which sugar is not distinguished as brown sugar and white but evaluated on the basis of polarization value. The respondents also contended that there was suppression and misrepresentation of facts, and the basis of cus-dec disclosed frauds.

HELD:

(1) The classification of goods so far as the customs declaration and or inquiry is concerned is not by the 4th respondent (SLSI) whose classification has no binding effect on the Sri Lanka Customs. The SLSI Act has no provision directing the Customs to adopt its standards for such purpose.

Per Wijayaratne, J

"The petitioners voluntarily submitted samples to the Government Analyst with sugar containing the colour 654 ICUMSA units disproving the very argument of the petitioner relying on the SLSI standards was well within the knowledge of the petitioner and the fact that they suppressed the result of the analyst from court alone is sufficient to dismiss the application.

Per Wijayaratne, J.

"The submission that no duty is leviable on any sugar whether white or brown has no relevance to the matter in issue, at the inquiry before the customs, because the application of section 47 can be on goods that are free of duty and the scope of the inquiry was to include goods that are free of any duty but still falling within the ambit of section 47".

(2) The consignment of goods that was imported needs classification/ categorization by the Customs Department and the determination whether any duty is leviable on the same. This has to be determined by the Customs Department through the inquiry under sections 8 and 47.

APPLICATION for a writ of certiorari / mandamus.

Cases referred to :

1. *Kandy Omnibus Co. Ltd. Vs. Roberts* (1954) 56 NLR 293
2. *Alphonso Appuhamy Vs. Hettiarachchi* (1973) 77 NLR 131
3. *Moosajee Ltd. Vs. Eksath Engineers Saha Samanaya Kamkaru Samithiya* - (1976-79) 1 Sri LR 285.
4. *Hulangamuwa Vs. Siriwardene* - (1986) 1 Sri LR 275
5. *Faleel Vs. Moonesinghe* - (1994) 2 Sri LR 501
6. *Laub Vs. Attorney General* - (1995) 2 Sri LR 88
7. *Malaffur and another Vs. M. B. Deragoda* -(1981) 2 Sri LR 483
8. *Wijesekera & Co. Vs. Principal Collector of Customs* - (1951) - 53 NLR 329.

M. A. Sumanthiran with Ms. Arulananthan for Petitioner.

Farzana Jameel, Senior State Counsel, *with Janak de Silva*, State Counsel for respondent.

Cur. adv. vult.

June 29, 2005,
WIJEYARATNE, J.,

The 1st Petitioner is the sugar importer who imported a consignment of 10,000 metric tons described as Plantation white sugar from Papua New Guinea on board the vessel "Ever Bright" which berthed in Colombo Harbour on 04.10.2004. The Petitioners having made custom's declaration (CUS-DEC) for 4,000 metric tons of sugar had discharged 324 metric tons on the basis of such CUS-DEC.

The Petitioners take up the position that on 05.10.2004 when it has taken delivery of said 324 metric tons, the Sri Lanka Customs under the 1st Respondent directed the Officer of the 1st Petitioner to cease to discharge the sugar cargo. The Petitioner was informed the cargo was not entitled to the duty free concession as the 1st Respondent has taken a decision to classify white sugar as being sugar that contains a maximum colour of 200 ICUMSA units and any sugar above 200 ICUMSA units would be classified as Brown Sugar. These Petitioner's contention that the Sri Lanka Standards Institution the 4th respondent has set standard for said plantation white sugar be contained a minimum polarization value of 99.2 degrees and its colour should be a maximum of 500 ICUMSA units, and sugar containing less than 500 ICUMSA units be classified as white sugar.

The Petitioners also alleged that a policy decision was taken by the Government of Sri Lanka to discontinue or cease an imposition VAT and import duty on white sugar as well as brown sugar.

However, a duty of Rs. 4.50 per kilogram was imposed upon imports of brown sugar and this decision was announced to the sugar importers including the 1st Petitioner at a meeting held at the Treasury on or about 01.01.2004. The Petitioners contend that the sugar imported had a colour of 400 ICUMSA units containing a minimum polarization value of 99.4 degrees which brings consignments within the classifications of plantation white sugar in terms of the standards set by the 4th Respondent.

The Petitioners alleged that the decision of the 1st Respondent to classify white sugar as sugar containing the maximum colour of 200 ICUMSA units and sugar above the said number of ICUMSA units being described as Brown sugar is totally arbitrary, illegal and ultra vires.

The Petitioners also alleged that an alteration of the SLSI (4th Respondent's) the classification of white sugar by the 1st Respondent and refusal to release the balance consignment 9676 metric tons of white sugar, the Petitioner described as plantation of white sugar, on such purported basis of dutiability on the part of the 1st and 2nd Respondents are arbitrary, unreasonable, illegal, null and void and of no force or avail in law. On such basis the Petitioners sought the grant of several mandates of writs of certiorari, mandamus and interim relief as contained in prayers 'a' to 'q' of the Petition.

Given notice the 1st to 3rd Respondents filed their objections to the application and the Respondents urged that the basis of levy of customs duties is under the provisions of Customs Ordinance and its determination according to Tariff Guide marked 2R15. According to which sugar is not distinguished as brown sugar and white but evaluated on the basis of polarization value. They also urged that the customs did not go by the standards set by the 4th Respondent to determine the classification of the goods and the levy of duty according to the standards set by the 4th Respondent.

It was their contention that even if it is to be accepted for the purpose of argument that any sugar beyond the unit value of 500 ICUMSA is to be considered brown sugar they further took up the position that the purported certificate issued by the 4th Respondent's employee is disclaimed by the 4th Respondent institution and the report of the Government Analyst on samples submitted by very Petitioners indicates that it has a colour of 654 ICUMSA units which fact the Petitioners did not disclose. The Respondents also urged that the 1st and 2nd Respondents are entitled to investigate and inquire into the matter of classification of consignment of goods *vis-a-vis* CUS-DEC submitted by the Petitioner. They sought a dismissal of the Petition on the basis of suppression of material facts and misrepresentation of facts and further on the basis of CUS-DEC which, they submitted, disclosed frauds.

When the matter was taken up for argument learned counsel for the Petitioners took pains to describe the process of classification and the use of Sri Lanka Standards Institution standards for the identification of goods. His argument was that the Customs Department is bound to follow the standards set by the SLSI, the 4th Respondent. He even referred to the objects and scope of the 4th Respondent.

However, what the learned counsel failed to establish is that the Customs Department is obliged to follow the standards set by the 4th Respondent in the categorization of goods by the Customs Department and the 1st and 2nd Respondents in the imposition of import or export duties or to relate the duty free structure to such goods. The SLSI Act, No. 6 of 1984 certainly has no provision directing the Customs to adopt its standards for such purpose.

It is my view that this position was very clear in the minds of the Petitioners who themselves have submitted samples drawn from the consignment of sugar to the Government Analyst for classification and identification of colour in terms of ICUMSA units. The Petitioners concede having submitted samples for analyst and it is for no other purpose than to classify the goods as they described the consignments as plantation white sugar. This is a clear admission, the proper authority is the Government Analysts and the classification of goods so far as the Customs declaration and or inquiry is concerned is not by the 4th Respondent SLSI whose classification has no binding effect on the Sri Lanka Customs, under the 1st Respondent.

In my view it is because the Petitioner so mere convention report by the Government Analyst to bring it within their classification of plantation of white sugar and not fall within the categorization of goods by the 1st Respondent. It is significant to note that upon voluntary submission by the Petitioner the samples of the consignments of sugar imported, the Government Analyst has reported it to contain 654 ICUMSA units bringing the same within the classification or category of brown sugar.

Even according to the standards set by the 4th Respondent, the respondents have submitted, that the report of the Government Analyst 2R3, certified that the sugar imported fell within the description of Brown sugar. It is to be noted that the Petitioner having the benefit of the reports of the analysis done by the Government Analyst neither submitted it to the 1st and 2nd Respondents nor to this Court, in support of their claim that the consignment of sugar imported is white sugar and not brown sugar, knowing very well that the result of the analysis did not support their contention. It is this position that the Respondents referred to as suppression of material facts. Learned counsel for the Petitioner in the

course of his arugument proposed to submitted that though the Petitioners concede that fact of having submitted samples for analysis by the Government Analyst, they did not receive the report from the Government Analyst and that is why the same is not referred to in their application to this Court.

However in the course of the argument learned counsel for the Respondent through the production and submission of relevant registers maintained by the Department of the Government Analyst established that very employee who had subsequently made statement to the customs has collected the report. In the course of their investigation it was further disclosed that it was this very employee of the 1st respondent who made fraudulent attempt to defraud the revenue by importing the consignments of sugar as plantation white sugar has collected this report. Accordingly it is made quite clear that as at the time of presenting this application to this Court seeking several mandates of writs as sought therein the Petitioners were fully aware or at least ought to have been aware that the report of the Government Analyst made on the voluntarily submissions of samples by the Petitioner did not support their contention that the consignments of sugar being the plantation white sugar and not brown sugar, as the Petitioners are now trying to make out. It was also established by the very statement on behalf of the Petitioner that they did not receive the report when in fact their employees have collected the report, an attempt on the part of the Petitioner to suppress this material facts is willful and with ulterior motive of not disclosing the true postition to this Court.

In the course of the argument the Respondent's counsel referred to result of on going investigation which reveals that the Petitioners had a design to avail the benefit of duty free imports by describing the articles differently from its true positions, when compared with the documents declarations and connected documents submitted to the bank for the purpose of obtaining letters of credit facilities. All these descriptions given there vary from the true categorization of the consignments and these are relevant to the determination as to whether any duties are payable, are matters for the Customs' Department.

It is not for this Court to determine any of such material facts. The Petitioners concede their having submitted the Customs declaration and inquiry being commenced by the 1st and 2nd Respondents under section 8 of the Customs Ordinance.

In the event of the Customs Department under the 1st Respondent and investigation carried out by the 2nd Respondent revealing that the consignment of goods described therein did not answer the description given there, then the matter falls within the ambit of section 47 of the Customs Ordinance.

The argument of the counsel that there is no duty payable on sugar according to the Revenue Protection Orders or the Customs Ordinance published in the Gazette is not a relevant fact for the reason that the application of the provision of section 47 of the Customs Ordinance did not depend on the liability of goods for the levy of customs duty or otherwise.

Section 47 reads : "The person entering any goods inwards, whether for payment of duty or to be warehoused, or for payment of duty upon the taking out of the warehouse, or **whether such goods be free of duty** shall deliver to the Director General a bill of entry of such goods ....."

Accordingly the submissions made by the learned counsel for the Petitioner that no duty is leviable on any sugar whether white or brown has no relevance to the matter in issue, at the inquiry before the Customs, because the application of section 47 can be on goods that are free of duty and the scope of the inquiry may include the goods that are free of any duty but still falling within the ambit of section 47.

The arguments on the part of the Petitioner specially the submissions made by the counsel for the Petitioner on the effect of Revenue Protection Ordinance, the application of the legal provisions and effect of the same on the Gazette notification XI to X4 therefore has no relevance for the matter in issue here because even if no duty was leviable in view of any of this notification, or any such notification not having the effect of law still the 1st and 2nd Respondents are empowered under the Customs Ordinance to proceed with their investigation to examine the classification of goods and determine whether they agree with the description given in the declaration admittedly made by the Petitioner. I am not in a position to disagree with the learned counsel for the Respondent that this argument was an attempt to vary the basis of the application made to the Court. However the undisputed position is that the consignments of goods that was imported by the Petitioner needs classification/categorization by the Customs Department through the 1st and 2nd Respondents and

determination whether any duty is leviable on the same. This has to be determined by the 1st and 2nd Respondents through the inquiry under the provisions of the Customs Ordinance more particular sections 8 and 47 thereof. Pending such inquiry provision of section 125 authorizes and empowers the 1st and 2nd Respondents to seize such goods. The Petitioner has sought the Customs inquiry to proceed and through the argument of this case with the consent of the Petitioner, the custom inquiry has commenced and is proceeding. In such situation, there is no reason for this Court to interfere with such inquiry merely on the basis of categorization/classifications of goods according to the Petitioner which through the acts of the Petitioner itself proved to be different from the classifications they sought to give the goods.

Besides there is a presence of misrepresentation and suppression of facts. In the case of *Kandy Omnibus Co. Ltd Vs Roberts* [1], it was observed that the Petitioner "must be frank with the Court and must not suppress material facts or practice anything like deception."

Again in the case of *Alphonso Appuhamy Vs Hettiarachchi* [2] Pathirana, J observed that "there is always the need for a full and fair disclosure of all material facts to be placed before the Court when an application for a writ or injunction is made of other words, so rigorous is the necessity for a full and fair disclosure of all material facts that the Court will not go into the merits of the application, but will dismiss it without examination."

In the case of *Moosajees Ltd Vs Eksath Engineru Saha Samanya Kamakru Samithiya* [3] *Hulamgamuwa Vs Siriwardena*[4] *and Faleel Vs Moonesinghe* [5]. Following the decisions referred to above, refused the application for writs on the failure of the Petitioner to disclose the material facts in his pleadings.

In the case of *Laub Vs Attorney-General* [6].Court even found that the application could be dismissed *in limine* as the Petitioner had suppressed material facts and had not acted with uberrimei fides.

In the instant case the Petitioners voluntarily submitted samples to the Government Analyst with sugar containing the colour of 654 ICUMSA units disproving the very argument of the Petitioner relying on the SLSI standards was well within the knowledge of the Petitioners and the fact that they suppressed the result of the analysts from this Court alone is sufficient to dismiss this application. Beside such position of suppression of material

facts, the legal position is also clear that the 1st and 2nd Respondents are entitled to investigate and inquire into the matter of identification/ categorization/classification of the consignments of goods imported, in relation to the description given in the CUS-DEC and consider whether the goods agreed to description given in the CUS-DEC. To interfere with this duty by way of a mandate issued in this Court would not be a review of an administrative decision but would amount to preventing the Customs Ordinance being given effect to, by the intervention of this Court.

Learned counsel for the Petitioner submitted that in the case of *Mulaffer and another* Vs *M. B. Dissanayake* [7], this Court having held that "when goods are correctly categorized and correct particulars are given in the bill of entry, insistence that goods are correctly classifiable under a different heading which attracts heavier duty is a refusal to perform a public duty and mandamus will lie."

The said judgment followed the decision in *Wijesekera & Co.* Vs *The Principal Collector of Customs* [7], where it was held that 'to insist upon the bill of entry being incorrectly filled up in such a manner that, upon the face of the document, the exporter would be liable to pay a heavier export duty than was justly due, would amount to a refusal to perform a public duty. In that event mandamus would clearly lie."

In both these cases, the most material fact was that goods were correctly categorized and correct particulars were given in the bill of entry, in other words true particulars as to the quantity, value, etc has been given in the declaration.

In the instant case, it is not the position that the Petitioners having given the true particulars or correct categorization of the goods but a case of Petitioners attempting to describe the goods under the category which attracted no duty and as a result of their own act and deed in obtaining Government Analyst Report, established that their description of goods in the Bill of entry did not agree with the consignments of goods. Therefore the above decisions have no application to the facts and material in this case.

Accordingly the application of the Petitioners is dismissed with costs fixed at Rs. 10,000/-.

SRIPAVAN, J. - I agree.

Application dismissed.

RANJITH DE SILVA
vs
DAYANANDA AND OTHERS

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 331/2003 (L G)
DC BALAPITIYA NO. 1794/SPL.
FEBRUARY 17TH, 2005

Civil Procedure Code, section 16 — Non compliance — Is it fatal ?— Failure of plaintiff to take steps initially — Court ordering plaintiff to publish a notice of the institution of the action — Nunc pro tunc — Actus curiae neminem gravabit — Permissibility

The plaintiff respondents instituted action seeking to invalidate the special general meeting of the CNAPT (Ambalagoda Branch) held on 28.01.1995 and to invalidate all decisions taken at the said meeting. In the course of the proceedings the 2nd to 7th defendants made an application to be added as defendants and moved court that a notice of the institution of the action be published under section 16. In the plaint the plaintiff has made only the Secretary of CNAPT as the defendant.

The trial judge made order to add the said defendants and permitted the plaintiff to publish a notice of the institution of the action to all parties concerned in the newspaper under section 16.

The 1A defendant-petitioner contends that non compliance with section 16 is a fatal irregularity, and that there was no averment in the prayer of the plaint seeking permission of court to take steps under section 16.

HELD:

(1) The purpose of giving notice under section 16 by publishing newspaper advertisements is to give notice to those who are represented as having a common interest.

(2) In the instant case the trial judge upheld the rule of tunc pro tune permitting the plaintiff to take steps to publish the required notice in terms of section 16. This rule is based on the "maxim-actus curiae neminem gravabit.

(3) the trial judge was convinced that the interests of justice would be served by the correct procedure being followed and averting a fatal irregularity which would have resulted, had the case proceeded to trial without complying with the provisions of section 16.

(4) One of the conditions necessary to bring an action under section 16 is to obtain permission of court, even in the absence of a formal order granting permission, direction to publish notice is sufficient to infer permission being granted.

Cases referred to :

1. *Ranasinghe* vs *Abeydeera (1997)* 3 Sri LR 401 (distinguished)
2. *Caroline Soysa* vs *Lady Ratwatte* 45 NLR 553

C. J. Ladduwahetty for substituted 1A defendant-petitioner.

D. M. G. Dissanayake for plaintiff respondents.

Cur.adv.vult

October 12, 2005

WIMALACHANDRA, J.

The substituted 1A defendant-petitioner (1A defendant) filed this application for leave to appeal from the order of the learned District Judge of Balapitiya dated 26.08.2003. Leave to appeal was granted on 23.07.2004.

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

The plaintiff-respondents (plaintiffs) instituted action in the District Court of Balapitiya seeking *inter alia* a declaration to invalidate the Special General Meeting of the Ceylon National Association for the Prevention of Tuberculosis-Ambalangoda Branch (CNAPT – Ambalangoda Branch) held on 28.01.1995 and to invalidate all decisions taken at the said meeting. In his plaint, the plaintiff named only the Secretary of the said Association as the defendant (who is now deceased and the 1A defendant has been substituted in the place of the deceased Secretary) In the course of the proceedings, the 2nd to 7th defendants made an application to be added as defendants and also moved court that a notice of the institution of the action be published in the newspapers under section 16 of the Civil Procedure Code for the benefit of all persons so interested. The learned District Judge made order adding them as the 2nd to 7th defendants and also held in the same order that the plaintiff who had failed to make an application for the permission of the court to publish a notice of the institution of the action to all parties concerned could now do so by publishing a public advertisement in the newspapers. The learned judge made this order based on the rule of *nunc pro tunc*. It is against this order this application for leave to appeal has been filed.

It is the position of the 1A defendant that non compliance with the provisions of section 16 of the Civil Procedure Code by the plaintiff is a fatal irregularity. The learned counsel for the petitioner contended, in his

written submissions, that the learned Judge had erred, by observing that the plaintiff had failed to take steps under section 16 of the Civil Procedure Code and then holding that the plaintiff can now publish a notice of the institution of the action in the newspapers by applying the rule of *nunc pro tunc* and ordering the plaintiff to so publish.

The learned counsel for the 1A defendant submitted that the learned District Judge had failed to consider that the plaintiff had not even prayed for an order seeking the permission of Court to take steps under section 16 of the Civil Procedure Code.

The learned counsel strongly urged that as decided by Weerasekera, J. in the case of *Ranasinghe vs. Abeydeera*[1] it is imperative for the plaintiff to have issued notice as contemplated by section 16 of the Civil Procedure Code and that the failure to comply with section 16 is a fatal irregularity and hence the District Judge had acted in excess of jurisdiction in ordering the plaintiffs to take steps under section 16 of the Civil Procedure Code when there is no averment or application in the prayer of the plaint seeking the permission of Court to take steps under such section.

The facts in the case of *Ranasinghe vs. Abeydeera (Supra)* are different from the facts in the present case before us. Unlike the case before us that case had proceeded to trial and judgment and the decree had been entered. The defendants appealed against the judgment and in the appeal took up the position that the plaintiff being an unincorporated body, section 16 of he Civil Procedure Code applies and that there had been non compliance with section 16 of the Civil Procedure Code. The Court of Appeal held that parties seeking to sue an unincorporated body should get permission of Court in terms of section 16 and the Appeal Court directed that the case to be heard *de novo* after application has been made afresh in terms of section 16 of the Civil Procedure Code.

In the case of *Caroline Soysa vs. Lady Ratwatte*[2] it was held *inter alia* that where permission is given by Court under section 16 of the Civil Procedure Code to a party to sue on behalf of a person having a common interest in bringing the action, the section imposes on the Court, after giving such permission, the duty of giving notice of the institution of the action to all persons on behalf of whom the action is brought.

In the circumstances, it is the Court that has to order the plaintiff to give required notice and also in what manner it should be published in the news papers. Accordingly, the complaint of the appellant that the plaintiff has failed to effect the publication has no merit. It is only after the Court directed the plaintiff to give required notice in newspapers and thereafter if the plaintiff fails to do so, it is only then the failure to comply with such an order amounts to a fatal irregularity.

In the instant case under consideration, the trial has not commenced and the case is still at the stage of pleadings. In the meantime, several intervenients have sought to be added as parties to the action under section 16 of the Civil Procedure Code and also made an application seeking an order from Court to permit the plaintiff to give required notice under section 16 by public advertisement. The learned District Judge after an inquiry into the application made by the intervenient-petitioners made order on 22.04.1999 adding them as added defendants and also made order permitting the plaintiff to comply with section 16 of the Civil Procedure Code by publishing a notice in the newspaper. The learned Judge would have been convinced that the interests of justice would be served by the correct procedure being followed and averting a fatal irregularity which would have resulted had the case proceeded to trial without complying with the provisions of section 16 of the Civil Procedure Code. It is only after the Court had directed the plaintiff to give required notice under section 16 of the Civil Procedure Code by publishing newspaper advertisements and the plaintiff fails to comply with such an order, then at that instance it amounts to a fatal irregularity.

The purpose of giving notice under section 16 of the Civil Procedure Code by publishing newspaper advertisements is to give notice to those who are represented as having common interest. In the instant case the learned Judge applied the rule of *nunc pro tunc* permitting the plaintiff to take steps to publish the required notice in terms of section 16 of the Civil Procedure Code. The rule *nunc pro tunc* is based on the maxim *actus curiae neminem gravabit.* That is an "act of the Court shall prejudice no man" Broom's Legal Maxims 10th edition at page 73 states thus :

> **"This maxim is founded upon justice and good sense ; and affords a safe and certain guide for the administration of the law."**

One of the conditions necessary to bring an action under section 16 of the Civil Procedure Code is to obtain permission of Court. Even in the absence of a formal order granting permission, direction to publish notice is sufficient to infer permission being granted.

It appears to me that the procedure adopted by the learned Judge is appropriate as the averments in the plaint disclose sufficient material to grant permission of Court to bring an action under section 16 of the Civil Procedure Code and that the interest of justice would be served by the correct procedure being followed at the initial stages before proceeding to the trial stage.

For these reasons I do not propose to interfere with the order of the learned District Judge of Balapitiya dated 26.08.2003. The appeal is dismissed with costs fixed at Rs. 5000.

Appeal dismissed.