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JAYASUNDERA
vs
TILAKERATNE AND ANOTHER

COURT OF APPEAL
SOMAWANSA, J. (P/CA) AND
BASNAYAKE, J.
CALA 276/2004
D. C. MT. LAVINIA 1168/99/L
NOVEMBER 1, AND
DECEMBER 14, 2004.

Civil Procedure Code, section 757(1) — Leave to appeal — Petition to be supported by an affidavit — Affidavit deposed to by the instructing attorney - at-law — Validity ?

When the plaintiff-petitioner sought leave to appeal preliminary objection was taken by the defendant-respondent that, there is no proper affidavit filed as required by law as the affidavit tendered was deposed to by one of the instruct attorneys at law, and hence the application should be dismissed *in limine.*

It was contended by the plaintiff-petitioner that the material on which the plaintiff relies on, are all events that transpired in court and the best evidence that one could place is that of the registered attorney-at-law, as what transpired in court was best known to him than to any one else and that the registered attorney is the best witness.

Held :

Per Basnayake, J.

"When an attorney at law gives an affidavit on facts which are false where would he or she be placed ? Could the attorney say that the affidavit was prepared on instructions ? There is no doubt that even the attorney-at-law is a fit and proper person to depose to the facts in an affidavit, provided those facts are within the knowledge of the attorney at law. It can't be said that it is within anybody's personal knowledge when facts are gathered through instructions."

In the present case some facts deposed to in the affidavit would have been related to the registered attorney by the plaintiff — as regards the relationship and how the plaintiff became the owner of the corpus.

APPLICATION for leave to appeal from an order of the District Court of Mt. Lavinia on a preliminary objection raised.

Cases referred to :

1. *Kumarasinghe* vs *Ratnakumara* – (1983) 2 Sri LR 39 and at 394 and 397

2. *Chandrasiri* vs *Abeywickrema* – (1998) 3 Sri LR 225

3. *Hakeem Mohideen* vs *Mohamadu Caseem* – 4 NLR 299

Sanath Jayatilake for plaintiff petitioner.
Ranjan Suwandaratne with *Ranjit Ranadeera* for intervenient respondents.

Cur.adv.vult.

April 26, 2005
ERIC BASNAYAKE, J.

The plaintiff petitioner (Plaintiff) filed this petition seeking leave to appeal to have the order of the learned District Judge of Mt. Lavinia dated 13.07.2004 set aside. When this case was called after notice, the learned counsel for the defendants/respondents (defendants) raised a preliminary objection to wit, that there is no proper affidavit filed in this case as required by law, as the affidavit tendered was deposed to by one of the instructing attorneys-at law, and hence moved court to dismiss this application *in limine.* Written submissions have been tendered by both parties with regard to the preliminary objection taken.

In terms of section 757(1) of the Civil Procedure Code, applications for leave to appeal proceedings shall be made by petition supported by an affidavit. In this case the plaintiff had filed along with the petition, an affidavit, deposed to by one of the attorneys-at law. The learned counsel for the plaintiff submits that the material on which the plaintiff relies on, are all events that transpired in court and the best evidence that one could place is that of the registered attorney-at-law. He states that what transpired in court was best known to him than to any one else and that the instructing attorney-at law is the best witness that is available. The learned counsel appears to rely on the judgment of *Kumarasinghe* vs. *Ratnakumara*[1] 394,397 where Sharvananda J. (as he then was) states thus :

> **"An affidavit is an oath in writing signed by the party deposing, sworn before and attested by him who had**

authority to administer the same" Bacon's Abridgement 124.

An affidavit is a declaration as to facts made in writing and sworn before a person having authority to administer an oath.

Any particular fact may be proved by an affidavit. The law provides for the admissibility, in certain circumstances, of evidence by affidavit. The evidence given by way of an affidavit is a substitute for testimony given by word of mouth. The affidavit can be used as evidence of facts stated therein. Any person acquainted with the facts may give the affidavit. An affidavit is only intended to satisfy the court, *prima facie*, that the allegations in the application are true so that the court may take legal action such as issuing notice on the opposite party on the basis of the evidence, provided by the affidavit. If the allegation of fact made in an affidavit in support of the application is not refuted by counter affidavit by the opposite party, then the allegation in the application is treated as true.

Affidavit in support of the application thus serves the purpose of proof of facts stated therein. It furnishes the evidence verifying the allegation of facts contained in the petition. Affidavit evidence carries equal sanctity as oral evidence.

While a stranger cannot make an affidavit it need not be made by the party individually, but may be made by any person who is personally aware of the facts. The court is entitled to have the best evidence before it ; where there exists evidence which is first hand it will be most unsatisfactory to place before court evidence of any other description. Ordinarily a petitioner is the best person who can speak to the facts and verify the facts averred in the petition ; then, it is he who should file the affidavit in support of the said facts ; but if there are other witnesses too who can, to their personal knowledge, depose to those

facts there is no bar to their filing affidavits in support of the petition, in addition to or in substitution for the petitioner's affidavit. But if the petitioner does not file his own affidavit verifying the facts, which he is personally conversant with, then the court would be extremely reluctant to grant relief. But the petitioner may be excused from filing an affidavit, if for some good reason or ground he is unable to do so.

In *Chandrasiri* vs. *Abeywickrema*[2] the court held that "in terms of section 757(1) of the Civil Procedure Code the affidavit which is required to support a petition made by a party for application for Leave to Appeal cannot be subscribed to by the registered attorney of such party". An affidavit sworn by the defendant before his own proctor is not according to the practice of English Courts, admissible in evidence *Hakeem Mohideen* vs. *Mohamadu Caseem*[3].

Under any circumstance, it is only persons who to their personal knowledge depose to those facts who are qualified to affirm an affidavit. In the present case some facts deposed to in the affidavit are that the 1st defendant is the younger brother of the plaintiff and the 2nd defendant is the wife of the 1st defendant, the plaintiff was the owner of Lot 4 in Plan 1210. This Lot 4 was sub divided in to two Lots by the plaintiff in the Plan 5075 and Lot 1 gifted to the 1st defendant. In addition to that, the facts leading up to the time the dispute arose were averred by the registered attorney-at-law in the affidavit in question. Can she state that she averred all those facts from her personal knowledge ? All these facts would have been related to her by the plaintiff, and the consequential preparation of the petition. The affidavit almost in line with the petition was prepared thereafter.

Could the registered attorney at law say that she knew all the facts deposed to in the affidavit ? In that case she should be an eligible witness who could give evidence from the witness box. When she comes to the witness box she cannot be heard to say that she learnt those facts from the plaintiff. In that case that evidence becomes hearsay and inadmissible.

Sometimes a client may not speak the truth and the affidavit could be prepared on falsehood. An attorney-at-law could prepare an affidavit on

the basis that the instructions given are truthful. This is not always the case. When an attorney-at-law gives an affidavit on facts which are false where would he or she be placed ? Could the attorney say then that the affidavit was prepared on instructions ? There is no doubt that even an attorney-at-law is a fit and proper person to depose to the facts in an affidavit, provided those facts are within the knowledge of the attorney-at-law. It cannot be said that it is within anyone's personal knowledge when facts are gathered through instructions.

Therefore I hold that this affidavit is bad in law. Hence I uphold the objection. Therefore leave is refused with costs fixed at Rs. 5,000.

SOMAWANSA, J. — I agree.

Application refused.

HEWAGE
vs
PUBLIC TRUSTEE

COURT OF APPEAL
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CALA 398/2004
DC COLOMBO 35481/T
MAY 5, 2005

Civil Procedure Code — Testamentary proceedings — Probate issued — Application to have fixed deposits excluded from inventory — Application rejected — Is it a final order or an interlocutory order. ?

The District Court issued probate of the will to the Public Trustee. Intervenient petitioner filed an application objecting to the inclusion of certain fixed deposits of the deceased in the inventory, on the ground that the said fixed deposits were deposited by the deceased in The Finance Company and the intervenient petitioner was designated as the nominee. The District Judge rejected the application as such disputed claim can only be tried in a separate action.

The petitioner sought leave to appeal from the said order.

The respondent raised a preliminary objection that the impugned order is a final order and hence the said order should have been canvassed by way of final appeal revision ; and not by way of leave to appeal.

APPLICATION for leave to appeal on the preliminary objection whether leave to appeal lies or not.

HELD :

(1) When the District Judge made order that the intervenient's remedy is to file a separate action and vindicate his rights, the dispute between the intervenient and the Public Trustee remains until it is finally decided.

(2) Hence the order will not finally dispose of the matter in dispute. The said order is not a judgment with the meaning of section 754(5).

Cases referred to :

1. *Ranjith* vs. *Kusumawathie and others* (1998) 3 Sri LR 232 at 236

2. *White* vs. *Brunton* (1984) 2 All ER 606

3. *Shubrook* vs. *Tufnel* (1882) (QBD 621 : (1881-8) All ER 180

4. *Salaman* vs. *Warner and others* (1891) 1 QB 734

Kuwera de Zoysa with *D. de Alwis* for the intervenient petitioner.
M. U. M. Ali Sabry with *Sanjeewa Dasanayake* for executor-petitioner-respondent.

Cur.adv.vult.

October 11, 2005
L. K. WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the Additional District Judge of Colombo dated 08.10.2004. Briefly the facts relevant to this application are as follows :

The petitioner-respondent (hereinafter referred to as the "Public Trustee") instituted these proceedings in the District Court of Colombo praying for the Probate of a Last Will which he claimed to have been executed by late Jayasena Weerasekera. This Last Will left the entirety of the deceased's estate to five charitable institutions in the Island. As there were no objections, the District Court issued the probate of the will to the Public Trustee. In the meantime, the intervenient-petitioner filed an application objecting to the inclusion of certain immovable properties, in that certain fixed deposits of the deceased be excluded from the inventory on the ground that the said "fixed deposits" were deposited by the deceased in "The Finance Company" and the intervenient-respondent-petitioner (petitioner) was designated as the nominee in all the said fixed deposits. Accordingly he made an application to Court to have the said 'fixed deposits' excluded from the inventory. On this application, the learned Judge made order dated 08.10.2004 rejecting the petitioner's application to have the said 'fixed deposits' in the inventory excluded therefrom on the ground that when the executor or administrator is not prepared to admit the claim of an intervenient to a property in the inventory, such disputed claim can only be made by way of a separate action. Thereafter the petitioner filed this application for leave to appeal from the said order of the learned Judge.

When the matter was taken up for inquiry, a preliminary objection was raised by the Public Trustee, that the impugned order is a 'Final Order' in the nature of fully and finally adjudicating the rights of the parties in respect of this dispute and hence the said order should have been canvassed either by way of final appeal and/or by application in revision and not by way of an application for leave to appeal, which is meant to challenge interlocutory orders.

When the matter was taken up, both counsel agreed to tender written submissions on the said preliminary objection. Accordingly, written submissions were tendered by both parties.

The learned counsel for the "Public Trustee" contended that the impugned order made by the learned Judge rejecting the petitioner's application to exclude the said "fixed deposits" from the inventory is an order which has the effect of a final judgment which can be canvassed only by

way of a final appeal or by a revision application.

Section 754(5) of the Civil Procedure Code reads as follows :

> **"Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter –**
>
> **"Judgment" means any judgment or order having the effect of a final judgment made by any civil Court ; and**
>
> **"Order" means the final expression of any decision in any action proceeding or matter, which is not a judgment."**

After examining several legal decisions in Sri Lanka and the U. K. on the question whether an order in a civil proceeding is a judgment or an order having the effect of a final judgment, Dheeraratne, J. in the case of *Ranjith* vs. *Kusumawathie* and others[1] made the following observation :

> **"There have been two virtually alternating tests adopted by different judges from time to time in the U. K. to determine what final orders and interlocutory order were. In *White* vs. *Brunton*[2] Sir John Donaldson MR labeled the two tests as the order approach and the application approach. The order approach was adopted in *Shubrook* vs *Tufnel*[3] where Jessel, MR and Lindley, LJ held that an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory, depended on the nature of the order made.**
>
> **The application approach was adopted in *Salaman* vs. *Warner and others*[4] in which the Court of Appeal consisting of Lord Esher, MR Fry and Lopes LJJ held that the final order is one made on such application or proceeding that, for whichever side the order was given, it will, if it stands, finally determine the matter in litigation. Thus**

the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not the order itself."

Then at 239 Dheeraratne, J. cited with approval the following passage of Lord Esher in *Salaman's* case *(supra)*.

"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be giving in favour of either of the parties. If their decision, whichever way it is given, will if it stands, finally dispose of the matter in dispute, I think for the purposes of these rules it is final. On the other hand, if their decision, if given in one way will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

I have quoted extensively from the decision in *Ranjith vs. Kusumawathie and others (supra)* as I find that the decision in that case will help to answer the question before us.

In the circumstances I am of the view that the order must determine the rights of the parties conclusively, completely and finally to be considered as a final order which falls into the category of "judgment" in terms of Section 754(5) of the Civil Procedure Code. Essentially, the distinction between "final" and "interlocutory" lies in the nature of the decision, in that, whether it finally disposes of the matter in dispute. An order is not a final order if such an order does not finally dispose of any dispute or claim in the suit itself.

In the instant case, the learned Judge held that the question as to the title to the "fixed deposits" in the inventory cannot be decided in the testamentary action and the Court does not have jurisdiction in the testamentary proceedings to determine disputes as to the title in respect of such

property between the administrator and an intervenient. The learned Judge further held that the intervenient's remedy is to file a separate action. If the deceased's title to a property included in the inventory is disputed, the question arises whether that question could be decided in the same proceedings or whether it is necessary to file a separate action. When the learned Judge made the order that the intervenient's remedy is to file a separate action and vindicate his rights, in my view the dispute between the intervenient and the Public Trustee remains until it is finally decided. Hence it can be clearly seen that the order of the learned Judge will not finally dispose of the matter in dispute. Accordingly the order made by the learned Judge is not a judgment within the meaning of Section 754(5) of the Civil Procedure Code.

For these reasons the preliminary objection raised by the Public Trustee is overruled but in all the circumstances we make no order as to costs.

SOMAWANSA, J. (P/CA) — I agree.

Preliminary objection overruled.

ABEYGUNAWARDENA
vs
PODI MAHATHMAA AND ANOTHER

COURT OF APPEAL
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CALA 350/2004(CG)
MAY 5, AND
JULY 6, 2005

Civil Procedure Code, sections 420, 422 and 422(1) — Refusal of court to issue a commission — Validity — Circumstances

The plaintiff-petitioner as well as the 1st defendant respondent both claimed that their predecessors in title was one 'A'. The plaintiff-petitioner filed action to have the deed whereby A has transferred the corpus to the 1st defendant-respondent set aside. The plaintiff petitioner with a supporting medical certifi-

cate moved court to issue a commission to record/examine the said A at the place he was residing as he had been medically advised not to travel due to his sickness.

This application was rejected by court. On leave being sought –

HELD:

(i) If it is for a commission to examine a sick person within the jurisdiction of the court, section 420 would be applicable and a commission to examine in other cases the relevant section is section 422. In either case court is given a discretion to grant or withhold a commission.

(ii) The power to issue commission is discretionary and for court to exercise its discretion adequate material must be placed before it. In an application under section 422 there must be material as to the residence of the person to be examined. In the circumstances, there is no material placed before Court to satisfy Court as to the residence of A.

(iii) Where forgery is pleaded witness speaking to the fact must be present so as to be cross examined.

(iv) The finding of the District Judge as to the evidentiary value of the medical certificate is correct, as the medical certificate only certifies that he is suffering from Parkinsons disease and at present not suitable for traveling.

(v) Where the witness is ill, medical, evidence of such fact must be given, and when illness is alleged, mere certificate of a medical man is not admissible unless proved by the evidence of the person giving it.

(vi) When a commission is asked for on the ground of illness the court is under obligation of coming to a definite conclusion and recording a finding as to whether the illness is serious enough to prevent the witness from attending court, before passing the order.

APPLICATION for leave to appeal, with leave being granted.

Cases referred to :

1. *Abner & Co.* vs *Ceylon Overseas Tea Trading Co.*, 47 NLR 9 at 11
2. *Sarala* vs *Surendra* 39 CWN 595
3. *Sirinivasa* vs *Ranga* – A 1927 M 524
4. *Panchkari* vs *Panchanam* – 39 CLJ 589
5. *R* vs *Ahiliya* – 47 B 74

Navin Rajapakse for plaintiff petitioner.
Chandana Prematilake with *S. Herath* for 1st and 2nd defendant respondents.

Cur.adv.vult.

October 07, 2005
ANDREW SOMAWANSA, J. (P/CA)

This is an application seeking leave to appeal from the order of the learned District Judge of Gampaha dated 30.08.2004 refusing to issue a commission in terms of Section 422 of the Civil Procedure Code and if leave is granted to set aside the aforesaid order dated 30.08.2004 and to issue a commission under and in terms of Section 422(1) read with Section 420 of the Civil Procedure Code to examine and/or record the evidence of Sathasivam Achalingam and in the alternative for a direction to the District Court of Gampaha to issue a commission under and in terms of Section 422(1) read with Section 420 of the Civil Procedure Code to examine and/or record the evidence of the said Sathasivam Achalingam who is listed in the plaintiff-petitioner's list of witnesses.

As per minute dated 12.01.2005 leave has been granted to decide the substantial question as to the correctness of the learned District Judge's order dated 30.08.2004. On this question of law both parties have made oral submissions and have tendered written submissions as well.

the relevant facts are the plaintiff-petitioner as well as the 1st defendant-respondent both claimed that their predecessor in title was one Sathasivam Achaligam who according to the plaintiff-petitioner had made and signed or executed the deed of gift No. 27 in his favour while the 1st

defendant-respondent claimed that the said Sathasivam Achalingam had made and executed the deed of transfer No. 2199 in his favour. Thus in terms of the recitals of both deeds the predecessor in title was one and the same person named Sathasivam Achalingam. The plaintiff-petitioner filed the instant action in the District Court of Gampaha to have the said deed No. 2199 set aside and for a declaration of his title to the land in suit and ejectment of the defendants-respondents therefrom.

On or about 14 November 2002 the plaintiff-petitioner made an application to the District Court of Gampaha to issue a commission on the Examiner of Questioned Documents (EQD) to compare and report on the authenticity of the signature of the said Sathasivam Achalingam claimed to be appearing on both the aforesaid deeds, deed No. 27 (plaintiff-petitioner) and deed No. 2199 (1st defendant-respondent). However the learned District Judge directed the plaintiff-petitioner to lead evidence for the purpose of issuing a commission to the Examiner of Questioned Documents.

In the meantime, the 2nd defendant-respondent was added as a party on the basis that the 1st defendant-respondent had by deed No. 1048 transferred his rights in the property to the 2nd defendant-respondent the son of the 1st defendant-respondent. Thereafter on or about 30.04.2003 the plaintiff-petitioner made an application to the District Court of Gampaha in terms of Section 178(1) of the Civil Procedure Code to record the evidence prior to trial which application was refused by the learned District Judge of Gampaha. It is to be noticed neither the application nor the order made has been made available to this Court.

It appears that another motion had been filed by the plaintiff-petitioner together with a copy of a medical certificate dated 16.08.2004 issued by a Neurologist indicating the present physical condition and/or health of Sathasivam Achalingam and moved Court to issue a commission to record evidence and/or examine the said Sathasivam Achalingam at the place he was residing as he has been medically advised not to travel due to his sickness. Though it is stated in the petition that a true copy of the said motion is tendered to Court marked P9 no such document marked P9 has been tendered to Court up to now. However a certified copy of the said

motion has been tendered by the defendants-respondents marked R1 to assist Court. The medical certificate has been produced marked P9A.

It is averred by the plaintiff-petitioner that as there was an error in the said written motion about the correct section of the Civil Procedure Code under which the said motion was made the plaintiff-petitioner's attorney-at-law made an oral motion and/or application to Court in terms of Section 422(1) of the Civil Procedure Code read with Section 420 of the Civil Procedure Code to which counsel for the defendant-respondent objected to. The learned District Judge having heard both counsel on this matter by her order dated 30.08.2004 rejected plaintiff-petitioner's aforesaid application.

Counsel for the plaintiff-petitioner has formulated two questions of law to be considered by this Court.

(1) Whether there is a specific procedure for the issue or refusal of a commission under Chapter XXIX of the Civil Procedure Code ?

(2) Whether the reasons for the order refusing the commission by the learned District Judge was reasonable in view of the material adduced before Court ?

On an examination of the order of the learned District Judge dated 30.08.2004 it is to be seen that the learned District Judge has not considered the procedural aspect of the matter either for the issue or refusal of a commission and in the circumstances I myself do not intend to consider this aspect of the matter at length. It suffices to say that the procedure is clearly stated in the relevant sections. If it is for a commission to examine a sick person within the jurisdiction of the Court, Section 420 would be applicable and a commission to examine in other cases the relevant section would be Section 422. In either case the Court is given a discretion either to grant or withhold a commission and it only requires the Court to adhere to the principles governing the exercise of its discretion.

Sarkar's Code of *Civil Procedure Code* 10th Edition 2002 (vol. 2) page 1770 states as follows :

> "The power to issue commission is discretionary. The recording of evidence by the Court has to be the normal rule or procedure. Examination of witnesses on a commission has to be an exception".

Thus it is to be seen that for this Court to exercise its discretion adequate material must be placed before it. Therefore if the application is made in terms of Section 422 of the Civil Procedure Code there must be material before Court as to the residence of the person to be examined as at the relevant time to the satisfaction of Court. In the instant action the fact that the aforesaid Sathasivam Achalingam's address as given in the two deeds is outside the jurisdiction of District Court of Gampaha will not be sufficient material to establish that at the time of the application the said Sathasivam Achalingam was residing outside the jurisdiction of the Court. Thus there was no material placed before Court to satisfy Court as to the residence of Sathasivam Achalingam.

K. D. P. Wickremasinghe in his Book *Civil Procedure in Ceylon* page 11 says :

> "Where forgery is pleaded, witnesses speaking to that fact must be present so as to be cross-examined".

This is exactly the situation in the present case where the plaintiff-petitioner alleges that the deed of transfer No. 2199 dated 18.09.1997 made in favour of the 1st respondent does no contain the signature of Sathasivam Achalingam and therefore is a forgery. Therefore the defendants-respondents must necessarily have the right and the opportunity to examine or cross-examine Sathasivam Achalingam under oath in Court to ascertain the truth and prove that the vendor's signature in the said deed is in fact that of Sathasivam Achalingam.

Soertsz ACJ and Rose, J in *Abner & Co.*, vs. *Ceylon Overseas Tea Trading Co.*[1] where Their Lordships said :

"The granting or withholding of a commission is, of course, a matter within the discretion of the Court and normally an Appellate Court would be slow to interfere with the exercise of that discretion".

The second question as to whether reasons for the order refusing the commission by the learned District Judge was reasonable in view of the material adduced before Court has been correctly considered and answered by the learned District Judge. It is to be seen that the only material adduced before Court was the copy of a medical certificate dated 16.08.2004 from a Neurologist indicating the present physical and/or health condition of the said Sathasivam Achalingam marked P9A which reads as follows :

"*Mr. S. Achalingam*

To whom it may concern

This patient is suffering from Parkinson's disease and ... At present he is not suitable for traveling. To review in three months."

It is interesting to note that under the heading Parkinson's and Death in a medical definition of Parkinson's disease found in Wikipedia, the free encyclopedia htm it is stated as follows.

Parkinson's and Death :

While Parkinson's does not by itself cause death, because the decease may affect the respiratory system, sufferers may eventually contract pneumonia and die. Swallowing difficulties may lead to aspiration where food goes down the windpipe. Immobility may increase susceptibility to infection. That being said, people have lived 20-30 years with the affliction.

I must concede that the finding of the learned District Judge as to the evidentiary value of the medical certificate marked P9A is correct and she cannot be faulted for not acting on it for the simple reason that the afore-

said medical certificate only certifies that Sathasivam Achalingam is suffering from Parkinson's disease and at present he is not suitable for travelling. Condition to be reviewed in three months. Certainly the medical certificate does not certify that Sathasivam Achalingam will never be able to travel or come to Court after three months or for a long period due to sickness. Sarkar's *Code of Civil Procedure* 10th Edition 2002 vol. 2 page 1770 states :

> "When a commission is asked for on the ground of illness the court is under an obligation of coming to a definite conclusion and recording a finding as to whether the illness is serious enough to prevent the witness from attending the court, before passing the order".

Sarala vs *Surendra*[2] goes on to say at page 1772 :

> "Mere age is no sufficient ground (*Sirinivasa v. Ranga*[3] If sickness and infirmity is alleged, its character and gravity have got to be assessed. At the same time the importance of having the witness before the court and the advantages that would follow from examination in court should not be altogether lost sight of. (*Panchkari v. Panchanam*[4]). When illness is alleged, mere certificate of a medical man is not admissible unless proved by the evidence of the person giving it. (*R* v. *Ahiliya.*[5]) "

Civil Procedure in Ceylon by K. D. P. Wickremasinghe at page 191 says"

"Where the witness is ill, medical evidence of such fact must be given".

It is to be seen that the so called medical certificate submitted by the plaintiff-petitioner falls far short of the above requirements and the District Judge is fully justified in refusing the commission. In the circumstances there is no basis to interfere with her finding.

However I must say that the aforesaid medical certificate is dated 16.08.2004 and the learned District Judge has made the order canvassed in this application on 30.08.2004 considering Sathasivam Achalingam's health condition as on or about August 2004. This does not mean that the District Court is prevented from entertaining another application for a commission if the plaintiff-petitioner is able to satisfy Court the necessity for the issue of a commission. This is what the learned District Judge herself has indicated in the last sentence of her order when she says :

"ඉල්ලීම මෙම අවස්ථාවේදී ප්‍රතික්ෂේප කරමි."

I might also say that it has taken one year to decide this matter and if this application was not made to this Court in all probabilities the trial would have commenced and the evidence of Sathasivam Achalingam could have been lead.

In the circumstances, I would hold that the reasons given by the learned District Judge for refusing to issue a commission is reasonable. The application of the plaintiff-petitioner will stand dismissed with costs fixed at Rs. 10,000.

WIMALACHANDRA, J. — I agree.

Application dismissed.

LEELAWATHIE

vs.

SUNDARALINGAM, HEAD QUARTERS INSPECTOR OF POLICE, MIRIHANA AND OTHERS

COURT OF APPEAL
BALAPATABENDI, J., AND
IMAM, J.,
CA/H. C. A. 65/90

Writ of Habeas Corpus - Ingredients - Prerogative writ of right - Violation of fundamental rights - Constitution, Articles 126(1), 126(2) and 126(3) - Detention unlawful - Reference to Supreme Court - Instances - Can it be done?

The petitioner sought a writ of habeas corpus directing the respondents to produce the 11th respondent her son and a declaration that the arrest and detention are unlawful.

The matter was referred to the Chief Magistrate's Court for inquiry and report.

The finding of the Chief Magistrate was that it had been established by evidence that the corpus was arrested by the Police, shot dead by the Police and the body of the corpus later cremated. This was during a period of nationwide unrest and emergency.

HELD:

1. To succeed in a writ of habeas corpus, the petitioner would have to prove that the corpus had been illegally or unlawfully arrested and detained by the respondents; in this case, the arrest is admitted and detention is also within the law as a detention order had been obtained.

2. It is only if the detention is not proved to be lawful that a writ of habea corpus is issued.

3. The writ of habeas corpus is a prerogative writ of right which issues *ex debit justitae* when the applicant has satisfied the court at the conclusion of the inquiry that the detention is unlawful.

As to the application that this matter be referred to the Supreme Court under Article 126(3) —

HELD FURTHER:

1. If a person who alleges that his fundamental rights have been violated fails to comply with Articles 126(1) and (2) he cannot smuggle that question into a writ application in which relief is claimed on different facts and grounds.

2. The evidence does not reveal any violation of the fundamental rights of the petitioner. The arrest and the detention of the corpus had been made in conformity with the law. The petitioner is endeavouring to obtain relief available to her under Article 126(1) in this application after a lapse of more than 14 years which is unreasonable.

APPLICATION for a writ of habeas corpus.

Cases Referred to :

(1) *Juwanis* v. *Lathiff, Police Inspector S. T. F. and others* (1988) 2 Sri LR 185
(2) *Shanthi Chandrasekeran* v. *D. B. Wijetunga and others* (1992) 2 Sri LR 299

R.S. Weerawickrama for petitioner

Nalini Kaneshayogan for 1st petitioner

Saliya Peiris for 2nd respondent.

S. K. Wickramarachchi, State Counsel for 9th and 10th respondents.

January 20, 2006
S. I. IMAM, J.

The Petitioner instituted this action by a Petition dated 01.11.1990 seeking a Mandate in the nature of a Writ of Habeas Corpus directing the 1st to 9th Respondents to produce the 11th Respondent namely Weragodage Jayarathna her son the corpus in this case, and a Declaration that the arrest and detention of the 11th Respondent and/or their subordinates is unlawful. The matter was thereafter referred by this Court to the Chief Magistrate's Court of Colombo for inquiry and report. The aforesaid report is in respect of the 11th Respondent in this application.

Consequent to the Inquiry, the learned Chief Magistrate of Colombo submitted a Report to this Court dated 24.01.2003 after inquiry into the relevant circumstances and available evidence. As the learned Chief Magistrate of Colombo has observed, November 1989 during which period the 11th Respondent is alleged by the Petitioner to have been arrested

and detained by the Sri Lanka Police was during a period of nationwide unrest and emergency. The general public, public institutions, public and private property, state officers and members of the armed forces and police were under grave threat and danger.

The Petitioner in her evidence before the learned Chief Magistrate of Colombo stated that on 02.11.1989 the corpus was taken away by the 2nd to 6th Respondents, and that she visited the corpus on several occasions at the Mirihana Police Station. She thereafter was informed that the corpus had been taken to the Athurigiriya Police Station where she visited the corpus, but since 24.12.1989 she had not seen the corpus. She further stated that she was informed by the Police that the corpus had escaped from the Police. The 1st Respondent Sundaralingam the HQI of Mirihana stated that after the corpus was arrested on 09.11.1989 by several Police Constables namely PCs 18565, 7104, 2606 and 22575 he was kept under detention orders at this Police Station until 01.12.1989, and thereafter for security reasons and on the instructions of the ASP, Mirihana the corpus was transferred to the Athurigiriya Police Station and kept there under Detention Orders.

IP Vijitha Gunarathna in his evidence said that he was assigned to take away the corpus and three others from Athurugiriya to be detained at the Detention Camp at the race course, and while being taken away at Koskandawala the persons they were taking including the corpus had escaped from their custody.

The 2nd Respondent in his evidence stated that while proceeding towards Athurugiriya he saw a group of persons moving in a suspicious manner who threw an object about 25 meters away which exploded. The 2nd Respondent explained that thereafter they fired, and subsequently found 4 dead bodies of the group. He said that IP Vijitha Gunarathna identified the body of the corpus among the dead persons. Subsequently SP Anura Senanayake giving evidence testified how IP Vijitha Gunarathna identified the body of the corpus and in accordance with the necessay order given under the Emergency Regulations the body of the corpus was cremated.

The finding of the learned Chief Magistrate was that it had been established by the evidence of the Respondents who gave evidence that

the corpus was arrested by the Police, shot dead by the Police, and the body of the corpus later cremated.

For the Petitioner to succeed in a Writ of Habeas Corpus and a Rule Nisi to be issued, the Petitioner would have to prove that the corpus had been illegally or unlawfully arrested and detained by the Respondents. In this case the arrest is admitted, and detention is also within the law as detention orders had been obtained. In the case of *Juwanis* vs. *Lathiff, Police Inspector Special Task Force and others* [1] it was held that it is only if the detention is not proved to be lawful that a Writ is issued. It was further held that the Writ of Habeas Corpus is a prerogative Writ of right which issues "ex debit Justitiae" when the applicant has satisfied the Court at the conclusion of the inquiry that the detention is unlawful.

In accordance with the evidence led before the learned Chief Magistrate the respondents having admitted the arrest of the corpus have also justified the said arrest by tendering the relevant arrest notes and the orders pertaining to the arrest of the corpus. The Petitioner has sought an order in her written submissions from this court referring this application to the Supreme Court to detemine any violations of the Petitioner's Fundamental Rights. However in accordance with Article 126(3) of the Constitution an application for. Writs of Habeas Corpus can only be referred to the Supreme Court only if it appears to this Court that there is *prima facie* evidence of an infringement or imminent infringement of fundamental rights. In the case of *Shanthi Chandrasekaram* vs. *D.B.Wijetunga and others* [2] it was held by his Lordship Mark Fernando J. that "Article 126(1) confers sole and exclusive jurisdiction in respect of infringement of fundamental rights. Article 126(2) prescribes how that jurisdiction may be invoked. Article 126(3) is not an extension of or exception to those provisions; if a person who alleges that his fundamental rights have been violated fails to comply with them, he cannot smuggle that question into a writ application in which relief is claimed on different facts and grounds, and thereby seek a decision from the Supreme Court. The evidence led before the learned Chief Magistrate of Colombo and the affidavits filed before this court do not reveal any violation of the fundamental rights of the Petitioner. The arrest and the detention of the corpus had been made in conformity with the law. The Petitioner is endeavoring to obtain reliefs available to her under Article 126(1) in this application, after a lapse of more than 14 years which is unreasonable.

It is my view that the arrest and detention of the corpus have been made in accordance with the law, and is thus lawful. The Petitioner has not satisfied this Court that at present the corpus is in the custody or control of the Respondents, nor has the Petitioner made out a *prima facie* case. The corpus died as a result of confrontation with the Respondents as borne out by the evidence at the inquiry in the Magistrate's Court.

For the aforesaid reasons as the allegations of the Petitioner have no merit, I dismiss the application of the Petitioner without costs.

BALAPATABENDI, J. — I agree.

Application refused.

VYAPURI

vs.

ABUTHAHIR

COURT OF APPEAL
SOMAWANSA, J(P/CA) AND
WIMALACHANDRA, J.
CA 390/2004 (REV.)
D. C. KANDY 2437/RE

Civil Procedure Code, section 639, 753(2), 763(1), 763 and 763(2) - Judicature Act, section 23 - Writ pending appeal - Dismissed on a technical ground - Second application for writ pending appeal - Dismissed not on merits - Inquiry under section 763 - Burden is on whom - Can the judgement creditor make a second application for writ?

On the eighth day of writ pending inquiry the case was kept down when it was first called as both parties indicated to court that they are ready. However, when it was called for the second time, the plaintiff petitioner moved for a date stating that he is not ready for inquiry. The District Judge dismissed the plaintiff petitioner's application for writ on the basis that the petitioner has misled court by stating that he was ready for inquiry, when in fact he had not been ready.

After the dismissal the plaintiff filed another application, and the court dismissed the application on the basis that, the conduct of the petitioner in the earlier application showed a lackadaisical approach.

HELD:

(i) It is settled law that a court cannot dismiss an applicaiton without going into the merits unless either party has agreed to a dismissal in the event of non-compliance with an undertaking.

(ii) Section 763 of the Civil Procedure Code and section 23 of the Judicature Act place the burden of satisfying court as to why writ should be stayed fairly and squarely on the respondent.

(iii) Once an application is made for the issue of a writ pending appeal, and the respondent judgment/debtor is present in court there is no burden on the part of the plaintiff petitioner to prove anything. He can be silent - the court would have to call upon the judgment debtor respondent to show cause or satisfy court why writ should be stayed. The District Judge has no power to dismiss an application on the basis the plaintiff-petitioner is not ready for trial or that he had moved for a postponement on numerous of occasions - for the burden is on the respondent.

(iv) There is no express bar in the Code preventing a judgment creditor from making a second application for writ pending appeal, if the first application is dismissed on technical grounds and not on merit.

HELD FURTHER :

(v) The object of the power of revision is the due administration of justice; the court will not hesitate to use its revisionery powers to give relief where a miscarriage of justice has occurred and indeed the facts of this case cry aloud for intervention of this court to prevent what otherwise would be a miscarriage of justice.

APPLICATION for leave to appeal and revision from order of the District Court of Kandy.

Cases Referred to :

1. *Don Piyasena v. Mayawathie Jayasuriya* (1986) 1 Sri LR 6
2. *Grindlays Bank v. Mackinnon Mackenzie & Co. (Ceylon) Ltd.* (1990) 1 Sri LR 19
3. *Esquire (Garments) Industries Ltd. v. Bank of India* (1993) 1 Sri LR 130
4. *Mamnoor v. Mohamed* 23 NLR 493
5. *Mariam Bee v. Seyed Mohamed* 68 NLR at 38
6. *Somawathie v. Madawala* (1983) 2 Sri LR 15 at 30, 31

Reza Muzni for plaintiff respondent.
Rohan Sahabandu with *Gamini Hettiarachchi* for defendent - respondent.

January 01, 2006

ANDREW SOMAWANSA, J. (P/CA)

This is a revisionary application seeking to revise and set aside order of the learned District Judge of Kandy dated 28.05.2002 and 14.10.2003 rejecting the two applications of the plaintiff-petitioner (hereinafter called the petitioner) for execution of decree pending appeal without going into the merits of the applications. Petitioner also prayed for an order for this case to be sent back to the learned District Judge with directions to hod an inquiry and adjudicate on the merits of the application dated 28.06.2002.

After the pleadings weres completed and when the matter was taken up for argument both counsel agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are pending the appeal lodged by the defendent-respondent (hereinafter called the respondent) the petitioner applied to have the decree executed pending appeal. The respondent filed his objections to the aforesaid applicationand the matter was fixed for inquiry and as the counsel for the petitioner Mr. S. Mahenthiran, PC was not well a postponement was sought. Thereafter this matter had been postponed 7 times at the instance of the petitioner in view of the ill health of his counsel and on the 8th occasion on 28.05.2002 the learned District Judge inquired

from parties if they were ready and the petitioner informed Court that he was ready and the matter was kept down to be taken up later. When it was taken up for the second time an attorney-at-law had appeared on behalf of the petitioner and sought a postponement on the basis that the petitioner was not ready for inquiry. The learned District Judge then by his order dated 28.05.2002 dismissed the petitioner's application for writ pending appeal on the basis that the petitioner has misled Court by stating that he was ready for inquiry when in fact he had not been ready. This is the order that the petitioner is canvassing in the leave to appeal application bearing No. 405/2003.

After the dismissal of his application for execution of writ pending appeal the petitioner filed another replication seeking the same relief to which the respondent objected to and also took up a preliminary objection to the maintainability of this second application for writ pending appeal on the basis that the second application cannot be maintained in view of the previous order dated 14.10.2003. Again the parties agreed to tender written submissions and at the conclusion of the inquiry the learned District Judge by his order dated 14.10.2003 dismissed the application of the petitioner for execution of writ on the basis that the conduct of the petitioner in the earlier application shows the lackadaisical approach of the petitioner. The petitioner thereafter filed the instant revision application seeking to revise and set aside the aforesaid two orders.

When an application is made to have the writ executed pending appeal the relevant provisions that would be applicable is Section 763(2) of the Civil Procedure Code which reads as follows.

"The Court may order execution to be stayed upon such terms and conditions as it may deem fit, where -

(a) the judgement-debtor satisfies the court that substantial loss may result to the judgement-debtor unless an order for stay of execution is made, and

(b) security is given by the judgement-debtor for the performance of such decree or order as may ultimately be binding upon him"

Section 23 of the Judicature Act reads as follows :

" Any party who shall be dissatisfied with any judgment, decree, or order pronounced by a District Court may (excepting where such right is expressly disallowed) appeal to the Court of Appeal against any such judgement, decree, or order from any error in law or in fact committed by such court, but no such appeal shall have the effect of staying the execution of such judgement, decree or order unless the District Judge shall see fit to make an order to that effect, in which case the party appellant shall enter into a bond, with or without sureties as the District Judge shall consider necessary, to appear when required and abide the judgement of the Court of Appeal upon the appeal."

Therefore in such a situation the Court is empowered to make an order staying the execution of the decree pending the disposal of the appeal where -

(a) the judgement-debtor satisfies Court that substantial loss may result to him unless execution is stayed and security is given by the judgement-debtor.

(b) there is a substantial question of law to be decided in appeal.

In the case of *Don Piyasena* vs. *Mayawathie Jayasuriya* [1] it was held :

"The provisions of section 23 of the Judicature Act and section 763(2) of the Civil Procedure Code make it clear that unless there is proof of substantial loss that may otherwise result, execution of decree will not be stayed merely on the grount that an appeal has been filed."

Again, in *Grindlays Bank* vs. *Mackinnon Mackenzie & Co. Ceylon Ltd.* [2] it was held :

"If the judgement-debtor desires stay of execution pending appeal he should establish substantial loss. The usual course is to stay proceedings pending an appeal when execution would cause irreparable injury. Mere inconvenience and annoyance is not enough. The damage must be substantial and the defendant must prove it."

In Esquire (Garments) Industries Ltd.,, vs. Bank of India [3] it was held :

"When an application for execution of a decree pending appeal is made in the exercise of rights conferred under section 763(1) of the Civil Procedure Code the District Judge may make any of the following orders :-

(a) Order execution or stay it, if he sees fit to order a stay, subject however, to the appellant furnishing a bond to abide the judgement of the Court of Appeal upon the appeal (Section 29 Judicature Act.)

(b) Order execution and if sufficient cause is shown by the appellant require security to be given for the restitution of the property which may be taken in execution of the payment of the value of such property and for the due performance of the decree or order of the Court of Appeal (Section 763(1) of the (C. P. C.)

(c) Order stay of execution upon such conditions as it may deem fit, where -

(i) the judgement-debtor satisfies the court that substantial loss may result to him unless an order for stay of execution is made;

(ii) the judgement-debtor gives security for the due performance of the decree or order as may be ultimately binding on him (Section 763(2) of the C. P. C.)

Thus it could be seen that it is settled law that on an inquiry under Section 763 the burden is entirely on the judgement-debtor to satisfy the Court as to whether he has met the aforesaid requirements. The plaintiff judgement-creditor need not even actively participate. The only limited matter the Court is called upon to adjudicate here is whether the judgement-debtor has satisfied the Court that substantial loss may be caused to him and /or that there is a substaintial question of law to be argued in appeal, in which event the Court has the discretion to stay execution of decree until the conclusion of the appeal.