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In the present instance, on a consideration of the facts of the case, it is apparent that the appellants' application does not fall within the scope described in Article 106(2) of the Constitution. If a case does not come within the aforesaid exceptions referred to in Article 106(2), the sittings of such matter will have to be held in public in terms of Article 106 (1) of the Constitution. It is not in dispute that in the instant case, the motion filed by the appellants was to intervene in the writ application instituted by the 1st respondent, and that the order refusing the said motion was decided not in open Court, but in chambers. In the circumstances, the impugned order of the judge of the Court of Appeal is contrary to the provision contained in Article 106(1) of the Constitution and accordingly the said order becomes illegal.

Learned Counsel for the appellants submitted that the application of the 1st respondent in the main matter in case No. CA 1978/2004, was made in terms of Article 140 of the Constitution. His contention was that, in terms of Article 146(2)(iii) of the Constitution, the jurisdiction of the Court of Appeal in respect of its powers as contained in Articles 140, 141, 142 and 143 should be exercised by not less than 2 judges of the Court, unless the President of the Court of Appeal by general or special order otherwise directs. On a consideration of Article 146(2)(iii) it is apparent that unless there was a general or a special order made by the President of the Court of Appeal, directing otherwise, the case in question should have been heard by 2 judges of the Court of Appeal. As borne out by the Journal Entry of 04.08.2005 (A4), the impugned order refusing the application for intervention was made by a single judge in chambers. No material was produced before this Court to indicate that the President of the Court of Appeal had given a general or a special order that the case in question should be heard by a single judge and according to the submissions of the learned Counsel for the appellants, the President of the Court of Appeal has appointed 2 judges to hear matters in the nature of writs. In such circumstances, the decision given by a single judge is contrary to the provisions of the Constitution of the Republic and therefore becomes illegal.

The next matter that has to be examined, relates to the breach of the rules of natural justice in the process in which the impugned order in question was given. It is not in dispute that the decision to refuse the application of the appellants to intervene in the main matter was taken in chambers and such decision was taken without hearing the parties. A

question thus arises at to whether such a procedure would be in breach of the rules of natural justice which requires consideration and let me now examine whether there had been any such breach of the rules of natural justice.

A fair administrative procedure, which would be comparable to 'due process of law' embedded in the Constitution of the United States, is based on the principles of granting a fair hearing to both sides. The Courts therefore are bound to exercise the rules of natural justice, as the decisions would not be valid if ordered without first hearing the party who was going to suffer owing to the decision of the Court. Although the applicability and thereby the interest in the development of the well known rule "*audi alteram partem*" to a wider category succeeded recently, giving a hearing to an aggrieved party had begun arguably at the beginning of the human kind. As pointed out by Fortescue, J. In *R v University of Cambridge* [2], the first hearing in human history was given in the Garden of Eden. In his words :

> "I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

Citing the aforementioned, referring to the principle in question as a 'picturesque judicial dictum', Professor Wade, describes it is a 'nice example of the old conception of natural justice as divine and eternal law'.

Since the decision in *R v University of Cambridge (Supra)* several developments have taken place in the sphere of the rules of natural justice and in the present day context, the said rules apply not only to those who are carrying out judicial functions, but also to officers in certain instances, exercising administrative power. Lord Denning M. R., in *Schmidt v Secretary of State for Home Affairs* [3] stated that,

> "..... an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say."

Thus it is abundantly clear that the legal concepts pertaining to rules of natural justice with specific reference to the need to grant a hearing to parties have developed to such great lengths extending the applicability of such rules even to inquires carried out by administrative bodies.

In such circumstances, when there is constitutional provision to the effect that 'the sittings of every Court, tribunal and other institutions shall be held in public, that would necessarily encapsulate the need for the parties before Court to present their case. As pointed out by S. A. de Smith, (Judicial Review of Administrative Action, 4th Edition 1980, pg. 200) what the *audi alteram partem* rule guarantees is an adequate opportunity to appear and to be heard.

Justice Amerasinghe, in his Treatise on Judicial Conduct, Ethics and Responsibilities (Vishva Lekha, 2002, pg. 782) refers to the right to be heard and is of the view that a judge cannot decide a matter without hearing the parties. In Justice Amerasinghe's words:

> "In general, however a judge cannot decide a matter without hearing the parties; nor may a judge decide a matter before hearing both parties to a dispute, for, it is 'an indispensable' requirement of justice that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him."

If the position is so clear and unambiguous could it be said that a hearing should be restricted to the two sides which are opposing to each other, and in a situation where a third party is attempting to intervene that such a party should not be given an opportunity to present his case? I am of the firm view that the rules of natural justice and especially the rule relating to a fair hearing, necessitates that all parties should be given an opportunity to present their case and thereby a fair hearing. According to Justice Amerasinghe, a Judge is expected, not only to arrive at an accurate decision, but also to ensure that it has been fairly reached (Supra). For that purpose it would be essential to hear all parties, which would clearly include an intervenient.

Although the law is quite clear on the general rule pertaining to the duty to state reasons for judicial or administrative decisions, I am of the view that mention should be made of the usefulness in giving reasons as it could create a 'sound system of judicial review'.

The order dated 04.08.2005 made by the judge of the Court of Appeal refusing the intervention does not give any reasons for the refusal and the order merely states 'refused'. When such an application is refused, the applicants may endeavour to file an appeal in the Supreme Court and for such purpose it would be necessary for them to know the reasons for the refusal of their motion. Without knowing the reasons for the decision of the Court, it would be difficult for the petitioners to know whether the decision is even reviewable. Thus without knowing the reasons a litigant may be deprived of obtaining judicial redress and thereby protection of the law. As S. A. de Smith (Supra, at pg. 149) has correctly pointed out, there is an implied duty to state the reasons or grounds for a decision. This theory is generally applicable in situations where there is provision to appeal to a higher Court against the impugned decision. It is an accepted principle that in the field of natural justice, a right to a hearing would include the right to have a reasoned decision (Administrative Justice, Diane Longley and Rhoda James, Cavendish Publishing Ltd., 1999. pp. 208-209).

Notwithstanding the aforementioned, it is to be borne in mind that the principles of natural justice do not at present recognize a general duty to give reasons for judicial or administrative decisions (*Pure Spring Co. Ltd. v. Minister of National Resources*[4]). Considering this position, Prof. Wade is of the view that there is a strong case to be made for the giving of reasons as an essential element of administrative justice (Prof. William Wade, Administrative Law, 9th Edition, Pg. 522). Prof. Wade (Supra) further states that,

> "The need for it has been sharply exposed by the expanding law of judicial review, not that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. **A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice.** It is also a healthy discipline for all who exercise power over others. No single factor has inhibited the development of English Administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions (emphasis added)".

It is common ground that the order of the Court of Appeal dated 04.08.2005 was given without indicating any reasons. It is also not disputed that there was provision for the appellants to appeal to the Supreme Court against the impugned decision. Considering the duty to give reasons for decisions, S. A. de Smith (Supra, at Pg. 156) is of the view that, 'whilst concern for the quality of administrative justice does not require that all tribunals in all circumstances comply with some universally applicable standard, it is, nevertheless, essential that the Courts do not allow the duty to give reasons to atrophy'.

Be that as it may, what the rules of natural justice require relates to a fair hearing which in the instant case had not been extended to the appellants. In such circumstances it is abundantly clear that there had been a breach of the rules of natural justice.

There is one other matter I wish to deal with, based on a submission made by the learned Counsel for the appellants. Learned Counsel for the appellants submitted that the appellants had sufficient standing in law to be entitled for intervention and it was illegal and wrong on the part of the Hon. Judge of the Court of Appeal to refuse such intervention.

The appellants filed the Special Leave to Appeal Application against the order of the Court of Appeal dated 04.08.2005(A4) and prayed that the said order be set aside. This Court granted Special Leave to Appeal on that basis and had heard both parties on that limited issue. In fact learned Counsel for the 1st respondent had no objection to granting Special Leave to Appeal in order to consider the grant of relief to the appellants by setting aside the order of the Court of Appeal of 04.08.2005 for the appellants to support their application to intervene in the Court of Appeal in the interest of natural justice.

In the circumstances, the submissions pertaining to the question as to whether there was sufficient standing in law for the appellants to intervene in the application is not taken into consideration in these proceedings since this question has to be examined by the Court of Appeal.

For the reasons aforementioned, I answer questions No. 1 and 2, referred to earlier, in the affirmative. This appeal is allowed and the order of the Court of Appeal dated 04.08.2005(A4) is therefore set aside.

In all the circumstances of this case there will be no costs.

RAJA FERNANDO, J. — I agree.

AMARATUNGA, J. — I agree.

Appeal allowed.

SENEVIRATNE AND ANOTHER VS LANKA ORIX LEASING COMPANY LTD

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 191/4
D.C. COLOMBO 36095/MS
JULY 16 AND
AUGUST 24, 2004

Debt Recovery (Special Provisions) Act, No. 2 of 1990 - Amended by Act, No. 9 of 1990 and Act, No. 9 of 1994 - Section 6(2) affidavit - Averment "justly due" absent - Triable issue - Security - Is it imperative ? - Civil Procedure Code, section 705 - High Court of the Provinces (Special. Provisions) Act, No. 10 of 1996, section 2 - Does it oust the jurisdiction of the District Court ? - Bills of Exchange Orinance, sections 27,30, 39(1), 45 and 88(1) provisions not followed - Existence of conditions - Presentment - Previous letters not replied - Is it an admission ?

The plaintiff respondent instituted action in the District Court of Colombo, upon an on demand promissory note under the Debt Recovery (Special Provisions) Act (D.R. Act) to recover a sum of Rs. 4 million with interest. Decree nisi was entered and it was served on the defendants. The defendents filed objections and moved for the dismissal of the action or in the alternative sought leave to appear and defend unconditionally. The trial court directed the defendants to deposit half the sum claimed as a pre-condition to defend the action. It was contended by the defendant petitioner that :

(i) the alleged cause of action falls within the Commercial High Court of Colombo - (High Court of the Provinces (Special Provisions) Act) and hence the District Court has no jurisdiction.
(ii) the affidavit is not valid;
(iii) the plaint and affidavit do not contain averments to the effect that the sum claimed is justly due;
(iv) Provisions of Section 27or Section 28 of the Bills of Exchange ordinance have not been followed.
(v) the plaint does not disclose a valuable consideration; and
(vi) the Promissory Note is not valid.

HELD:

(i) An action instituted under the Debt Recovery (Special Provisions) Act, as amended, falls outside the jurisdiction of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996—section 2(1). The Debt Recovery Act has provided for a special procedure for the recovery of debts by lending institutions.

(ii) It is not essential that the plaintiff should actually use the word "justly" in his affidavit. If the affidavit substantially complies with the requirements of section 705 and if the facts threrein set out show that the sum claimed was rightly and properly due it is in order.

(iii) As regards the objection that there is no averment with regard to the existence of consideration, the defendants had not denied their signature on the Promissory Note. It is never necessary to aver consideration for any engagement on a Bill or Note or to provide the existence of consideration.

(iv) The Promissory Note in question was an on demand Promissory Note; the defendants promised to pay the plaintiff at its registered office in Colombo, the plaintiff by its letter of demand of 8.1.2003, demanded the sums set out in the Promissory Note, to which the defendants did not reply–this amounts to presentment. "In business matters", if a person states in a letter to another, that certain facts exist, the person to whom the letter is written must reply if he does not agree with or means to dispute assertions; if not the silence of the latter amounts to an admission of the truth of the allegations in the letter".

Accordingly, the only possible conclusion, for the failure to reply to the letter of demand is that the amount stated is correct and the defendants have not repaid the sum stated in the Promissory Note.

(v) The defendant pettioners, have not denied the Promissory Note. There is nothing to show that they repaid the sum in the Promissary Note. The defendants have not dealt with the plaintiff's claim on its merit, but have soley depended on the regularity of the procedure and technical objections to the plaintiff's action. As the defendants have not disclosed a triable case, they are not entitled to be heard without obtaining leave to appear and defend.

(vi) The Debt Recovery Act, as amended, does not permit unconditional leave to defend the claim. The minimum requirement is the furnishing of security.

It is imperative that court has to order security, but court can use its discretion to determine the amount of security if the defendants disclose a defence.

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

Cases referred to :

1. *Paindathan vs. Nadar - 57NLR 101*
2. *Saravanamuttu vs. de Mel - 49 NLR 429*
3. *Carpen Chetty vs. Manilan - 3 Cey. LR 11*
4. *Mather Saibo vs. Crowther - 3 ey. LR 31*
5. *Sadadeen vs. Meeresa - 3 CLW 138*
6. *People's Bank vs. Lanka Queen Int'l (Pvt) Ltd., (1999) 1 Sri LR 233*
7. *National development Bank vs. Chrys Tea (Pvt) Ltd., and another (2002) 2 Sri L.R. 206*

S. P. Srikantha for defendant petitioner respondents.
Hiran de Alwis for plaintiff respondents respondents.

cur. adv. vult.

February 02, 2005
WIMALACHANDRA, J.

This is an application for leave to appeal from the order dated 19.05.2004 of the Additional District Judge of Colombo.

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

The plaintiff-respondent-respondent (plaintiff) instituted action bearing No. 36095/MS in the District Court of Colombo upon an on demand

promissory note marked "CA3" against the defendant - petitioners - pertitioners (defendants) under the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended by Act, No. 9 of 1994, to recover a sum of Rs. 4,000,000 together with interest thereon at 21% and other charges.

The Additional District Judge of Colombo entered decree *nisi* in favour of the plaintiff and it was served on the defendants. The defendants filed objections by way of petition and affidavit, and moved for the dismissal of the plaintiff's action or in the alternative sought leave to appear and defend unconditionally. The learned Additional District Judge by her order dated 19.5.2004 directed the defendants to deposit half the sum claimed by the plaintiff as a precondition to defend the action. The present application to this Court is against the said order of the Additional District Judge.

In this application, the counsel for the defendants in his written submissions took the position that the said order of the learned Judge is erroneous for the following reasons:

(i) the plaintiff cannot have and maintain this action as the alleged cause of action falls within the jurisdiction of the Commercial High Court of Colombo in terms of the provisions of the High Court of Provisions (Special Provisions) Act, No. 10 of 1996 and hence the District Court has no jurisdiction to hear and determine the plaintiff's action.

(ii) the affidavit of the plaintiff is not valid.

(iii) the plaint and the affidavit do not contain averments to the effect that the sum claimed by plaintiff is "justly due".

(iv) the plaintiff has not followed the provisions in sections 27 and 88 of the Bills of Exchange Ordinance.

(v) the plaint does not disclose a valuable consideration.

(vi) the promissory note which is the subject matter of this action is not valid.

The first objection of the defendants is based on the question of jurisdiction. The learned counsel for the defendant submitted that the nature

of the transaction between the plaintiff and the defendants falls within the ambit of a commercial transaction and is for a sum exceeding Rs. 3 million as set out in the schedule to section 2 of the High Court of the Provinces (Special Provinsions) Act No. 10 of 1996.

It is to be noticed that when the learned counsel for the defendants made the aforesaid submission he conveniently disregarded the first schedule to this Act. Section 2(1) of the Act states that every such Provincial High Court, with effect from the date that the Minister may appoint by order published in the Gazette, shall have;

Exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the first schedule to this Act.

The first schedule reads thus :

(1) all actions where the cause of action arisen out of commercial transactions(including causes of actions relating to banking, the export or import merchandise, services affreightment, insurance, mercantile agency, mercantile usage and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding one million rupees or such other amount as may be fixed by the Minister by notification in the Gazette **excluding actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990** (emphasis added)

One million Rupees referred to in the first schedule has been increased to Three Milion Rupees by the Minister, by order in the Gazette.

Therefore it is very clear that actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990 as amended by Act, No. 9 of 1994 falls out side the jurisdiction of the High Court of the Provinces Act, No. 10 of 1996. The Debt Recovery (Special Provisions) Act has provided for a special procedure for the recovery of debts by lending institutions.

In the circumstances the learned judge who made the aforesaid order and the District Court of Colombo in which the learned Judge presided, has jurisdiction to hear and determine the plaintiff's action.

The next objection raised by the counsel for the defendants is that the affidavit is not valid. The learned Counsel submitted, as required by section

705 of the Civil Procedure Code, that there is no averment stating that the sum which the plaintiff claims is justly due to him from the defendants. It had been held in earlier decisions, it is not enough that the affidavit in support of the plaint merely states that an amount is due on the instrument sued upon, but it must be stated that the sum claimed is "justly due". However in the case of *Paindathan vs. Nadar*[1] it was held by a Divisional Bench that it is not essential that the plaintiff should actually use the word "Justly" in his affidavit. Upon a persual of the affidavit filed by the plaintiff it appears that the sum claimed by the plaintiff is rightly due. It was also held in the case of *Paindathan Vs. Nadar* (supra) that the affidavit will substantially comply with the requirements of the section 705 of the Code if the facts therein set out show that the sum claimed was rightly and properly due. Accordingly, in my opinion there is no merit in this objection raised by the defendant.

The defendants have taken the objection that there is no avermnet with regard to the existence of consideration. However they have not denied their signature on the promissory note. Section 30(1) of the Bills of Exchange Ordinance states as follows :

> " Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value".
>
> Byles on Bills of Exchange, 21st edition at page 132 states thus:
>
> "If a man seeks to enforce a simple contract, he must, in pleadings, aver that it was made on good consideration, and must substantiate that allegation of proof. But to this rule bills and notes are an exception. It is never necessary to aver consideration for any engagement on a bill or note or to prove the existence of consideration ....."

The learned counsel for the defendants also submitted that the plaintiff has failed to present the promissory note for payment to the defendants as required by section 45 and section 88(1) of the Bills of Exchange Ordiance.

In the promissory note which is the subject matter of this action it states that, on demand the defendants promise to pay the plaintiff at its

registered office in Colombo. Accordingly, the plaintiff by its letter of demand dated 8.1.2003 demanded the sums set out in the promissory note, to which the defendants did not reply. This alone amounts to presentment.

Byles on Bills of Exchange 21st edition at page 220 states that if a bill is accepted payable at a banker's, which banker happens to become the holder at its maturity, that fact alone amounts to presentment, and no other proof is necessary.

The plaintiff duly and properly presented the promissory note for payment along with a demand for payment to the defendants through registered post by letter dated 8.1.2003. There was no reply to the said letter of demand. Further there was no challenge as to the correctness of the promissory note. In this regard I refer to the Supreme Court case of Saravanamuttu Vs. De Mel[2] where Dias, J. held that in business matters, if a person states in a letter to another that certain state of facts exists, the person to whom the letter is written must reply if he does not agree with or means to dispute the assertions. If not, the silence of the latter amounts to an admission of the truth of the allegations contained in the letter. Accordingly, the only possible conclusion for the faliure to reply to the letter of demand is that the amount stated in that letter is correct and that the defendants have not re-paid the sum stated in the promissory note.

It is to be observed that in the petition and the affidavit filed by the defendants in the district Court, the promissory note has not been denied and there is nothing to show that they repaid the sum stipulated in the promissory note. In their petition the defendants have taken several technical objections mainly with regard to the regularity of the procedure.

K.D.P. Wickremasinghe in his book "Civil Procedure in Ceylon" 1971 edition at page 318, citing the cases, *Carpen Chetty Vs. Manilan*[3], *Mather Saibo vs. Crowther*[4] and *Sadadeen Vs. Meerasa*[5] states as follows :

> "In an action under the summary procedure on a liquid claim the defendant cannot be heard or allowed to take any objection, as to the regularity of the procedure, without having first obtained the leave of the Court to appear and defend. A judge cannot dismiss a summary action on a liquid claim on the merits of the case before granting the defendant leave to defend."

In the circumstances, I am of the view that the defendants cannot take objections at this stage as to the regularity of the procedure without first obtaining the leave of Court to appear and defend the action.

It is to be noted that the defendants have not dealt with the plaintiff's claim on its merit and they have solely depended on the regularity of the procedure and technical objections to the plaintiff's action. The defendants have not disclosed a triable issue. Accordingly, the defendants are not entitled to be heard without first obtaining leave to appear and defend.

Section 6(2) of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 was amended by Act, No. 9 of 1994, and section 6(2) of the original Act was repealed and a new subsection was introduced. It reads thus:

> **6(2) The court shall upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the decree *nisi*, either -**
>
> **(a) Upon the defendant paying into court the sum mentioned in the decree *Nisi* : or**
>
> **(b) upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree *nisi* in the event of it being made absolute;or**
>
> **(c) Upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to security, framing and recording of issues, or otherwise as the court thinks fit".**

The defendants have filed this application against the impugned order of the learned Judge on the basis that they are entitled to unconditional

leave to appear and defend the action. In the case of *People's Bank V. Lanka Queen INT'L Private Ltd* [6] it was held that the amended section 6(2) (amended by Act, No. 4 of 1994) does not permit unconditional leave to defend the claim. The minimum requirement according to section 6(2) (c) is the furnishing of security.

In the aforesaid case De Silva J. has made a comprehensive analysis of section 6(2) as amended by Act, No. 9 of 1994. De Silva, J. observed at 237 and 238 thus :

> **"The new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show cause. On an examination of the amendment introduced in subsection 6(2) it is abundantly clear that the word "application" which appeared in the original section has been qualified with the following words : "Upon the filing of an application for leave to appear and show cause supported by affidavit". This shows that -**
>
> **(a) It is mandatory for the defendant to file an application for leave to appear and show cause.**
>
> **(b) such application must be supported by an affidavit which deals specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it.**
>
> **This section does not permit unconditional leave to defend the case as the defendant respondent has requested from the district Court. The minimum requirement according to subsection (c) is for the furnishing of security.**
>
> **If the defendant satisfies (a) and (b) above then the defendant should be given an opportunity of being heard. The court will have to decide on one of the three matters specified in the above section. They are :**

(a) The Court may order the defendant to pay into court the sum mentioned in the decree *Nisi*. Thus, even where the requirements as stated above are complied with, the court has the power and the authority to order the defendant to pay the full sum mentioned in the decree *Nisi* before permitting the defendant to appear and defend.

(b) Alternative to (a) above, the court can order the defendant to furnish security which, in the opinion of the court is reasonable and sufficient to satisfy the decree *nisi* in the event it being made absolute. The difference between this provision and the (a) above is that instead of paying the full sum mentioned in the decree *nisi*, it will be sufficient to the defendant to furnish security, such as banker's draft, and then defend the action.

(c) the third alternative is where the court is satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to security; framing of issues or otherwise permit the defendant to defend the action. Thus, it is imperative that before the court acts on section 6(2)(c) it has to be satisfied;

i. With the contents of the affidavit filed by the defendant;

ii. that the contents disclose a defence which is *prima facie* sustainable; And

iii. determine the amount of security to be furnished by the defendant, and permit framing and recording of issues or otherwise as the court thinks fit.

In the case of *National Development Bank* vs. *Chrys Tea (Pvt.) Ltd.* and another [7] this Court held that;

(i) Under Section 6(2) (a) or 6(2)(b) the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree *nisi*

(ii) Section 6(2)(c) is the only section which permits the Court discretion to order security which would be a lesser sum than the sum mentioned in the decree *nisi*.

It appears to me that it is imperative that even under section 6(2)(c) the Court has to order security, but the Court can use its discretion to determine the amount of security if the defendants disclose a defence. The Court has to be satisfied that the contents of the affidavit filed by the defendants disclose a defence against the claim made by plaintiff which is *prima-facie* sustainable.

In the instant case, the defendants have not disclosed a defence against the claim made by the plaint. The defendants' defence is mainly confined to technical objections and objections to the regularity of the procedure. The defendants have merely denied the plaintiff's claim. In my view mere denial is not sufficient when they have failed to respond to the letter of demand sent by the plaintiff demanding the said sum in the promissory note. In support of this view, I cited above the Supreme Court case of *Saravanamuttu Vs. De Mel* (supra) where it was held that in business matters, in certain circumstances, the failure to reply to a letter amounts to an admission of a claim made therein.

In the instant case the defendants have failed to raise a sustainable defence in their affidavit. That is the defendants have failed to disclose a defence which requires investigation and trial and not one which is summarily disposed of on the affidavits as done by the defendants in this case. The defendants have failed to deal with the plaintiff's claim on its merits. It is my considered view that the defendants have failed to disclose a plausible defence which ought to be tried by Court. It is my further view that the defendants are not entitled to unconditional leave on defences based on mere technical objections and evasive denials which have no strength to stand on their own. In any event, as pointed out by De Silva, J. in the case of *People's Bank vs. Lanka Queen International (Pvt) Ltd.*, (supra) section 6(2) (as amended by Act, No. 4 of 1994) does not permit unconditional leave to defend the claim; the minimum requirement according to section 6(2) (c) is for the furnishing of security determined by Court and the Court can exercise its discretion in determining the amount of security to be furnished by the defendant if he discloses a sustainable defence.

I would therefore affirm the order of the learned Additional District Judge dated 19.5.2004 and dismiss the defendants' application for leave to appeal with costs.

Application dismissed.

SANJEEWA AND ANOTHER
VS
PIYATISSA AND ANOTHER

COURT OF APPEAL
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CA 480/2004 NWLT
DC KULIYAPITIYA 10590/L,
MARCH 28,2005

Civil Procedure Code, sections 754, 755, 756 and 765 - Appeal notwithstanding lapse of time- Prevented by causes not within his control?-Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939, section 51(d) - Revocation?- In what circumstances?- Statutory right to revoke.?

Held:

(i) A mistake or oversight on the part of the registered attorney-at-law is not a cause within the meaning of section 765.
(ii) Miscalculation of time or some other mistake or the failure being due to attorney's neglect are not causes within the meaning of section 765.

Held further:

(iii) The amending Ordinance to the Ordinance, No. 59 of 1939, has enacted a uniform rule requiring an express and not merely inferential renunciation of the right of revocation.

(iv) The renunciation must be effected in a particular way, by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning. The statutory right to revoke has to be exercised in a particular way.

APPLICATION for leave to appeal notwithstanding lapse of time from a judgment of the District Court of Kuliyapitiya.

Cases referred to :

1. *Rakira* vs. *Silindu* 10 NLR 376
2. *Julius* vs. *Hodgson* 11 NLR 25
3. *Ratnayake* vs. *Bandara* - (1990) 1 Sri LR 156

Sunil Cooray with *Shaminda Silva* for defendant petitioners
M. C. Jayaratne with *Sobha Adhikari* for plaintiff respondents.

Cur. adv. vult.

May 20, 2005
ANDREW SOMAWANSA, J. (P/CA)

This is a leave to appeal application nothwithstanding lapse of time seeking to set aside and vacate the judgment of the learned District Judge of Kuliyapitiya dated 02.08.2002 and the interlocutory decree entered in this action and for the grant of reliefs prayed for in the answer of the defendants - petitioners or a declaration that under Kandyan Law, irrevocable deeds of gift cannot be subsequently revoked and to stay all further proceedings and for the issue of an interim order staying the execution of the writ for ejectment.

Counsel for the plaintiffs - respondents did not file objections but at the hearing both parties agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

It is common ground that the judgment sought to be vacated by the defendants- petitioners is dated 02.08.2002 and the application for appeal notwithstanding lapse of time is dated 16.02.2004. In terms of Section 765 of the Civil Procedure Code the burden is on the defendants- petitioners to satisfy Court that the defendants-petitioners were prevented by causes not within their control from complying with the provisions of Sections 754 and 755 and that the defendants - petitioners have a good ground of appeal. The relevant Section 765 of the Civil Procedure Code reads as follows :

"It shall be competent to the Court of Appeal to admit and entertain a petition of appeal from a decree of any original court, although the provisions of sections 754 and 756 have not been observed.

Provided that the Court of Appeal is satisfied that the petitioner was prevented by causes not within his control from complying with those provisions; and

Provided also that it appears to the Court of Appeal that the petitioner has a good ground of appeal, and that nothing has occurred since the date when the decree or order which is appealed from was passed to render it inequitable to the judgment -creditor that the decree or order appealed from should be disturbed".

It is common ground that the trial in the instant action commenced on 17.06.2002 with 4 admissions and 9 issues settled between the parties. The 1st plaintiff respondent testified to the fact that he revoked the deed of gift given in favour of the 1st defendant - petitioner as the 1st defendant - petitioner was unkind to him. With this evidence the plaintiffs-respondents closed their case.

It is the position of the defendants - petitioners that at the end of the 1st plaintiff-respondent's evidence a date was moved for on behalf of the defendants for the defence case. However as a practice in that Court at that period the learned District Judge refused to grant a date and accordingly the trial was concluded on the same day. The position of the defendants-petitioners is that the refusal of the adjournment sought by the defendants-petitioners from presenting their case was unreasonable and arbitrary and that they were thereby deprived of a reasonable opportunity of being heard on the defences which they have taken up in this action. However on an examination of the proceedings of 17.06.2002 the statement appears to be incorrect and a misrepresentation of facts as to what took place that day. The proceedings of that day reads as follows:

'එක්ස්', 'පැ1' සිට 'පැ 4' දක්වා ඉදිරිපත් කරමින් පැමිණිල්ලේ නඩුව අවසන් කරයි. මේ අවස්ථාවේ දී විත්තිකරුවන් අද දින අධිකරණයට පැමිණ නොමැති බැවින් විත්තිය වෙනුවෙන් සාක්ෂි කැඳවීම සඳහා නීතිඥ ගුණසිංහ මහතා දිනයක් ඉල්ලා සිටියි. නඩු වාර්තාව පරීක්ෂා කිරීමේ දී මෙම නඩුව අද දින 30 වැනි විභාග දිනට නියම කර ඇති බව පෙනේ. එමෙන්ම පසුගිය දිනයේ විත්තිකරුවන්ගේ නීතිඥ සෙන්දප්පෙරුම මහතා දී ඇති පෙරකලාසිය අවලංගු කිරීම හේතුකොට ගෙන විත්තිකරුවන්ට අධිකරණය විසින් නඩු විභාගය සඳහා අවසන් දිනයක් අද දිනට ලබා දෙන බවට ද, නියම කර ඇත. ඒ අනුව අද දිනට සාක්ෂිකරුවන් කැඳවා නඩු විභාගයට සූදානම් වීම විත්තිකරුවන්ගේ වගකීමකි.

විත්තිකරුවන්ගේ සාක්ෂි සහ ලේඛණ ලැයිස්තු ගොනුකර තිබුන ද අද දින විභාගය සඳහා සාක්ෂි කැඳවා සිටිදු සාක්ෂිකරුවෙකුට සාක්ෂි සිතාසි නිකුත් කරවා ගෙන ඇති බවක්, නොපෙනේ.

ඒ අනුව විත්තිකරුවන් වෙනුවෙන් සාක්ෂි කැඳවීමට නඩු විභාගය කල් තැබීමට වලංගු හේතුවක් ඉදිරිපත් වී නොමැති බවට අධිකරණය තීරණය කරයි. ඒ අනුව නඩු විභාගය කල් තබන ලෙස විත්තියෙන් කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කරමි.

විත්තිය වෙනුවෙන් සාක්ෂි කිසිවක් නොකැඳවයි.
ඒ අනුව නඩු විභාගය අවසන් කරමි.

තීන්දුව 2002.08.02 වෙනි දිනට. දෙපාර්ශ්වයට 2002.07.25 වැනි දින හෝ ඊට ප්‍රථම මෝසමක් මඟින් ලිඛිත දේශන ඉදිරිපත් කළ හැකිය."

I might also say that the record does not indicate that an application has been made to revise this order dated 17.06.2002 and I might observe that the learned District Judge cannot be faulted for making the aforesaid order which I think is a correct order, considering the circumstances explained by him.

It is also common ground that the judgment in the instant case was delivered on 02.08.2002 in favour of the plaintiffs-respondents and thereafter the defendants-petitioners filed a notice of appeal. However it is admitted that the defendants-petitioners did not file a petition of appeal. The reason given by the defendants- petitioners for their failure to tender a petition of appeal is that they did not contact their Attorney-at-Law thereafter on the belief that the appeal procedure had been completed with the filing of the notice of appeal. Accordingly no petition of appeal has been filed in this case and on 16.08.2002 the appeal had been referred to the Court of Appeal. In the circumstances applying the provisions of Section 765 of the Civil Procedure Code to the reasons adduced by the defendants-petitioners for failure to comply with the provisions in Section 755, my considered view is that the defendants-petitioners have failed to satisfy Court that the defendants - petitioners were prevented by cause not within their control from complying with the provisions in Section 755.

In the case of *Rakira vs. Silindu* [1] it was held :

"A mistake or oversight on the part of the proctor of a party to suit is not such cause within the meaning of section 765 of the code as would entitle such party to the relief of leave to appeal notwithstanding the lapse of time".

Again in *Julius vs. Hodgson* [2] it was held:

"The practice is not to give leave to appeal where the only ground relied on is that the appellant or his proctor made some miscalculation of time or some other mistake, or that the failure was due to the proctor's neglect".

The circumstances enumerated by the defendants-petitioners are not sufficiently unusual and compelling to satisfy that they were causes not within the defendants-petitioner's control. There was negligence, inaction and want of *bona fides* on the part of the defendants- petitioners.

For the foregoing reasons, the contention of the submission of the counsel for the defendants-petitioners that the defendants-petitioners have a very good case in appeal as they were not afforded a reasonable opportunity of being heard at the trial and that they were unable to file the petition of appeal because of reasons beyond their control is without any merit and has to be rejected.

In passing I might refer to another matter raised by the defendants-petitioners in that it is submitted by counsel for the defendants- petitioners that as per clause 9(c) of the Kandyan Law a deed of gift in which the right to revoke has been expressly renounced by the donor. Such deed of gift cannot be subsequently revoked. However this submission appears to be incorrect in view of the decision in *Ratnayake* vs. *Bandara*[3] which held :

"(1) The Kandyan Law Declaration and Amendment Ordinance, No. 59 of 1939 is an Ordinance to declare and amend the Kandyan Law. It seeks to amend the Kandyan Law and not to make a mere restatemet of the law as it was prior to 1939 when the intention to renounce the right to revoke was inferred or deduced from the particular words used. The amending Ordinance has enacted a uniform rule requiring an express and not merely inferential renunciation of the right of revocation. The words "expressly renounced" in s. 5(1) (d) of the Ordinance recognize a pre-existing right to revoke which every Kandyan donor had in Kandyan Law. What the Ordinance contemplates is an express and deliberate renunciation by the donor of his right to revoke. From the words " absolute and irrevocable" it may be implied that the Donor intended to revoke but such an expression would not constitute an express renunciation of the right to revoke.

There is a further requirement that the renunciation must be effected in a particular way, viz. by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning.

The Ordinance by s. 5(1) (d) has now vested in the Donor a statutory right to revoke and he is required to exercise that right in a particular way.

The words "absolute and irrevocable" are only an adjectival description of the gift but the essential requirement is a transitive verb of express renunciation. Words merely of further assurance are insufficient.

The use of the words "absolute and irrevocable" and "to hold the premises for ever" do not satisfy the requirement of s. 5(1)(d) of the Ordinance. Deed No. 8247 was revocable."

For the foregoing reasons, the application for leave to appeal notwithstanding lapse of time will stand dismissed with costs fixed at Rs.7500.

WIMALACHANDRA, J. — I agree.

Application dismissed.

WICKRAMASINGHE
VS.
ROBERT BANDA AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.
AMARATUNGA, J AND
MARSOOF, J
SC (APPEAL) NO. 14/2004
12TH MAY 2005 AND 14TH AND 20TH JUNE, 2005

Kandyan Law – Daughter married in deega. – Forfeiture of rights to paternal (mulgedera) inheritance – Re-acquisition of binna rights in mulgedera – Rights of daughter's son to succeed to maternal grandfather's property.

The District Court gave judgement in a partition case in favour of the 1st respondent Robert Banda on the ground that the property of his paternal grandfather Mohotty Appuhamy who died intestate devolved on Punchi Banda (son) and Podimahathmayo (daugther), Robert Banda's mother, who married in deega and lived at Kegalle. That marriage was dissolved in two years on 30.01.1908. In 1915, Robert Banda was born to Podimahthmayo by an illicit

connection with one Mudiyanse ; and Podimahathmayo returned to the mulgedera as was customary, where she gave birth to Robert Banda (the plaintiff).

The district Judge gave judgement for the plaintiff on the basis that by reverting to mulgedera, at Halpandeniya. Podimahaththayo had by such "close connection" with the mulgedera re-acquired her rights to mulgedera property.

The Court of Appeal affirmed the District Judge's order notwithstanding that Podimahathmayo had predeceased Mohotti Appuhamy, the plaintiff's maternal grandfather on the strength of *Appuhamy v Lapaya* (8 NLR 328) on the basis that the plaintiff was entitled to inherit the acquired property of his maternal grandfather.

HELD:

1. In Kandyan Law, a daugther who marries in deega forfeits her rights to mulgedera property, except that she would reacquire binna rights by proof of several instances :–

   (a) having a close link with mulgedera even after the marriage ;

   (b) by a subsequent marriage in binna ;

   (c) by leaving a child with the grand parents at the mulgedara ;

   (d) by possessing shares of property in spite of the marriage in binna ;

   (e) any evidence to indicate the waiver of the forfeiture of her rights by other members of the family.

2. When it was found that Podimahathmayo had predeceased her father, plaintiff's maternal grandfather, the Court of Appeal held wrongly that the plaintiff is entitled to succeed to the property of his maternal grandfather, Mohotti Appuhamy. On the strength of *Appuhamy* v *Lapaya* which decision has been criticized by Hayley and *Kiri Puncha* v *Kiri Ukku* (1981)[1] Sri LR 341 as having been wrongly decided.

3. In the circumstances and on the evidence, the plaintiff was not entitled to judgment on any basis. Both the District Court and Court of Appeal had erred in giving judgment for the plaintiff.

CASES REFERRED TO :

(1) *Gunasena* v *Ukku Menika* (1976) 78 NLR 524
(2) *Dingiri Amma* v *Ukku Banda* (1905) 1 BAL 193
(3) *Tikiri Kumarihamy* v *Loku Menika* (1875) RAM 1972-76 p. 106
(4) *Babanisa* v *Kaluhamy* (1909) 12 NLR 105
(5) *Dingiri Amma* v *Ratnayake* (1961) 64 NLR 163
(6) *Madawalatenna* (1834) Marshal's Judgements 329
(7) *Ukku* v *Pingo* (1907) 1 Leader 53
(8) *Appuhamy* v *Kiri Menika* et at (1912) 16 NLR 238
(9) *Banda* v *Angurala* 50 NLR 276
(10) *Appu Naide* v *Heen Menika* (1948) 51 NLR 63
(11) *Emi Nona* v *Sumanapala* (1948) 49 NLR 440
(12) *Appuhamy* v *Lapaya* (1905) 8 NLR 328
(13) *Kiri Puncha* v *Kiri Ukku and Others* (1981) 1 Sri LR 341
(14) *Rankiri* v *Ukku* (1907) 10 NLR 129

APPEAL from the judgment of the Court of Appeal.

J. Joseph with *Ms. H. P. Ekanayake* and *Chamindika Perera* for appellant.
Peter Jayasekera with *Gamini Peiris and Kosala Senedeera* for respondent.

Cur.adv.vult

09th September, 2005,
SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgement of the Court of Appeal dated 27.08.2003. By that judgment the Court of Appeal affirmed the judgment of the District Court dated 30.07.1993 and dismissed the appeal. The 1st defendant-appellant-appellant (hereinafter referred to as the 1st defendant) appealed against the said judgment of the Court of Appeal on which this Court granted special leave to appeal.

The main issue in this appeal is whether the plaintiff-respondent-respondent (hereinafter referred to as the plaintiff), the son of Podimahathmayo, could succeed to his maternal grandfather, Mohottihamy.

The facts of this appeal, *albeit* brief, are as follows :

The plaintiff instituted action in the District Court of Kurunegala to partition the land described in the schedule to the plaint (P1). The plaintiff had stated that one Mohottihamy alias Mohotti Appuhamy, (hereinafter referred to as Mohotti Appuhamy) who was the original owner of the property, died intestate and his property devolved on his son and daughter namely Punchi Banda (son) and Podimahathmayo (daughter) and the said Podimahathmayo owned and possessed her 1/2 share of the property, which devolved upon her death to her only child Robert Banda, who was the plaintiff in the District Court case.

According to the plaintiff, his mother (Podimahathmayo) was married in *diga* to S. M. Dingiri Banda on 30.05.1906 and the said marriage was dissolved on 30.01.1908 (P2). Podimahathmayo returned to her *Mulgedera* and while living with her father at Halpandeniya there had been an illicit relationship with one Menawa Ralalage Mudiyanse and the plaintiff was born to Podimahathmayo in 1915. Thereafter Podimahathmayo had died in 1918, when the plaintiff was 3 years of age. Mohotti Appuhamy (the maternal Grandfather) had brought him up at the *mulgedera* in Halpandeniya until his death in 1929 and thereafter the plaintiff's maternal uncle (Punchi Banda) had looked after him.

The contention of the 1st defendant, however, is different and his position is that at the time the plaintiff was born in 1915, his parents were residing not at Halpandeniya as stated by the plaintiff, but at Menawa in Kegalle. Further it was contended that the union between Podimahathmayo and Menawa Ralalage Mudiyanse, though not registered, is a *diga* marriage since Podimahathmayo had left the *mulgedera* with the said Menawa Ralalage Mudiyanse. The 1st defendant took up the position that as there is no *binna* marriage contracted between the parents of the plaintiff, that the plaintiff is not entitled to the 1/2 share of the property.

Learned Counsel for the 1st respondent further contended that the plaintiff had not averred that his mother married in *binna* and that his Certificate of Birth (P3) indicates clearly that his parents were residing at Menawa in Kegalle and not at Halpandeniya, the village of the plaintiff's mother and the grandfather. The learned Counsel for the 1st respondent submitted that the union between the plaintiff's mother Podimahathmayo and Menawa Ralalage Mudiyanse, although not registered, is a *diga* marriage since the plaintff's mother, Podimahathmayo had left the *mulgedera* with the said Menawa Ralalage Mudiyanse. Further he contended that, there was no

binna marriage between Podimahathmayo and Menawa Ralalage Mudiyanse as there is no evidence of *binna* settlement. Therefore his submission is that since Podimahathmayo married Menawa Ralalage Mudiyanse in *diga,* the plaintiff had forfeited his rights to his maternal grandfather's property.

It is well recognized in Kandyan Law that a daughter who marries in *diga,* forfeits her right to the paternal inheritance (*Gunasena* v *Ukku Menika* (1)). Hayley referring to the Kandyan Law that is applicable to a daughter who had married in *diga,* clearly states that,

> "the general rule is that neither a *diga*-married daughter, nor her children, can compete with other children by the same mother, or their descendants, in the distribution of a deceased intestate's estate. This rule has been accepted without hesitation ever since the Kandyan Law was first administered by British Courts ..... (The Laws and Customs of the Sinhalese or Kandyan Law, Reprint 1993, pg. 379)."

In terms of the general rule, a *diga*-married daughter, or her children would therefore not be entitled to any paternal or maternal inheritance. However, the general rule is not to be applied thus simply as the modern case law has clearly accepted certain exceptions, which favours the *diga*-married daughter enabling her to re-acquire the rights of a *binna*-married daughter in the event she fulfils certain requirements. In fact Hayley points out that 'certain modern judgments have tended towards engrafting an exception in favour of the *diga*-married daughter who has[1] kept up a close connection with her father's home' (Supra, pg. 379).

The exception to the general rule thus appears to be a development through the case law and therefore it would be useful to examine the important judgments to assess the circumstances in which the exception had been applied.

Dingiri Amma v *Ukku Banda* [(2)] is one of the early decisions, which had considered a daughter married in *diga* re-acquiring the rights of a daughter who had married in *binna.* In Dingiri Amma's case the plaintiff first lived with her husband in her father's house prior to the marriage being registered. Subsequently the marriage was registered and both husband and wife lived in the father's *mulgedera* as well as in the husband's house, until the *mulgedera* was demolished. Thereafter the plaintiff's husband built a new

house in the same garden where the *mulgedera* was situated and both the husband and the wife were living together in that house. Pereira, J., held that even if the plaintiff was married in *diga*, she had acquired *binna* rights.

In *Tikiri Kumarihamy* v *Loku Menika* [3] the Court was of the view that a daughter originally married in *binna*, subsequently leaving her parents' house and going to live with her husband in *diga* and still keeping up a close connection with the *mulgedera* or a daughter originally married in *diga* and subsequently returning to her parents house and being re-married in *binna*, may preserve her rights to any share in her parents estate.

The entitlement of a Kandyan woman to her parental inheritance, who had contracted a *diga* marriage, but who had subsequently returned to the parental roof and contracted a *binna* marriage during the lifetime of her father, was further strengthened in *Babanisa* v *Kaluhami* [4] as well as in *Dingiri Amma* v *Ratnayake* [5].

It is therefore clear that a daughter who had married in *diga*, but under varying circumstances had kept a close connection with the *mulgedera*, would re-acquire the rights to inherit from her father as that of a daughter who had married in *binna*. This position has been endorsed in an early case, namely in *Madawalatenne* [6] decided in 1834 where the Supreme Court was of the view that,

> "..... it appears that, though she was married in *diga*, she always kept up a close connection with her father's house, in which indeed three of her children were born ; ..... again it appears that the father, on his death-bed, gave one talpot to the defendant and two others to his wife, what had become of those two latter olas does not appear, but it is not improbable that one of them may have been intended for the plaintiff, **more especially considering the frequency of her visits to the paternal residence** (emphasis added)."

However, it is to be borne in mind that, as correctly pointed out by Hayley (*Supra*), that the daughter in Madawalatenne was awarded only

one-sixth of what her mother possessed and not the half share to which she would have been entitled if not for her marriage.

Be that as it may, there are several other decisions that had taken the view that depending on the circumstances, a Kandyan woman married in *diga* could later re-acquire the rights of a *binna* marriage. I would refer to some of the judgments to indicate the circumstances in which such re-acquiring the rights of a *binna* marriage had taken place.

In *Ukku* v *Pingo* [7] it was held that a daughter, who married in *diga*, after her father's death, retained her share by leaving behind in the *mulgedera* a child previously born to her there as mistress of her brother-in-law. A similar view was adopted in the decision in *Appuhamy* v *Kiri Menika* et al [8] where a Kandyan woman, who was married in *diga* went to live with her husband about two miles away from the *mulgedera*. One of their children was left in the *mulgedera* and brought up by her grandmother. It was also revealed that the woman, although maried in *diga*, kept up a constant and close connection with the *mulgedera*. Lascelle, C. J., held that in the circumstances, the woman did not by reason of her marriage in *diga*, forfeit her right to the paternal inheritance.

The decision in *Banda* v *Angurala* [9] on the other hand, clearly indicates that the Court had looked at the question from another perspective and held that the regaining of *binna* rights may be evidenced by material other than in connection with the *mulgedera*. Emphasising on this aspect, Bertram, C. J., stated that,

> "In all previous cases the question for the recovery of *binna* rights has always appeared to turn upon something done in connection with the *mulgedera*, such as a resumption of residence there ; the cultivation of the paternal lands held in connection with it ; the leaving of a child in the *mulgedera* ; or the maintenance of a close connection with the *mulgedera*. But in this case nothing of the sort is suggested. The claim to *binna* rights, however, in the case is based upon circumstances of a very significant and uneqivocal character....."