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DIGEST

CIVIL PROCEDURE CODE –

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HIGH COURT OF THE PROVINCES ACT, NO. 19 OF 1990 – Section 9 – Maintenance Act, No. 37 of 1999, section 14(2) – Maintenance Ordinance, No. 19 of 1889-Maintenance Ordinance, No. 13 of 1925-Constitution, Article 138 Article-154P 3(b) 13th Amendment – Appeal from the High Court – Applicability of Rules of Supreme Court 1990 – Procedure.

SAMANTHA KUMARA

VS.

MANOHARI

SUPREME COURT.
S.N. SILVA, C. J.
FERNANDO, J.
AMARATUNGA, J.
SC 44/2005.
HC KALUTARA NO. 118/2003.
MC MATUGAMA NO. 13390.
MARCH 13, 2006.
MARCH 24, 2006.

High Court of the Provinces Act, No. 19 of 1990, section 9 – Maintenance Act, No. 37 of 1999, section 14(2) – Maintenance Ordinance, No. 19 of 1889- Maintenance Ordinance, No. 13 of 1925 - Constitution Article 138–Article-154P 3(b)-13th Amendment – Appeal from the High Court – Applicability of Rules of Supreme Court 1990 – Procedure.

HELD:

(1) The 13th amendment to the Constitution which came into force on 14.11.1987 by Article 154P(3)(b) vested the High Court of the Provinces with jurisdiction in respect of orders made by the Magistrates.

(2) The present Maintenance Act section 14 specifically provided for an appeal to the Provincial High Court and from there to the Supreme Court with the leave of the Supreme Court and when such leave is refused with special leave of the Supreme Court first had and obtained.

(3) Supreme Court Rules of 1990 have categorized appeals to the Supreme Court into three groups. The instant appeal falls into the category of other appeals Part 1C.

Per Raja Fernando, J.

> "When the appeal is with leave of the High Court then Supreme Court Rules under Part 1C applies; if the appeal is with special leave of the Supreme Court, then rules under Part 1A shall apply."

(4) In determining the time for an aggrieved party to lodge an application for special leave to appeal – when no time is fixed by statute or Rules - the time frame is 42 days.

(5) Following the same reasoning the time frame for a petitioner to file an appeal from a High Court order is 42 days from the date leave to appeal is granted by the High Court.

(6) According to Rule 28(2) every such petition of appeal when leave is granted by the High Court shall be lodged at the Supreme Court Registry not in the Registry of the High Court.

(7) The appellant should also tender a notice of appeal with his petition of appeal-Rule 28(3).

HELD FURTHER:

(7) The petition of appeal has been filed in the Registry of the High Court Kalutara contrary to Rule 28(2).

(8) The appellant has also failed to comply with Rule 28(3) which required the appellant to tender with his petition of appeal the notice of appeal.

APPEAL from an order of the High Court, Kalutara on a preliminary objection raised.

Cases referred to:

1. *Tea Small Holders Ltd.*, vs. *Weragoda* 1994 3 Sri LR 353

2. *Mahaweli Authority of Sri Lanka* vs. *United Agency Corporation (Pvt) Ltd.* 2002 1 Sri LR 8

D. Amarasekera for petitioner.

Rohan Sahabandu with *Athula Perera* for respondent.

Cur.adv.vult.

June 15, 2006.

RAJA FERNANDO J.

The applicant Respondent-Respondent, hereinafter referred to as the Respondent instituted action No. 13390 (Maintenance) on 6th July 2000 in the Magistrate's Court of Mathugama claiming maintenance from the Respondent-Appellant-Appellant (hereinafter referred to as the Appellant) for the child born out of wedlock.

The learned Magistrate by his order dated 17.12.2002 ordered the Respondent to pay a sum of Rs. 750 per month as maintenance for the child.

Being aggrieved by this order the appellant appealed to the High Court under Article 154 P of the Constitution read with section 14 of the Maintenance Act, No. 37 of 1999, and the High Court dismissed the appeal on 10.03.2005.

The Appellant thereafter sought leave to appeal to the Supreme Court in terms of section 14(2) of Act, No. 37 of 1999 read with section 9 of Act, No. 19 of 1990 from the High Court and leave was granted by the High Court on 06.06.2005.

After leave to appeal to the Supreme Court has been granted by the High Court on 06.06.2005 the appellant on 13.06.2005 has filed a petition of appeal addressed to the Supreme Court in the Registry of the High Court.

When the matter came up before this Court counsel for the Respondent took up a preliminary objection that the Petition of Appeal has not been filed in terms of the Rules after the High Court granted leave.

Written submissions of both parties were filed on 24.03.2006.

It was the position of the respondent that the Petition of Appeal has been filed out of time and that the Petition of Appeal ought to have been filed in the Supreme Court whereas the appellant has lodged the petition in the High Court and therefore there is no valid appeal before Court.

Under the old Maintenance Ordinance No. 19 of 1889 as amended by Act, No. 13 of 1925 an appeal from the order under the Maintenance

Ordinance was to the then Supreme Court and the procedure was the same as if the order was by the Magistrate in a criminal case. (Vide section 17 of the Maintenance Ordinance No. 19 of 1889).

In 1978 with the new Constitution when the Court of Appeal was established Article 138 vested the Court of Appeal with appellate jurisdiction in respect of orders made by courts of first instance, resulting in all appeals under the Maintenance Ordinance which hitherto came to the Supreme Court being directed to the Court of Appeal.

The 13th Amendment to the Constitution which came into force on 14.11.1987 by Article 154 P 3(b) vested the High Court of the Province with jurisdiction in respect of orders made by the Magistrate.

The present Maintenance Act, No. 37 of 1999 repealed the Maintenance Ordinance and Section 14 specifically provides for an appeal to the Provincial High Court and from there to the Supreme Court with the leave of the High Court and when such leave is refused with the Special Leave of the Supreme Court first had and obtained. (vide Section 14 of Act, No. 37 of 1999).

The Appellant in this case has in terms of section 14 of the Maintenance Act, No. 37 of 1999 read with Article 154 P 3 (b) of the Constitution made an appeal to the High Court of the Province. He has obtained leave to appeal to this Court from the High Court.

The Appellant has thereafter filed a petition of appeal addressed to the Supreme Court in the registry of the High Court.

This procedure is being challenged by the Respondent as being contrary to the Supreme Court Rules of 1990.

The Appellant submits that no Rules exist at present governing appeals from the Provincial High Court to the Supreme Court and there is no default on his part.

Supreme Court Rules of 1990 have categorised Appeals to the Supreme Court into three groups:

Part 1A – Appeals with special leave obtained from the Supreme Court
Part 1B – Appeals with leave to appeal from the Court of Appeal

Part 1C – Other appeals

Part 1C – Rule 28 of the Supreme Court rules read as follows :

"(1) Save as otherwise specifically provided by Parliament, the provisions of the rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal **or any other court or Tribunal"**

The present Appeal is neither with special leave from the Supreme Court nor with leave of the Court of Appeal but with leave from the High Court. Therefore the instant appeal clearly falls into the category of other appeals and hence rules in Part 1C dealing with other appeals would apply.

The position of the Appellant that there are no rules governing appeals from the Provincial High Court to the Supreme Court is therefore incorrect.

An appeal to the Supreme Court from an order of the Provincial High Court can be either with the leave of the Provincial High Court or with special leave obtained from the Supreme Court upon a refusal of leave by the High Court.

If the appeal is with leave of the High Court then Supreme Court rules under Part 1C (other appeals) shall apply; if the appeal is with special leave of the Supreme Court then Supreme Court rules under Part 1A (special leave to appeal) shall apply *mutatis mutandis* since Rule 2 relates to every application for special leave to appeal....."

As regards the procedure in the instant case the rules applicable to other Appeals in Part 1C of the Supreme Court rules shall apply.

A question arises in fixing the time within which the Appeal is to be filed in the Supreme Court for the reason that the Rules are silent on the matter.

In determining the time for an aggrieved party to lodge an application for special leave to the Supreme Court where no time is fixed either in the statute or the rules; this Court has in the case of *Tea Small Holders Limited vs. Weragoda* [1] and in the case of *Mahaweli Authority of Sri Lanka vs. United Agency Construction (Pvt.) Ltd.* [2] held that the Petitioner

should make his application within a reasonable time, and relying on the time period prescribed in the rules for similar applications has held that 42 days is reasonable time.

Following the same reasoning I am of the view that the time frame for a petitioner to file an appeal should be 42 days from the date leave to appeal is granted by the High Court.

Coming to the preliminary objection with regard to the place of filing of the appeal papers after having obtained leave from the High Court; Part 1C (other appeals) is clear in its provisions as to the papers that need to be filed and also the place where it has to be filed.

According to rule 28(2) "every such appeal shall be upon a Petition in that behalf lodged at the Registry" (Supreme Court).

It is undisputed that the petition of appeal has been filed in the Registry of the High Court contrary to the provisions of Rule 28(2) of Supreme Court Rules 1990.

Further the Appellant has failed to comply with rule 28(3) which requires the Appellant to tender with his petition of appeal a notice of appeal.

Therefore I hold that the Appellant is guilty of non-compliance of the Rules and hence the preliminary objection raised by the Respondent must succeed.

Accordingly this appeal of the Appellant is rejected.

The Respondent is entitled to the costs of this application.

Registrar is directed to return the record to the High Court of Kalutara to be forwarded to the Magistrate's Court of Matugama.

S. N. SILVA C. J. — *I agree.*

AMARATUNGA, J. — *I agree.*

Appeal rejected.

CONSTRUCTION AND DEVELOPMENT COMPANY LTD. AND ANOTHER VS GUNASEKERA

COURT OF APPEAL.
WIJEYARATNE, J.
C. A. 350/2001 (LG).
DC COLOMBO 17090/L.
SEPTEMBER 23, 2002.
OCTOBER 1, 2002.

Civil Procedure Code, sections 75, 146 and 146(2) - No express denial in answer - Can they be regarded as admissions ?-Deemed to have been admitted - Is it in fact admitted ?-Evidence Ordinance, sections 58, 101 and 102.

The plaintiff-respondent instituted action seeking a declaration of title to the premises in suit. The defendant-appellants filed answer wherein paragraphs 3, 4, 6 and 7 were not specifically denied or admitted; paragraph 1 of the amended answer and certain parts of some paragraphs were admitted and put the plaintiff to the proof of other averments in those paragraphs but did not expressly deny any averment therein.

On an application made by the plaintiff the trial judge made order to record them as admissions.

HELD:

(1) There is no justification or rational basis to record as an admission a fact which is not expressly admitted on the basis that what is not expressly denied is deemed to be an admission. What is deemed to have been admitted is not in fact admitted.

(2) Per Wijeyaratne, J.
"Answer clearly indicates that the 1st and 2nd defendant-appellants having admitted part of the averments contained in the relevant paragraphs has put the plaintiff-respondent to the proof of the other averments. This means that the defendants did not admit and it is because that they did not admit what is averred they expected the plaintiff who asserted them to prove same."-sections 101, 102 of the Evidence Ordinance.

(3) The Order to record as admissions what is not expressly admitted and matters where parties are at variance is neither lawful nor justifiable.

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

Cases referred to :

1. *Fernando* Vs. *Samarasekara* 49 NLR 285.
2. *Mallawaaratchi* vs. *Central Investments Finance* -CA 433/79(F).

Wijeyadasa Rajapakse, PC with *Asoka Kalugampitiya* for 1st and 2nd petitioners.

Ikram Mohamed, PC with *Thisath Wijesiriwardane* for plaintiff-respondent.

Cur. adv. vult.

January 10, 2006.

WIJEYARATNE, J.

The Plaintiff-respondent instituted action against the 1st and 2nd defendant-appellants and the 3rd defendant-respondent seeking declaration of title to the premises in suit and injunctive relief as prayed for in the plaint. The 1st and 2nd defendant-appellants filed answer and amended answer dated 17.01.1995 wherein paragraphs 3,4,6, & 7 were not specifically denied or admitted. However paragraph 1 of the amended answer admitted certain parts of such paragraphs of the plaint and put the plaintiff to the proof of other averments in those paragraphs but did not expressly deny any averment therein.

At the commencement of the trial counsel for the Plaintiff-respondent moved to record that the 1st and 2nd defendants have admitted paragraphs 3,4,6 and 7 of the plaint in the absence of any express denial of the same, which, the counsel urged, be treated as being deemed to have been admitted. The learned trial Judge having heard the submissions made by counsel made order to record them as admissions. The 1st and 2nd respondents made application for leave to appeal from such orders which are recorded as four separate orders. This Court by its minute dated 26.03.2002 granted leave and the appeal when taken up for hearing the parties opted to file written submissions and invited Court to deliver judgment on the strength of such submissions.

The counsel for the plaintiff-respondent supporting the orders relied on the decision of *Fernando Vs Samarasekera*[1] where it was held that the failure to deny the averments of the plaint in accordance with the requirements of the statute (section 75 of the Civil Procedure Code) must be deemed to be an admission by the defendants of the averment. He further referred this Court to the judgment in *Mallawaratchi vs Central Investments Finance Ltd.*[2] which followed the judgment above referred to.

The recording of the same as an admission is not in accordance with any provision of the Civil Procedure Code. Nor does the counsel refer this Court to any such provisions requiring or empowering the trial Court to record such admissions. However the recording of admissions has become a long established practice in civil trials. Yet there is no justification or rational basis to record as an admission a fact which is not expressly admitted on the basis that what is not expressly denied is deemed to be an admission. What is deemed to have been admitted is not in fact admitted.

Section 146 of the Civil Procedure Code requires".....questions of fact or law to be decided between parties as issues. The duty of the trial Court in terms of the provisions of sub section (2) of section 146 is to ".....ascertain upon what material propositions of fact or law the parties are at variance and shall there upon proceed to record the issues on which the right decision of the case appears to the Court to depend."

Perusal of the amended answer clearly indicates that the 1st and 2nd defendants-appellants having admitted part of the averments contained in the relevant paragraphs has put the plaintiff-respondent to the proof of the other averments. This means that the 1st and 2nd defendants did not admit and it is because they did not admit what is averrred only they expected the plaintiff who asserted them to prove the same. In terms of the provisions of sections 101 and 102 of the Evidence Ordinance the burden of proving a particular fact is on the party who asserts the same and expect judgment to be given on such facts. The exception is found in the provisions of section 58 of the Evidence Ordinance which states what is admitted need not be proved. This means that what is admitted by the adverse party need not be proved though admissions does not amount to proof.

Applying these provisions to the matter in issue, it is the burden of the plaintiff - respondent to prove what he asserts in the plaint excepting what is admitted. To record as an admission what the defendant did not admit, but did not deny either, purely on the basis of a deeming aspect of it would

mean the plaintiff-respondent would be absolved of his burden to prove facts needed to be proved as assertions relied on for the purpose of obtaining a decision in his favour. This is in complete contrast to the scheme of the Civil Procedure Code and the legal system of adversaries ; specially in the absence of any provisions enabling or empowering Court to resort to such a cause through recording of admissions. It would if permitted, result in a total twist of the process of law and subvert justice.

The order to record as admissions what is not expressly admitted and matters where parties are at variance is neither lawful nor justifiable.

Such orders are set aside and vacated and the appeal is allowed with costs.

The learned trial judge is directed to proceed with the trial from the commencement according to law.

Appeal allowed.

FAROSE AHMED
VS
MOHAMED AND ANOTHER

COURT OF APPEAL.
IMAM, J.,
SRISKANDARAJAH,J.,
CA 223/2002.
DC MT LAVINIA 820/97/L.
FEBRUARY 14, 2005.
JANUARY 11, 2005, JUNE 5, 2006.

Civil Procedure Code, section 51, section 54, section 121(2), section 125(2)- Document not listed - Can it be produced? - Discretion of Court-Public documents-Purpose of section 121(2) – Objective?

HELD:

(1) The trial was fixed for 19.09.2001, the additional list of documents was filed on 14.02.2002 long before the next trial date viz. 30.05.2002. The petitioner's application was to mark a public document and there was no element of surprise caused as the document had already been gazetted.

Per Imam J.
"The objective of section 121(2) is to give notice of the witnesses and documents intended to be called or produced fifteen days defore the date of trial".

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

Cases referred to :

1. *Eheliyagoda Gama Alhiralage Karunawathie Menike vs. Bank of Ceylon* - CALA 164/99 - DC Balangoda - CAM 11.02.2000.
2. *Girantha vs. Maria* - 50 NLR 519
3. *Casie Chetty vs. Senanayake* - 1999 2 Sri LR 11

C. E. de Silva for plaintiff-petitioner.
Malaka Herath for defendant-respondent.

Cur.adv.vult.

May 5, 2006.

IMAM, J.

The Plaintiff - Petitioner (hereinafter referred to as the Petitioner) filed this application for leave to appeal against the order of the learned Additional District Judge of Mount Lavinia dated 30.05.2002 (X9), and inter alia make order permitting the "Petitioner" to mark at the trial of this case the Notification published in the Government Gazette bearing No. 839 dated 30.09.1994 (X10), amongst other reliefs sought for.

The facts of this case are briefly as follows : The Plaintiff-"Petitioner" instituted this action in the District Court of Mount Lavinia against the Defendant Respondent (hereinafter referred to as the "Respondent") seeking a Declaration to title to the allotment of land depicted as Lot 4043 A in Plan No. 474 dated 10.02.1999 made by H. Devasurendra Licensed Surveyor, described in the 2nd schedule to the amended plaint dated 12.02.1999, the ejectment of the "Respondent" from the said land, and recovery of damages at Rs.2000 per month from 12.02.1999 until the Petitioner is restored to vacant possession of the aforesaid premises.

The case of the Petitioner as pleaded in the amended plaint (X1) is Para (a) That by Notices published in the Government Gazette dated 12.11.1993 and bearing No. 793 (ඇ1) and by Government Gazette No. 839 dated 30.09.1994 (X10), the allotment of land and premises depicted as Lot 4043 in Plan No. 1250 dated 24.06.1994 made by T. S. Siriwardena Licensed Surveyor bearing Assessment No. 22/3, Mallika Lane, Wellawatta, Colombo 06 vested in the Commissioner of National Housing under section 17(1) of the Ceiling on Housing Property Law No. 01 of

1973. The said land and premises is described in the 1st Schedule to the amended plaint (X1).

(b) That the Commissioner of National Housing by deed of disposition bearing No. 16573 dated 14.10.1995 sold and conveyed the said land and premises described in the 1st schedule to the amended plaint (xi) to Tuan Kitchi Sahideen who by Deed No. 223 dated 31.03.1996 attested by Sarojini Sornabale NP gifted the said land and premises described in the 1st schedule to the amended plaint (X1) to his daughter the Petitioner in this case. It is averred by the Petitioner that the respondent having no manner of right, title or interest is in wrongful and unlawful occupation of a portion of the land and premises described in the 1st schedule to the amended plaint (X1), denying and disputing the title of the Petitioner.

The Respondent filed amended answer (X2) denying all the averments contained in paragraph 2 to 8 of the amended plaint (X1) and pleaded *inter alia* ;

(a) That by the Notification published in the Government Gazette bearing No. 793 dated 12.11.1993 that only the house bearing assessment No.22/3 and the land covered by the said house vested in the Commissioner of National Housing.

(b) That the Commissioner was not entitled to convey to the predecessor in title of the petitioner more land than what was vested in the Commissioner by the said Gazette Notification.

(c) That the Respondent is the owner of the remaining land which is not covered by the house bearing assessment No.22/3 including the land situated on the eastern boundary of the respondents land.

The Respondent prayed for;

(a) Dismissal of the action by the Petitioner ;

(b) A declaration that the Petitioner is only entitled to the house bearing assessment No.22/3 and the land covered by the said house.

A true copy of the list of Witnesses and Documents filed by the Petitioner is filed marked "X3" and pleaded as part and parcel of the Petition.

The trial commenced on 19.09.2001, and the parties recorded their admissions and issues (X4). It was contended by the Respondent that the Document 'X10' was not listed in compliance with sections 51 and 54 of the Civil Procedure Code. The crux of the matter was whether the Petitioner had listed the document "X10" in accordance with section 121 of the Civil Procedure Code or not. Section 121(2) of the Civil Procedure Code states that "Every party to an action shall, not less than 15 days before the date

fixed for the trial of an action, file or cause to be filed in Court after Notice to the opposite party—

(a) A list of witnesses to be called by such party at the trial.
(b) A list of the documents relied upon by such party and to be produced at the trial."

The Respondent averred that (X10) was not listed in conformity with section 121 of the Civil Procedure Code, and thus should be rejected which objection counsel for the Respondent took up. On counsel for both sides making oral submissions, the learned Additional District judge of Mount Lavinia upheld the objections of the "Respondents" and made order on 30.05.2002 (X9). rejecting the application to mark (X10).

Leave to Appeal was granted on 23.01.2003 with regard to the question whether the trial judge had exercised her discretion properly and the case fixed for argument.

The contention of the Petitioner was that although trial was fixed for 19.09.2001 and 'X10' was not in the list of documents 15 days prior to 19.09.2001, on payment of Rs.5000 as costs, further trial was fixed for 30.05.2002. The Petitioner avers that he filed an additional list of witnessess and documents including 'X10' in the aforesaid list (X6) on 06.02.2002 with notice to the Respondent which was accepted on 14.02.2002. It is contended by the Petitioner that he gave further evidence on 30.05.2002, that grave prejudice would be caused to the Petitioner by not being permitted to mark the Gazette Publication No. 839 (X10) dated 30.09.1994 and that "X10" should therefore be permitted to be marked in evidence.

The Defendant - Respondent avers that there is no merit whatsoever in the application of the Petitioner, as the discretion to allow a document which is not listed in accordance with section 121 of the Civil Procedure Code is vested solely with the learned trial judge and that the Petition be dismissed with costs.

I have examined the appeal of the Petitioner and the objections of the Respondent. As per journal Entry (32(X7), Trial in this case was fixed for 19.09.2001 on which date the Plaintiff (Petitioner) and Defendant (Respondent) were present, represented by counsel and issues were raised by both sides, and further trial was fixed for 01.02.2002. The additional list of witnesses and documents dated 06.02.2002 was filed on 14.02.2002 (X7) by the Plaintiff (Petitioner) which was long before the next trial date namely 30.05.2002. The Plaintiff (Petitioner) sought to mark the Gazette

Publication 839 dated 30.09.1994 which was included in the aforesaid additional list of witnesses and documents. The Gazette Publication is a public document, and it is my view that there was no element of surprise caused to the Defendant (Respondent). The objective of section 121(2) of the Civil Procedure Code is to give Notice of the witnesses and documents intended to be produced fifteen days before the date of trial. So that a party would not be taken unaware. On the trial day prior to the 30.05.2002, namely on 01.02.2002 only the Examination in Chief of the Plaintiff (Petitioner) was led to a point. Especially as 'X 10 ' is a Public Document bearing No. 839 and was Gazetted on 30.09.1994. Hence irreparable prejudice would be caused to the Plaintiff (Petitioner if 'X 10' is not permitted to be marked in evidence.

Section 175(1) of the Civil Procedure Code states that "No witness shall be called on behalf of any party unless such witness shall have been included in the List of witnesses previously filed in Court by such party as provided by section 121.

Provided however that the Court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of Justice, permit a witness to be examined, although such witness may not have been included in any such list."

(2) "A document which is required to be included in the list of Documents filed in Court by a party as provided by section 121 and which is not so included shall not, without the leave of the Court be received in evidence at the Trial of the action.

Provided that nothing in this sub-section shall apply to documents produced for Cross Examination of the witnesses of the opposite party or handed over to a witness merely to refresh his memory.".

In *Eheliyagoda Gama Athiralage Karunawathie Menike Vs Bank of Ceylon*[1] it was held that the object of filing a list of witnesses is to prevent an element of surprise and thereby causing prejudice to the other party.

In *Girantha vs Maria*[2] it was held that in exercising the discretion of the judge, the paramount consideration for the judge is the ascertainment of the truth and not the desire of a litigant to be placed at an advantage by reason of some technicality."

In *Casie Chetty vs Senanayake*[3] it was held by Jayasinghe J that "In exercising discretion under section 175 of the Civil Procedure Code where

it is sought to call a witness whose name was not in the list, the paramount consideration for the judge is the ascertainment of the truth and not the desire of a litigant to be placed at an advantage by some technicality."

It is my view that justice would be meted out if the document "X10" is permitted to be led in evidence as it is a public document, and there could be no element of surprise to the Defendant (Respondent), as "X10" had already been gazetted.

For the aforesaid reasons I permit the appeal of the "Petitioner" and set aside the order of the Learned Additional District Judge, Mount Lavinia dated 30.05.2002 (X9). I further permit the "Petitioner" to mark the Document "X10" which is the Notification published in the Goverment Gazette bearing No. 839 dated 30.09.1994.

SRISKANDARAJAH, J. - *I agree.*

Appeal allowed.

ANULAWATHIE MENIKE
VS
ABHAYARATNE

COURT OF APPEAL.
SOMAWANSA. J. (P/CA) AND
EKANAYAKE.J.
CA 247/91 (F).
DC KEGALLE 2591/L.
MARCH 17, 2006.

Debt Conciliation Ordinance, sections 17, 18, 22, 30, 49 and 56 - Conditional transfer - Time limit to make an application ? - Settlement before Board - Application outside the time limit - Submitting to jurisdiction?–Challenging jurisdiction in appeal - Permissibility ?

The plaintiff - respondent instituted action seeking to enforce an order made by the Debt Conciliation Board (DCB) to re-transfer the property in suit which was transferred to the defendant - appellant on a conditional transfer. The DCB after inquiry entered a settlement in terms of section 30. The plaintiff - respondent complained to the DCB that his attempts to pay the 1st instalment as per the settlement failed as the appellant refused to accept same. The DCB instructed

the plaintiff respondent to institute action in the District Court to get an order of enforcement.

The appellant in the District Court took up the position that the settlement was bad in law and the application made to the Board has not been made within the stipulated time limit set out by law. The District Court held with the plaintiff-respondent. On appeal the appellant contended that since the respondent failed to make the application to the D. C. B. within the time specified - 30 days- section 19(A)(1)-the application ought to have been dismissed *in limine*.

HELD:

1. The DCB had jurisdiction to inquire into matters of this nature generally and therefore the Board was acting within its jurisdiction. In such a situation irregular exercise of jurisdiction can be waived by the parties which is exactly what the appellant had done, for the appellant did not take any steps to get the certificate issued on the basis of the settlement entered into by both parties, cancelled.

2. It is trite law that issues relating to fundamental jurisdiction of the Court Tribunal to hear and determine a matter must be taken at the earliest opportunity and must be expressly set out. Therefore the appellant having taken no objection to the validity of the application and also having submitted to the jurisdiction of the Board and in fact having taken one step further by entering into a settlement, she cannot now be heard to say the DCB acted beyond its jurisdiction or the settlement entered in terms of section 30 is bad in law.

4. In any event –
   Section 19 A does not refer to any consequences if it is not complied with.

5. As the trial judge has accepted the evidence of the respondent as having been corroborated by the evidence of the Grama Sevaka, there was no reason to disagree with her, for it is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal.

APPEAL from the judgment of the District Court of Kegalle.

Cases referred to :

1. *T. Praisoody vs. K. Gurunathepillai* 74 NLR 567
2. *Hilda Perera vs. Lawrence Perera* 67 NLR 186

3. *Bastianpillai Antonipillai Swamipillai and Another vs. K. Gunaratnam* CA 649/80 (F) DC Jaffna MB/447 CAM 17.11.1993
4. *W. Robinson Fernando, v. Henrietta Fernando* 74 NLR 57

H. G. Dharmadasa for appellant.
Rohan Sahabandu with *Athula Perera* for respondent.

Cur.adv.vult.

March 17, 2006

ANDREW SOMAWANSA, J. (P/CA)

The plaintiff - respondent instituted the instant action in the District Court of Kegalle seeking to enforce an order made by the Debt Conciliation Board to re-transfer the property in suit to the plaintiff - respondent which was transferred to the defendant-appellant on a conditional transfer.

The position taken by the plaintiff - respondent (hereinafter called the respondent) is that on 19.06.1979 he made a conditional transfer of a paddy land to the defendant - appellant (hereinafter called the appellant) for a consideration of Rs. 5,000. The condition of the transfer was for the appellant to re-transfer the property to the respondent within a period of two years upon payment of Rs.9,200 by the respondent to the appellant.

As the respondent could not redeem the said property within the period as stipulated in the conditional transfer, he had written to the Debt Concilliation Board seeking its intervention. The Debt Conciliation Board after holding an inquiry entered a settlement in terms of section 30 of the Debt Concilliation Ordinance. In terms of the settlement the respondent had to pay to the appellant Rs.9700 in three installments the first of which had to be paid on or before 22nd January 1982.

The respondent made complaints to the Debt Conciliation Board that his attempts to pay the 1st installment as per the settlement failed as the appellant refused to accept the same. Thereafter on the instructions of the Debt Conciliation Board action was instituted in the District Court to obtain an order to enforce the order of the Debt Conciliation Board.

The appellant took up the position that the respondent failed to pay the first installment on the due date as per the settlement arrived at the

Conciliation Board. She also took up the position that the settlement by the Debt Conciliation Board was bad in law, as the application made to the Board by the respondent had not been made within the stipulated time limit set out by law. The appellant further took up the position that the application to the Board by the respondent had not been made according to law.

At the conclusion of the trial, the learned District judge by her judgment pronounced on 21.06.1995 held with the respondent. It is from this judgment that the appellant has preferred this appeal.

When the appeal was taken up for argument, the only issue raised by the counsel for the appellant was that since the respondent failed to make his application within the time frame specified in the Debt Conciliation Ordinance *viz*: one month before the expiry of the conditional transfer, the Debt Conciliation Board had no jurisdiction to entertain or to make an order and issue a certificate. Hence the said certificate is null and void and cannot be enforced. The appellant did not challenge the correctness of the judgment on the facts. However counsel for the appellant has in his written submissions referred to facts regarding the attempt to pay back the money which I would deal with later.

It is submitted by counsel for the appellant that the Debt Conciliation Board acted beyond its jurisdiction in that the settlement made by the Debt Conciliation Board in terms of section 30 of the Debt Conciliation Ordinance is bad in law. He submits that in terms of section 19A of the Debt Conciliation Board Ordinance an application to the Board has to be made at least 30 days before the expiry of the period in the conditional transfer and that in view of the words used in the aforesaid section 19A(1) : "The Board shall not entertain an application... unless that application is made at least 30 days before the expiry of the period". An application not made within that stipulated period would be fatal.

In the instant action the conditional transfer had been made on 19.06.1979 and the two year period within which the property may have been redeemed would have expired on 18.06.1981. Therefore in terms of section 19A(1) of the Debt Concilliation Ordinance the application to the Board should have been made on or before 18.05.1981. Evidence of the officer from the Debt Conciliation Board reveals that the Board received a letter sent by the respondent on 25.05.1981 though it was dated as

12.05.1981. Since this letter did not comply with the requirements of an application in terms of section 17 of the Debt Conciliation Board Ordinance the Board had sent him a set of application forms by registered post. The Board had received this set of application forms perfected by the respondent on 16.06.1981 that is only 2 days prior to the expiry of the period within which the property should have been redeemed by the respondent. Even if 25.05.1981, the date to which the respondent's letter was received is taken as the date the application was made, it is still one week short of the period stipulated under section 19A(1) of the Debt Conciliation Ordinance. Accordingly counsel submits that the questions to be determined in this appeal are :

(a) when is an application deemed to have been made in the instant action in terms of section 19A(1)?

(b) whether the Debt Conciliation Board has acted exceeding its jurisdiction in entertaining an application that was not made within the stipulated time limit under section 19A(1)?

Counsel submits that the question (a) has been decided in the case *T. Praisoody vs. K. Gurunathapillai 74* and *Hilda Perera vs. Lawrence Perera*[1] [2] wherein it was held that the date an application is deemed to have been made is the date that it had been received by the Board.

With reference to question (b) he again cited the aforesaid case of *Praisoody vs. Gurunathapillai (supra).* Therefore he submits the Debt Concilliation Board in entertaining the application that did not fall within section 19A(1) of the Debt Conciliation Ordinance, *i. e.* an application not made within 30 days before the expiry of the period, had acted in excess of its jurisdiction. Therefore the settlement entered under section 30 on such application is bad in law and what flows from it also is bad in law.

Section 19A(1) of the Debt Conciliation Ordinance reads as follows" :

> "The Board shall not entertain any application by a debtor or creditor in respect of a debt purporting to be secured by any such conditional transfer of immovable property as is a mortgage within the meaning of this Ordinance unless the application is made at least thirty days before the expiry of the period within

which the property may be redeemed by the debtor by virtue of any legally enforceable agreement between him and his creditor".

It is to be noted that Somasiri an officer attached to the Debt Conciliation Board who was called as a witness by the appellant admitted that they accepted the letter sent by the respondent and issued a set of printed forms to the respondent to fill up and return. At this point, it is useful to consider section 22 of the Debt Conciliation Ordinance which reads as follows:

"The Board may, if it is of opinion that any application is substantially defective in any of the particulars required by section 17 or section 18 return the application and order that it be amended within such time as may be fixed by the Board. If the application is not amended as ordered by the Board it shall be deemed to have been withdrawn by the applicant".

Another very relevant section in the Debt Concilliation Ordinance to the issue at hand is section 49 of the said Ordinance which has given a wide discretion to the Board which reads as follows :

"It shall be the duty of the Board to do substantial justice in all matters coming before it without regard to matters of form"

It is interesting to note that the appellant had submitted to the jurisdiction of the Board and in fact entered into a settlement. The jurisdiction of the Board to entertain, inquire into and determine the respondent's application was not challenged in any way. No objection was taken to the validity of the application or the proceedings. It is trite law that issues relating to the fundamental jurisdiction of the Court or the tribunal to hear and determine a matter must be taken at the earliest opportunity and must be expressly set out. Therefore the appellant having taken no objection to the validity of the application made by the respondent and also having submitted to the jurisdiction of the Board and in fact having taken a step further by entering into a settlement the appellant cannot now be heard to say that the Debt Conciliation Board acted beyond its jurisdiction or the settlement entered into between the two parties in terms of section 30 of the Debt Conciliation Ordinance is bad in law. Furthermore accepting and admitting the settlement before the Debt Conciliation Board the appellant as well as the

respondent have waived off their rights to challenge any lack of latent jurisdiction (if any) of the Board to follow any procedure.

In *Bastianpillai Antonipillai Swamipillai and Another vs. K. Gunarathnam and Others* decided by S. Anandacumaraswamy, J and P Edussuriya, J. Anandacoomaraswamy, J stated "The only question before us is whether the plaintiffs followed the correct procedure and instituted the correct action. Under the provisions of the Debt Conciliation Ordinance where the settlement is effected between the parties it is final and the debt becomes merged in the settlement and the rights of the creditor is deemed to subsist under the settlement. The learned counsel for the appellants submitted that even assuming that the hypothecary decree can be entered in this case the purported hypothecary decree is null and void as statutory procedure had not been followed. This submission was not made earlier and it is taken for the first time in appeal. It is therefore not open to the defendants to complain of this irregularity if any now".

In the case of *Robinson Fernando* vs. *Henrietta Fernando* it was held :

"Having regard in particular to the prejudice to the plaintiff and the late stage at which the amendment of the answer was sought to be made, the defendant was precluded by delay and acquiescence from raising the objection to jurisdiction and that she had in fact waived it".

It is to be seen that the Debt Conciliation Board had jurisdiction to inquire into matters of this nature generally and therefore the Board was acting within its jurisdiction. In such a situation irregular exercise of jurisdiction can be waived by the parties which is exactly what the appellant had done, for the appellant did not take any steps to get the said certificate issued on the basis of the settlement entered into by both parties cancelled. In fact neither did the appellant take any objection to the settlement or to the certificate issued thereafter nor did he institute an action to have the aforesaid certificate cancelled until the respondent instituted the instant action.

It is interesting to note the procedure as prescribed in section 56 of the Debt Conciliation Ordinance which provides that no civil Court has the right to revise any decision made by the Debt Conciliation Board. Section 56 which deals with 'Bar of Civil actions' reads as follows :

'No civil court shall entertain any action in respect of -

(i) any matter pending before the Board : or

(ii) the validity of any procedure before the Board or the legality of any settlement".

After the settlement and issuance of the certificate upon the settlement in the present case, if the appellant wished to challenge the said settlement or procedure followed by the Debt Conciliation Board Act, the only remedy available for the appellant was to challenge the same by way of a writ which the appellant has failed to do.

In any event, section 19A does not refer to any consequences if it is not complied with. It does not state that the order is illegal, unlawful or void. Thus giving the impression that parties could waive their right to object if any, and what becomes material is the intention of the parties as in the instant case to settle the dispute *via* Debt Conciliation Board.

Further, the appellant has not raised an issue either before the District Court or this Court that she entered into a settlement before the Debt Conciliation Board upon duress, misdirection of fact or law or for any other reasons.

In view of the appellant submitting to the jurisdiction of the Board not raising any objection whatsoever either to the validity of the application of the respondent or to the proceedings had at the Board and having entered into a settlement thereby waiving any lack of jurisdiction on the part of the Board cannot rely on the decision in *Praisody Vs. Gurunathapillai (supra)* or *Hilda Perera vs. Lawrence Perera (supra)* wherein the facts could be distinguished for unlike in the present application, in those two cases proceedings were pending at the Board when a party came to court whereas in the instant application the parties had submitted themselves to the jurisdiction of the Board without any objections and the parties having come to a settlement and thus had come to Court after the proceedings in the Board was concluded and the certificate issued. In the circumstances it appears to me that the learned District Judge has come to the correct findings and conclusion in her judgment regarding the issues relevant to the jurisdiction or proceedings of the Debt Conciliation Board and there is

no reason to interfere with the judgment of the learned District Judge, Kegalle.

As for facts regarding the attempt to pay back the money, evidence of the respondent reveal that he sent two people to make the payment in compliance with the settlement entered into at the Board, but the appellant had refused. The first person to be sent to make the payment was his uncle on 16.01.1982 but the appellant refused to accept the payment. However this uncle of his was not called to give evidence and the appellant denied that an uncle of the respondent came to her house on 16.01.1982 to made the payment. Counsel for the appellant submits that the respondent's evidence to the effect that he sent his uncle to make the payment is not corroborated and as the uncle did not give evidence it is only hearsay and has no evidentiary value. However the second person through whom the respondent attempted to make the payment the Grama Sevaka of the area was called to give evidence and he in fact corroborated the evidence of the respondent.

Counsel for the appellant sought to make out that the evidence given by the respondent is contradicted by the evidence of the Grama Sevaka. He submitted that though the respondent in his evidence and in her petition filed in Court states that he handed over the money to the Grama Sevaka to be taken with him when he went to meet the appellant, the Grama Sevaka has categorically denied this. This submission appears to be incorrect for the evidence of the respondent as well as the Grama Sevaka was that though the respondent wanted to hand over the money to the Grama Sevaka to be taken with him to make the payment the Grama Sevaka did not accept the money but informed the respondent that he would first go to the house of the appellant and inquire from her as to whether she is willing to accept the money.

According to the evidence of the Grama Sevaka he did go to the house of the appellant on 21.01.82 and this fact is admitted by the appellant. Grama Sevaka goes on to say that he did inquire from the appellant whether she is willing to accept the money, but the appellant has refused to accept the money and this fact was conveyed by him to the respondent. However the position of the appellant is that though the Grama Sevaka did come to her house on 21.01.1982 it was to inquire into a complaint made by the respondent and that the Grama Sevaka did not hand over the money.

The learned District judge has accepted the evidence of the respondent as having been corroborated by the evidence of the Grama Sevaka and I have no reason to disagree with her. For it is well established that findings of prirmary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal. *Vide Alwis vs. Piyasena Fernando* [5]

For the foregoing reasons, I see no basis to interfere with the judgment of the learned District Judge and accordingly the appeal will stand dismissed with costs fixed at Rs. 15,000.

EKANAYAKE, J, — *I agree.*

Appeal dismissed.

SILVA
VS.
SILVA

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CALA 75/2005 (LG).
DC NEGOMBO 5484/L.
MAY 25, 2005.
SEPTEMBER 21, 2005.

Civil Procedure Code, sections 121(1), 121(2), 175(1), - List of witnesses filed after fifteen days –Leading the evidence of a witness in the list - Is it permissible?- Does section 175 (1) apply as the party has filed a list?–Discretion granted to court under section 175(1) - Existence of special circumstances - Burden of proof on whom?

The District judge refused to permit the defendant to lead the evidence of a witness whose name appeared in the list filed not within 14 days as stipulated under section 121(1).

HELD:

(1) In terms of section 175(1) of the Civil Procedure Code a party is not entitled to call as a witness a person who has not been listed in terms of section 121(2). The Proviso to section 175(1) empowers the Court to use its discretion in special circumstances where such a course is rendered necessary in the interest of justice. The burden of satisfying court as to the existence of special circumstances is on the party seeking to call such witnesses.

(2) The defendant's list was filed on 26.02.1999. The plaintiff's objection was on 21.02.2005. It is to be observed that sufficient notice had been given to the plaintiff before calling the witness since there was a long period of time between 26.02.1999 and 21.02.2005. Therefore no prejudice would be caused to the plaintiff as the plaintiff had more than 5 years notice of the witness that the defendant intended to call.

(3) Section 175(1) imposes a bar against the calling of witnesses who are not listed in terms of section 121(2). In the instant case, the witness was included with list but the list was not filed within the time provided by section 121(2). Section 175(1) becomes applicable.

Per Wimalachandra, J.

"In exercising the discretion in terms of the proviso to section 175(1) the Court is entitled to look into whether the conduct of the party is grossly negligent and whether there are serious laches on the party."

APPLICATION for leave to appeal from an order of the District Court of Negombo with leave being granted.

Cases referred to :

1. *Girantha* vs. *Maria* 50 NLR 519 at 522
2. *Kandiah* vs. *Wiswanathan* 1991 1 Sri LR 269
3. *Asilin Nona* and *Another* vs. *Wilbert Silva* 1997 1 Sri LR 176
4. *Casiechetty* vs. *Senanayake* 1999 3 Sri LR 11

Hiran M. C. de Alwis for defendant-petitioner.
Sunil Cooray for plaintiff-respondent.

Cur.adv.vult.

March 3, 2006.

WIMALACHANDRA. J.

This is an application for leave to appeal filed by the defendant-petitioner (defendant) from the order of the learned District Judge of Negombo dated 21.02.2005. By that order the learned District Judge refused to permit the defendant to lead the evidence of a witness as his name had not been filed at least fifteen days prior to the date fixed for the trial.

Briefly, the facts are as follows:

The plaintiff instituted this action in the District Court of Negombo *interalia* – for a declaration of title to the property described in the schedule to the plaint, for the ejectment of the defendant and for damages. The defendant filed answer and prayed for the dismissal of the plaintiffs action and in the alternative for a declaration that the plaintiff is holding the land in dispute as a constructive trust in favour of the defendant. The case was fixed for trial on 09.03.99 and both parties filed their respective list of witnesses and documents. Admittedly, the trial started on 09.03.1999. Issues were raised and the plaintiff gave evidence. Thereafter additional lists were tendered by the plaintiff on 02.06.1999 (*Vide* - J. E. No. 7 dated 02.06. 1999) and the defendant too filed an additional list of witnesses and documents on 15.03.2002 (*vide* J. E. No. 15/A dated 15.03.2002). The trial was resumed on 15.03.2002 before another judge after the proceedings were adopted before him. After the conclusion of the plaintiff's case the defendant started his case on 07.05.2004. On 21.02.2005 the defendant moved to call witness No. 3 in the original list filed on 26.02.1999. The plaintiff objected to the calling of the witness on the basis that the particular list dated 26.02.1999 had not been filed fourteen days before the first date of trial. After hearing the submissions made by both parties, the learned District Judge by his order dated 21.02.2005 upheld the objection and refused to allow that witness being called. It is against this order, the application for leave to appeal has been filed.

When the matter was taken up for inquiry by this Court on 03.05.2005 both counsel agreed to file written submissions and if the Court granted leave they further agreed that the appeal also be decided on the same submissions.

The case had been first fixed for trial on 09.03.1999. The defendant had filed the original list of witnesses, in which the witness concerned was listed as No. 3, on 26.02.1999. It appears that the list had been filed ten days before the case was first fixed for trial.

The learned judge in his order has held that the section 175 (1) of the Civil Procedure Code will apply only where a party has not filed a list at all, and he has held that in this case it will not apply because even though the list had been filed it had not been filed within fifteen days as contemplated by section 121 (2) of the Civil Procedure Code.

In terms of section 175 (1) of the Civil Procedure Code, a party is not entitled to call as a witness a person who has not been listed in terms of section 121 (1) of the Civil Procedure Code. This provision requires the list of witnesses to be filed not less than fifteen days before the date fixed for trial. The proviso to section 175 (1) empowers the Court to use its discretion in special circumstances where such a course is rendered necessary in the interests of justice to permit a witness to be called, whose name is not included in a list filed in compliance with section 121 (2) of the Code.

In the instant case, the position is that the witness that the counsel for the defendant wanted to call was included in the list of witnesses but the list had not been filed within fifteen days before the date fixed for trial in terms of section 121 (1) of the Civil Procedure Code. The reasoning of the District Judge was that he cannot exercise the discretion in terms of the proviso to section 175 (1) of the Civil Procedure Code because the Court can permit a witness to be examined only in cases where that witness is not included at all in such list. In the instant case the witness was included but the list was not filed within the time provided by section 121 (2) of the Code.

Section 175 (1) of the Code imposes a bar against the calling of witnesses who are not listed in terms of section 121 (2) of the Code. However, the first proviso to section 175 (1) empowers the Court to use its discretion in special circumstances where such a course is rendered necessary, to permit a witness despite his name not being listed as required by section 121 of the Code. In the instant case too the witness concerned was not listed in terms of section 121 (2) of the Civil Procedure Code. Accordingly, the first proviso to section 175 (1) of

the Code vests discretion in the trial judge to permit the witness to be called if special circumstances appear to him to render such a course advisable in the interests of justice.

It is to be observed that the trial, first commenced on 09.03.1999. On that day issues were raised and the plaintiff gave evidence. Thereafter the trial commenced on 15.03.2002 after adopting the proceedings of 09.03.1999. It is also to be noted that the plaintiff too filed an additional list of witnesses after the commencement of the trial and on 19.02.2003 the plaintiff led the evidence of her husband who was a witness listed in the additional list filed by her. The defendant started his case on 07.05.2004 and on 21.02.2005 the counsel for the defendant moved to call the witness No.3 in the original list dated 26.02.1999. Accordingly, it appears that the plaintiff had sufficient notice as to the original list of witnesses filed by the defendant which was available to the plaintiff for well over 5 years prior to the defendant commencing the leading of the evidence of that particular witness. The defendant's list was filed on 26.02.1999. The plaintiffs objections were on 21.02.2005.

In the circumstances. it appears that the plaintiff was not placed at a disadvantage as he was aware of the defendant's list of witnesses. The defendant had filed the list of witnesses with notice to the plaintiff. As Justice Gratiaen pointed out in the case of *Girantha* vs. *Maria* [1] at 522 "the purpose of the requirement of section 175 that each party should know before the trial the names of the witnesses whom the other side intends to call to prevent surprise". In the circumstances it appears that the sole object of filing a list of witnesses is to prevent an element of surprise and thereby cause prejudice on the other party. Accordingly, a judge may exercise his discretion and allow to call a witness not listed according to section 121(2) in the interests of justice provided it avoids an element of surprise.

The judgment of Gratiaen, J. referred to above, interpreted the repealed section 121 of the Civil Procedure Code which did not specifically require the filing of a list of witnesses fifteen days before the date fixed for trial. However in my view, the above mentioned observation made by Gratiaen J. is relevant for the purpose of exercising the Court's discretion in terms of the proviso to section 175 (1) of the Civil Procedure Code, in special circumstances where such a course is necessary, in the interests of justice to permit a witness to be called who is not listed in terms of section 121(2) of the Civil Procedure Code.