THE

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Relevance of the Video Evidence

The 'petitioner' contends that the video evidence is paramount in determining whether the prosecution's version or the accused's version, is true. The 'petitioner' contends that the following issues which are of a fundamental nature would be resolved by viewing the video.

(i) **Position in which the three wheeler was parked**

(a) IP Liyanage stated that the three wheeler was parked opposite the small gate. He said that only the pavement which was about 15 feet was between the gate and the three-wheeler.

(b) On the contrary PS Manappriya stated that the three wheeler was parked on the opposite side of the road, and that the distance between the three wheeler and the residence of the 1st accused was about 25 to 30 meters.

(c) Sunil Fonseka the defence witness stated that the three wheeler was parked opposite the main gate.

(d) The 2nd accused in his Dock Statement stated that the three wheeler was parked outside the main gate.

The 'petitioner' states that the video cassette was played before counsel on both sides by Mutual Agreement on 15.09.2006. The viewing was however interrupted within five minutes as Power Supply was inadvertently disconnected as the learned Deputy Solicitor General accidently tripped on the connecting cord. The 'petitioner' contends that during the five minutes the video was viewed it displayed the three wheeler being parked at Ward Place opposite the Main Gate of the residence of the 1st accused. This was not contested by the prosecution. The three wheeler was taken into custody, and is listed as a production in this case.

(ii) **Whether infact, the small gate was ever opened**

The 'petitioner' asserts that counsel appearing in the Trial Court had been instructed that this gate had been locked from inside.

The 'petitioner' avers that if the events in the residence had been videoed as claimed by the defence, a view of the cassette would

be of the utmost evidential value in determining whether the prosecution version is true or not.

(iii) **Credibility of IP Liyanage**

The 'petitioner' contends that the parties are at issue, as to whether as claimed by the prosecution, the events initially commenced with the police intervening at the point when the 1st accused came out of the house towards the 2nd accused having moments earlier taken charge of the two 'tulip bags' which had been handed over to him by the 2nd accused. According to the prosecution they were both apprehended at this stage, and the bag which the 1st accused brought from within the house was taken over by IP Liyanage. This officer claims that this bag was retained by him throughout the raid at the residence. It was suggested to him by defence counsel that he had been handling gems which were found in the residence of the 1st accused, and that the aforesaid bag was not in his hands as claimed by him, which suggestion was denied by him. The petitioner's position is that the video would resolve this issue. IP Liyanage and PS Manappriya deny that any videoing took place, although PS Karunathileka admits having made a video recording at the instance of OIC Amarajith, but states that the video recording was made subsequently at the Narcotics Bureau, and not during the raid at the residence of the 1st accused. Learned President's Counsel for the 'petitioner' does not accept this view of the aforementioned Police officers as on the occasion of viewing of the video by Counsel which was subsequently interrupted, Ward Place and the interior of the house were seen on the video which contradicts the view of the police officers.

Sequence of events leading to the order complained of

As IP Liyanage categorically denied that there was a video recording of any sort, counsel for the petitioner made an application on 28.04.2006 for permission to produce a copy of a portion of the video which had come to the possession of the defence in order to discredit the witness. The learned High Court Judge made order refusing the application on the following grounds.

(a) That the prosecution case has not been concluded, and the application had been made in the midst of the prosecution case.

(b) Non-compliance with requirement of Notice in terms of the Evidence (Special Provisions) Act No. 14 of 1995.

PS Manappriya was the 2nd police witness called by the prosecution. On cross-examining him on 13.06.2006 Defence Counsel put to him an entry in the RIB maintained by the Narcotics Bureau, which entry the witness identified as being in the handwriting of PS Karunatileka, which was in Sinhala and was to the effect that a video cassette had been handed over by PS Karunatileka to Chief Inspector Balachandra, the then OIC of the Narcotics Bureau which had been underlined in red by OIC Balachandra.

On the basis of this evidence, defence Counsel cited the case of *Wijepala* v *Attorney General*[1] and submitted that it was necessary for the Court to call for the video tape, and make a copy available to the defence for the purpose of cross-examination in the interests of a fair trial. The State objected to the Application on the basis that the entry in the RIB had been after the service of the Indictment, and that the video tape was not a part of the prosecution case. The learned High Court Judge of Colombo made Order on 28.04.2006 disallowing the application of Defence Counsel on the following grounds.

(a) The Defence had the knowledge of the contents of the video tape whereas the prosecution's position was that there was no such tape. That being so, the learned High Court Judge took the view that it was for the defence to produce the video tape and

(b) That it was open to the defence to do so in the course of the case for the defence.

After the closure of the prosecution case, the defence led evidence *inter-alia* to establish that there was a video-recording of the raid at the residence of the 1st defendant in the possession of the Narcotics Bureau. The 1st, 2nd and 3rd accused made the Dock Statements that the raid at the house was video-recorded. Defence witness Sunil Fonseka also gave evidence that the aforesaid raid was video-recorded. The defence also called 3 police officers, namely the following in this regard.

(a) PS Ranjan testified that he had possession of the tape from 29.11.2005 when he received it from OIC Balachandra until he produced it in Court on 15.09.2006. The video was physically

produced in evidence by PS Ranjan and marked as 2V1, but not admitted in evidence.

(b) OIC Balachandra stated that he received the tape form PS Karunatilleke on 28.11.2005 and placed it in an envelope which he sealed. PS Karunatilleke made the IB entry pertaining to the delivery of the tape, and he underlined it in red. He handed over the tape to PS Ranjan on 29.11.2005 to be kept in safe custody. The tape was identified by OIC Balachandra.

(c) PS Karunatilleke's evidence was that he did a video recording on the instructions of OIC Amarajith, but that the recording was of the subsequent events at the Narcotics Bureau and not of the raid at the residence. He identified the particular tape by reason of an entry made by him on the video cassette itself which contained references to the relevant IB Entry pertaining to the raid at Ward Place.

In view of the aforesaid evidence. Counsel for the petitioner moved on 15.09.2006 that he be permitted to produce in Evidence and exhibit the video tape, which Application was objected to by the State on the basis that the authenticity and the chain of evidence pertaining to proper custody of the tape had not been established. The learned High Court Judge, made order on 15.09.2006 refusing the application of the 'petitioner' on the following grounds.

(i) Failure to give Notice to the prosecution in terms of section 7(1)(a) of the Evidence (Special Provisions) Act No. 14 of 1995.

(ii) That the witnesses had not admitted that the events at the Ward Place residence had been videoed.

Subsequently Counsel on both sides agreed to view the video in the presence of the Interpreter Mudaliyar which they did. However after the tape was run for 5.51 minutes the learned DSG accidentally trod on the connecting-cord and the power supply was interrupted, without a resumption of the viewing. The said video during the period of screening depicted Ward Place (including the traffic), the outside view of the residence, the three-wheeler parked in front of the gate, some bags containing a powder, some currency notes displayed, and a travelling bag (P1) opened on the white coloured floor of the said residence.

On 27.09.2006 the Defence served Notice on the Attorney-General in terms of section 7(i)(a) of the Evidence (Special Provisions) Act No. 14 of 1995 of the intention to produce the video in evidence.

On 16.10.2006 Counsel for the 'petitioner' made a two-fold application namely:

(a) for the resumption of viewing the video and

(b) to produce the video in evidence and in the event of the prosecution or the Court requiring the lapse of 45 days after the service of the notice as contemplated by section 7(i)(a) of the Evidence (Special Provisions) Act No. 14 of 1995, the proceedings be adjourned to cover the prescribed period.

(c) the State declined to recommence the viewing. The DSG admitted the receipt of the notice and specifically stated that the prosecution was not insisting on the lapse of 45 days and thus waived this requirement. The DSG however stated that with regard to the Application made by the Defence Counsel, if an application is made under section 165 of the Evidence Ordinance, he would respond to such an Application.

The learned DSG however maintained that such an Application should be made after the prosecution and the defence have closed their respective cases.

The learned High Court Judge on 16.10.2006 (P5) made order refusing this Application on the following grounds.

(i) That the requirement of a 45 day Notice prior to the date fixed for Trial as envisaged in section 7(1)(a) of the Evidence (Special Provisions) Act No. 14 of 1995 was mandatory.

(ii) The Defence has failed to take steps to comply with this requirement despite the orders made by the learned High Court Judge on 28.04.2006 and 15.09.2006.

(iii) That statutory requirements could not be waived by parties.

(iv) That the viewing of the video by the parties was based on agreement between them and the Court did not propose to make an order on that account.

The 'petitioner' being aggrieved by the said order lodged a Leave to Appeal bearing No. CA 213/2006 and Revision Application bearing No. CA 212/2006. When the matter came up for argument before their Lordships Sriskandarajah, J. and W.L.R. Silva, J. the DSG appearing for the State conceded that it was not mandatory to comply with the requirement of Notice stipulated in section 7 of the Evidence (Special Provisions) Act No. 14 of 1995, where the document is in the possession of the adverse party. It was held by Their Lordships in the aforementioned cases that 'The video tape was with the prosecution', and set aside the Order of the learned High Court Judge (P5). Their Lordships directed the Trial Judge to permit the defence to make a fresh application with liberty to lead evidence if necessary and subject to the right of the State to object to the Application.

Proceedings subsequent to the Orders in CA. 212/2006 and CA 213/2006. When proceedings were resumed before the learned High Court Judge of Colombo, Counsel for the 'petitioner' made an application to lead evidence of the video. The learned High Court Judge made Order directing the 'petitioner' to satisfy the Court of compliance with the requirements of section 4(1)(a)(b)(c) and (d) (Y1).

The 'petitioner' filed a list of witnesses comprising of 05 police officers. On 22,02.2007 the 'petitioner's learned Counsel led the evidence of Shimran Shyam, the 10 year old daughter of the 1st and 3rd accused. In evidence she stated that she remembered the day, when her father and mother were taken away by some persons. She said that on that day her mother and household servants were made to sit at a table in the main hall, on which occasion some persons videoed the house. Upon the conclusion of evidence Counsel for the 'petitioner' stated that as the witnesses had testified with regard to a video recording he was not calling any further evidence in that regard, and moved to mark the video in evidence.The DSG objected and made submissions. Learned President's Counsel who appeared for the 'petitioner' in this Court stated that PC Pradeep was called as a witness in the High Court, where he testified that at approximately 11.30 a.m. on 21.02.2007 a person whose voice he later identified as that of PS Ranjan, telephoned him and asked him to give evidence in favour of the accused. Learned President's Counsel admitted that PC Pradeep made no reference to any of the accused, was not tendered for cross-examination, and that although the learned High Court

Judge did not come to a finding was highly influenced by this allegation. The learned High Court Judge made Order on 28.2.2007, refusing to lead the video evidence. The present Revision and Leave to Appeal Application are to set aside the aforesaid orders of the learned High Court Judge dated 28.2.2007. The learned President's Counsel referring to the claim with regard to the video cassette accepted in his Written Submissions that the recording had been in the custody of the Narcotics Bureau from the time the recording was effected until it was produced. Learned President's Counsel cited (1) *Queen* v *Aboobucker*[2], where the recording of a speech made at a public meeting was held to be admissible, provided there was evidence that the recording had been correctly done, and that the machine was functioning properly. (2) *Karunaratne* v *The Queen*[3], where it was held that a tape recording of a telephone conversation could have been admitted subject to the same qualifications.

I have considered the application of the petitioner, the evidence led in this case, the Written Submissions tendered by both sides, the provisions of the prevailing Evidence (Special Provisions) Act No. 14 of 1995 and connected matters. Learned President's Counsel for the petitioner state that the accused were in possession of parts of the video. Learned President's Counsel did not state the manner in which the accused obtained the aforesaid possession. The learned High Court Judge directed the 'petitioner' to lead evidence to satisfy Court that the requirements of section 4(1)(a)(b)(c) and (d) of the Evidence (Special Provisions) Act No. 14 of 1995 have been complied with before making any order. After the aforesaid Act became law, admissibility of video recordings is governed solely under the provisions of the said amendment. In accordance with section 2 of the said Act it is clear that the provisions of the Amendment Act No. 14 of 1955 override both the Evidence Ordinance or any other Written Law. Hence for such video evidence to be led the provisions of section 4(1)(a)-(d) have to be satisfied. Section 4(1)(b) reads as follows:

"The recording or reproduction was not altered or tampered with in any manner whatsoever during or after the making of such recording or reproduction or that it was kept in safe custody at all material times, during or after the making of such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered

with, during the period in which it was in such custody." The aforesaid provision makes it manifestly clear that a contemporaneous recording could only be admitted as evidence, only if the requirements of section 4(1)(d) are satisfied. The prosecution avers that no contemporaneous recording by video took place at the time of the raid, although the defence claims that such a recording took place. The prosecution emphasizes the fact that the raid took place at the Ward Place residence of the 1st and 3rd accused. Besides the possibility that the video may have been tampered with editing and altering of any video is possible which can completely distort the true picture using modern technology techniques. P.S. Karunathilaka in his evidence stated that he placed a piece of paper for identification at the time he handed over the cassette as testified by him when he handed over the video to the Narcotics Bureau. He however said that the piece of paper could not be found by him as it was not there, when the envelope containing the cassette was opened in Court. P.S. Karunathilaka also described the manner in which the video cassette lay for two years in a dark room, which dark room was not padlocked, nor the envelope that contained the video cassette sealed, as in the case of other productions, and accessible to many others, before he was instructed to hand over the video cassette to Chief Inspector Balachandra.

The evidence of P.S. Karunathilaka in my view clearly establishes that the requirements as set out in section 4(1)(d) of the aforesaid Evidence (Special Provisions) Act No. 14 of 1995 were **not** complied with. Section 4(2) of the aforesaid Act makes it clear that the video cassette could be admissible in evidence only if the conditions set out in section 4(1) are satisfied. However the question remains as a how parts of the cassette got into the possession of the accused. The learned High Court Judge interpreted section 7 of the aforesaid Act, and observed that although the requirement of 45 days notice was brought to the attention of the defence by the learned High Court Judge as early as 28.4.2006, the accused had not complied with the aforesaid requirement. Despite an opportunity being granted by the learned High Court Judge by his Order dated 8.2.2007 to lead evidence to satisfy Court that there was compliance with section 4(1)(a) to (d) of the Evidence (Special Provisions) Act No. 14 of 1995, the 2nd accused ('petitioner') nor the 1st and 3rd accused did not avail themselves of the opportunity much to their detriment.

The right of the accused to a fair trial is enshringed in our Constitution. It is an established principle that all the parties are entitled to a fair trial as a constitutional right. However in applying such a right to the production of the video cassette, the relevant question to be considered is as to whether the video cassette passes the test of authenticity, and whether it was altered or tampered with, as stipulated by the Evidence (Special Provisions) Act No. 14 of 1995. In my view the video cassette produced by PS Karunatilaka does not satisfy the requirements of section 4(1)(d) of the aforesaid Act, as

(a) the video cassette was not contained in a sealed envelope,

(b) the piece of paper which PS Karunathilaka attached to the video cassette initially to enable him to identify the video cassette was missing,

(c) the video cassette was kept in a dark room which was unlocked for a period 2 years, during which period there was time for tampering with the video-cassette as it was left exposed,

(d) numerous persons used to come and go to the dark room,

(e) there was no evidence that there was a proper sealing of the envelope that contained the video-cassette in the presence of other officers ..... etc, and thus there was *no contemporaneous,* which could be led as Evidence. However this situation cannot be construed as a violation of the provisions of the Right to a fair Trial guaranteed to an accused, as envisaged by the Constitution.

The conduct of Chief Inspector Balachandra is questionable namely.

(i) Why did he not seal the video cassette in the presence of PS Karunatilaka?

(ii) Why did he wait until the following day to handover the envelope not sealed in the presence of any one else to PC Ranjan?

(iii) What happened to the piece of paper placed by PS Karunathilaka inside the cassette?

(iv) Why didn't he record anything in the envelope?

No plausible explanation has been given as to how the petitioner came to be in possession of parts of the video cassette.

During the Trial the prosecution led the evidence of it's main witness IP Priyantha Liyanage who was the Officer in Charge of the raid.

This witness in cross examination specifically denied any videoing of the raid inside the residence of the 1st and 3rd accused. Although Counsel who appeared for the 2nd accused (petitioner) stated that the accused were in possession of parts of the video, there was no evidence led as to the manner in which parts of the video were obtained. The prosecution also called PS Rajitha Manamppriya who participated in the raid with I.P. Liyanage and was attached to the Police Narcotics Bureau at the time of the raid. During cross examination of this witness Counsel for the 2nd accused's (petitioner) attention was drawn to certain notes made by PS Karunathilaka and CI Balachandra. The said notes indicate that a CD pertaining to the case was handed over by PS Karunathilaka to CI Balachandra on the said date. However this witness denied that any videoing was done by any of the officers of the Narcotics Bureau.

On 13.06.2006 Counsel for the 2nd accused (petitioner) made an application for the production of the video. At this stage no reference was made to the earlier submission that the accused were in possession of parts of the video. However a reference was made that the Counsel had received instruction that certain officers of the Narcotics Bureau are clearly seen in the video now in the custody of the Narcotics Bureau. The prosecution expressed surprise as to how the accused was making submissions as to what was in the cassette which was not a part of the prosecution case, and which the prosecution was not even aware of. The learned High Court Judge referred to the evidence of the prosecution, where it was stated that they did not video the raid. The learned High Court Judge held that as the accused appeared to have a good understanding of the video, if the video is to be produced it should be done in accordance with the provisions of the Evidence Ordinance, and during the case of the defence.

CI Balachandra who was called by the defence, in his evidence stated that he took the production (cassette) from PS Karunatilake, and according to his recollection he placed some seals, and handed it over for safe-keeping to the person in charge of the room where the IBE's are kept. Witness said that there was a cassette with a plastic

cover with a marking "RIB 1104/2107. During his evidence although the cassette was not marked as a production a marking "2V1A" was given only to show that the aforesaid cassette was a given to Court by this witness. Under cross-examination CI Balachandra accepted that he did not take part in the raid, and that he did not know what the cassette contained. The next witness called by the Defence PS Karunathilake, in his evidence stated that he handed over to CI Balachandra what he videoed at the Narcotics Bureau pertaining to the raid of 23 kilograms of heroin at a residence at Ward Place. He very specifically stated that he never videoed any part of the raid nor anything outside the Narcotics Bureau.

On an analysis of the raid it is evident that IP Priyantha Liyanage led the raid and PS Rajitha Manamppriya also partook in the raid, if any video cassette was found in the raid the officers who partook in the raid could have marked it as a production and sealed it. However in this case PS Karunathilaka who did not take part in the raid but stated in evidence on being called by the defence that he videoed the Police Narcotics Bureau consequent to the raid, and handed over the video cassette to CI Balachandra who was also called by the Defence as a witness, PS Karunathileke and CI Balachandra did not partake in the raid. Hence there is no evidence by the Prosecution witnesses that a videoing took place during the raid. On the contrary the prosecution witnesses denied that any videoing took place during the raid.

Apparently consequent to the raid PS Karunatilleke videoed at the Police Narcotics Bureau consequent to the raid, which is said to be contained in the video cassette marked as "2V1A". The 2nd accused (petitioner) however seeks to mark a video cassette which is not a production in this case. From a perusal of the evidence, the prevalent Law namely the Evidence (Special Provisions) Act No. 14 of 1995, and related matters it is my view that;

(i) The evidence led by the both the prosecution and defence prove that there was no contemporaneous recording of the raid.

(ii) The evidence clearly establishes that whatever recording that was made (filming of the Productions at the Police Narcotics Bureau) was not kept in safe custody at all material times.

(iii) Insufficient precautions were taken to prevent the possibility of such recordings being altered or tampered with. (Counsel for the accused have admitted that they were in possession of such recording or part thereof).

Hence it is manifestly well established that the Provisions of section 4(1)(a)-(d) of the Evidence (Special Provisions) Act No. 14 of 1995 have not been compiled with , and thus it is my view that the marking of the video cassette is **not** admissible under section 4(2) of the aforesaid Act.

For the aforesaid reasons I do not permit the 2nd accused-petitioner to lead in evidence the said video recording marked as '2V1A'. I uphold the Order dated 28.02.2007 made by the learned High Court Judge of Colombo which is in conformity with the legal provisions, and as such I hold that the learned High Court Judge did not misdirect himself on the law and facts in the aforesaid orders.

Hence for the aforesaid reasons, I dismiss both 34/2007 (Revision) and 39/2007 (Leave to Appeal) Applications of the 2nd accused-petitioner without costs. The learned High Court Judge is hereby directed to proceed with the case.

SARATH DE ABREW, J. - I agree.

Application dismissed.

DEHIWELA-MT. LAVINIA MUNICIPAL COUNCIL

v

FERNANDO AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 214/97
DC 1139/M
MAY 23, 2007

Civil Procedure Code – section 154 – Evidence Ordinance section 74– section 83– Presumption that Surveyor General's plans are duly made – Rejecting Surveyor General's plan for non compliance of section 154 – Validity? Ingredients necessary for reception of fresh evidence or a new trial.

The plaintiff-respondent sought a declaration of title to the land in question. The defendant-appellant's position was that it forms a part of a crown land. The Surveyor General's plan/report was rejected since it was not produced in the proper way. The trial Judge held with the plaintiff-respondent.

Held:

(1) In terms of section 74 of Evidence Ordinance Surveyor General's plan is a public document and section 83 states that, there is a presumption that Survey General's plans are duly made and accurate.

(2) Court cannot reject the plan and report merely because of non compliance under section 154 of the Civil Procedure Code.

(3) The presumption under section 83 in favour of such plans/surveys extend to everything necessary to be done in order to make the survey/plan a faithful drawing and manuscript of the land surveyed.

(4) In a *rei vindicatio* action, plaintiff must prove title and establish his title, as a declaration cannot be granted merely because the defendant's title is poor or not established. Title and identity are important matters to be established to succeed in a *rei vindicatio* action.

Per Anil Gooneratne, J.

"It is apparent that, the learned trial Judge has misdirected himself on the plan and report submitted by the Surveyor General. In fact the Surveyor General's

witness (if called) would be an essential witness not to prove title of state as such but to ensure the identity of the land in dispute is considered from the proper perspective, to either exclude state property or include same within the disputed area of land".

Held further

(5) In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled.

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

(2) Evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive.

(3) The evidence must be such as is presumable to be believed or in other words it must be appropriately credible although it need not be incontrovertible.

The above conditions may not be exhaustive in a way and also not imperative, but certainly could be used to guide Court in cases where a retrial is ordered".

Per Anil Gooneratne, J.

"It is my view that the Surveyor General or his authorized representative's evidence both oral and documentary would be appropriately credible and would have an important influence on the result of the case."

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to:

(1) *Surveyor General* v *Zylva* – 12 NLR 53.

(2) In *Re Juwanis Appuhamy* – 65 NLR 167.

(3) *Beatrice Dep* v *Lalani* – 1997 – 3 Sri LR 379.

W. Dayaratne for 1st defendant-appellant.

Dr. Jayatissa de Costa with *C. Siriwansa* and *T. Jayatilake* for respondent.

Cur.adv.vult.

July 26, 2007

ANIL GOONERATNE, J.

This was an action instituted in the District Court of Mt. Lavinia seeking a declaration of title to the premises described in the 3rd schedule to the Amended Plaint dated October 1981, and for

ejectment of the defendants and damages in a sum of Rs. 100,000/-. The appeal arises from the judgment of the District Court dated 17.02.1997 entered in favour of the plaintiffs.

The plaintiff-respondent supports his case for a declaration of title to the land shown in the 3rd schedule to the amended Plaint, according to the chain of title referred to in paragraphs 8 - 20 of the amended Plaint. Defendant-appellant's position is that the land described as above by the plaintiff form part of a crown land described as Galkissawatta and the chain of title set out in the amended Plaint has no bearing on the said crown land (shown in the schedule to the answer), and at the hearing of this appeal learned Counsel for the appellant *inter alia* contended and emphasized that title and identity of land has not been proved and that the plaintiff was not in possession of divided portion of land.

At the trial before the District Court 11 issues were raised. The plaintiff-respondent contends that he is the owner of the land described in the 3rd schedule to the amended plaint (assessment No. 368 Galle Road, Mt. Lavinia) in extent of 0.70 perches and that the 1st and 2nd defendants illegally dispossessed him on 14.10.1979. The position of the defendant-appellant is that the said premises No. 368 referred to in the amended plaint is a part of lot 8 to the land described in the schedule to the amended answer called Galkissawatta which is a plot of land acquired by the State by certificate dated 9.2.1919 for the Sanitary Board and successor to the said Board is the 1st defendant (as in paragraphs 11 of the amended Answer). It has been pleaded in the amended Answer that a commission should be issued to a Court Commissioner to ascertain the identity of the land as in paragraph 13.

Trial in this case began with the framing of issues on 21.11.90 and the evidence had been led from time to time with further trial being postponed for several dates with the close of the plaintiff's case on 9.6.94. Further trial for the defendant's case had been put off for 22.9.94 on which date District Judge was on leave. The Journal Entry of 26.1.95 gives an indication that a commission had been moved on the Survey General only on that date. The commission papers of 2.6.95 had been submitted to court and the Survey General had received same on 7.6.95. The Survey General had returned the commission on 24.7.95 and the District Court seal on same is dated

27.7.95. The Survey General's survey plan and report is filed of record (which was marked at the trial as V1 & V1a). It would be necessary to lead oral evidence of the witness of the Survey General's Department. If oral evidence was placed before the Original Court parties could have examined the witness and elicited more details, although V1 & V1a were marked in evidence.

On perusing the Petition of Appeal I find that one of the points urged therein is that the defendant-appellant was deprived of the opportunity of presenting his case more particularly the District Court had not given an opportunity to the defendants to call the Survey General as a witness. (as alleged in paragraph 13 of the Petition of Appeal). Instead compelled the defence lawyer to close the case for the defence, as there were no other witness available for the defendants. However the Journal Entry/proceedings of 22.7.96 does not record the facts alleged as above, and by looking at the record I cannot find any refusal by court, to call the witness from the Survey General's Department on a subsequent date. The learned Counsel for the appellant repeatedly submitted to this Court the difficulty that had to be faced by the defendants of not being able to call the Survey General's representative to give evidence.

Whatever it may be, I wish to observe that in the case in hand, it would be important to ascertain the fact as to whether the disputed area of land is exclusively private property or land which belongs to the crown and by it's available procedure vested with the 1st defendant. In these circumstances the Trial Court Judge's finding on the above point and evidence in the case will have to be examined very closely.

The District Judge's finding are as follows. The learned District Judge concluded that the land in dispute belongs to the plaintiff. The defendant has not been able to produce any document to prove that the land in question was acquired by the State and vested in the 1st defendants, other than by the Survey General's plan and report marked as V1 & V1A. Court observed that according to V1 (plan) the land in dispute is part of lot 8 in p.p. 16821, and that this land is claimed by the State. According to 1D1 assessment No. 368 does not fall within the land in question. It is also observed that the defendant had not called any witness to clarify the above position. To support the title of the plaintiff the learned District Judge refers to evidence of

witnesses who testifies to deeds marked 'P4' to 'P10' and plan 'P6' with several other documents. The judgment also refer to the fact that the 1st defendant had been responsible for forceful occupation of the land.

To deal with the evidence very briefly witness Grero for the plaintiff states that her father took the premises on rent from B.J. Perera in 1976 and rent paid to Mr. Perera. She continued to be tenant up to 1979 and the 1st defendant took over the premises and at present continues to do business under the 1st defendant. The other witness Munasinghe from the 1st defendant Council who was Chief Revenue Officer confirms that the 1st defendant Council took over the premises on the direction given by the Mayor. There was no court order to take over the premises and entered the upstairs of these premises by force opening the door. The other witness Fonseka explained to court that his task was to settle the issue relating to these premises and produced marked 'P3' the recommendation to release the premises, but this recommendation was not put into operation. Thereafter the plaintiff gave evidence and produced 'P4' - 'P10'. Plaintiff also produced 'P6' the plan relied upon by him. In cross examination of the Surveyor on 'P6' he admitted 'P6' was prepared without carrying out a survey, without visiting the site and minus the field notes, but relied on a building plan.

The learned Counsel for the plaintiff-respondent contended *inter alia* that plan 'P6" was admitted in evidence without any objection and invited this Court to accept the position of the Surveyor who gave evidence for the plaintiff may be to prove the identity of the land. Since the document was led in evidence without any objection I would accept the position of the learned Counsel for the respondent on that aspect only. It was also submitted that the Survey General's plan and report should be rejected since it was not produced in the proper way in terms of the provisions of the Civil Procedure Code more particularly section 154 of the Code. I wish to observe that in terms of section 74 of the Evidence Ordinance Survey General's plan is a public document and section 83 of the Evidence ordinance there is a presumption that Survey General's plans are duly made and accurate. In the circumstances I would observe that Court cannot reject the plan and report marked as 'D1' & D1A' merely because of non-compliance with section 154 of the Civil Procedure Code.

In *Surveyor General* v *Zylva*[1] the presumption under the section in favour of such plans or surveys extends to everything necessary to be done in order to make the survey or plan a faithful drawing and measurement of the land surveyed.

In a *rei vindicatio* action plaintiff must prove and establish his title, and a declaration cannot be granted merely because defendant's title is poor or not established, *Juwanis Appuhamy's case.*[2] As such title and identity are important matters to be established to succeed in a *rei vindicatio* action.

In the circumstances having considered all the material placed before the Original Court it is apparent that the learned District Judge has misdirected himself on the plan and report submitted by the Survey General. In fact the Survey General's witness (if called) would be an essential witness not to prove title of State as such but to ensure the identity of the land in dispute is considered from the proper perspective,to either exclude State property or include same within the disputed area of land.

It is my view that reception of fresh evidence is essential to ascertain the truth of the matter. *Beatrice Dep* v *Lalani*[3].

In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled:

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

(2) Evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive.

(3) The evidence must be such as is presumable to be believed or in other words it must be apparently credible although it need not be incontrovertible.

The above conditions may not be exhaustive in a way and also not imperative, but certainly could be used to guide court in cases where a re-trial should be ordered. In the present case it is my view that the Survey General or his authorized representatives evidence both oral and documentary would be apparently credible and would have an important influence on the result of the case. In the

circumstances I would set aside the Judgment of the District Court and direct that a re-trial be held. The Registrar of this Court is directed to forward the record in Case No. 1139/M to the District Court of Mount Lavinia.

EKANAYAKE, J. - I agree.

Appeal allowed.

Trial de novo ordered.

JAYATILAKE
v
RATNAYAKE

COURT OF APPEAL
RANJIT SILVA, J.
SISIRA DE ABREW, J.
CA PHC 82/97
HC KANDY 61/96 (REV.)
MC HATTON 67572

State Land Recovery of Possession Act 7 of 1979 – amended by Act 58 of 1981, 29 of 1983 and 45 of 1992 – section 3 – Order of Magistrate's Court canvassed by way of Revision. Should exceptional circumstances be urged?

Held:

(1) There is no right of appeal against the order of the Magistrate's Court when an order is made under the provisions of the State Lands Recovery of Possession Act.
The party aggrieved could only move the High Court in Revision.

(2) In a Revision application when there is no alternative remedy available, the appellants need not show exceptional circumstances – but has to show illegality or some procedural impropriety in the impugned order.

(3) Breach of a procedural or formal rule should be treated as a mere irregularity if the departure from the terms of the Act is of trivial nature.

AN APPLICATION from an order of the Provincial High Court of Kandy.

Case Referred to:

(1) *Gunaratne* v *Abeysinghe* 1988 - 1 Sri LR 261

Vidura Gunaratne for respondent-petitioner-appellant.
Vikum de Abrew SSC for AG.

Cur.adv.vult.

October 24, 2007
RANJIT SILVA, J.

Mr. Vidura Gunaratne moves for a date stating to Court that he managed to obtain the brief only two days ago and therefore he is not ready in this case. We find that this matter was laid by at a particular time due to the fact that the appellant had died and it was later discovered that it was not the appellant who died but the registered Attorney-at-Law for the appellant late Mr. Rajanayake. An application was made to re-list the matter and that had been allowed by this Court on 24.09.2007 fixing the matter for argument for 24.10.2007. The appellant had nearly one month to get ready for this case and it appears that the appellant had not been diligent in moving in this matter in order to get ready to face the argument fixed for today. No valid reason was given as to why he is not ready. For that reason, we have refused to grant a date.

The petitioner-appellant who shall be referred to as 'the appellant' has appealed to this Court against the order made by the learned High Court Judge of Kandy dated 26.05.2007. The learned High Court Judge having gone into the matter held that the impugned order of the learned Magistrate of Hatton dated 17.05.1996 to be in order thus affirming the order of eviction made by the learned Magistrate of Hatton.

After hearing the learned Senior State Counsel for the respondents and having perused the necessary documents we find that the impugned order made by the learned Magistrate of Hatton dated 17.05.1996 to be in order. There isn't any illegality or impropriety in the said impugned order.

The petitioner-appellant had argued in the Magistrates' Court of Hatton that the application made to Court under section 5(1) of the State Land Recovery of Possession Act No. 7 of 1979 as amended

by Act No. 58 of 1981, 29 of 1983 and 45 of 1992 was defective in that it did not contain the correct information such as the name and address of the appellant and the particulars with regard to the premises sought to be recovered under the said Act and also that the Notice issued under section 3(i) of the said Act was defective in that it mentioned a wrong plan and a wrong District.

The learned Magistrate has stated in his order that the application to the Magistrates' Court was made according to schedule "B" of the Act with an affidavit and a copy of the Notice under section 3 (i) (A) attached. The learned Magistrate for very good reasons concluded that the defects mentioned above did not cause any prejudice to the appellant and held against the appellant. The Magistrate concluded that although by an over sight the name and address were not mentioned in the application made to the Magistrates' Court there was an endorsement in the said application to the effect, that 'the Notice to vacate was handed over to Titus Jayathilake' who is the appellant. (Vide application for eviction dated 06.02.1995 in paragraph (ඇ)(iii)). The said application mentioned the correct plan bearing No.මඕ 489. We have perused the Notice of Eviction and we find that the schedule contains the correct District and the correct plan number (to wit: මඕ 489.) We hold that the impugned order of the learned Magistrate to be a well reasoned out and well analyzed order. Dealing with the impugned order of the learned High Court Judge of Kandy dated 26.05.2007, we observed that the learned High Court Judge has made one error by making a wrong statement of law namely that the appellant has not shown exceptional circumstances. As this was a revision application to the High Court against the order of the learned Magistrate in a State Land Recovery of Possession matter under the State Land Recovery of Possession Act., it was not necessary for the appellant to show the existence of exceptional circumstances (Viz: as there is no remedy by way of appeal).

We find that since there is no right of appeal the appellant had to move the High Court in revision. In a revision application in the ordinary sense where there is no alternative remedy available, the appellant need not show exceptional circumstances, but has to show illegality or some procedural impropriety in the impugned order. We do not see any impropriety or any procedural defect or any illegality in the

impugned order dated 17.05.1996 and therefore we conclude that the wrong statement of law made by the learned High Court Judge does not vitiate his order dated 26.05.2007.

The appellant has urged three procedural defects, in the High Court. They are:

(i) That the appellant alleged that the application to the Magistrates' Court was defective as it contains the wrong district namely 'Kandy' instead of 'Nuwara-Eliya'.

(ii) That the name and address of the appellant were not mentioned.

(iii) That the application refers to a wrong plan.

With regard to the grounds urged before the learned High Court Judge that the application made under section 5 of the State Land Recovery of Possession Act No. 7 of 1979 was defective, the learned High Court Judge has concluded that it has not caused any prejudice to the appellant. It appears that the appellant in the High Court has not assigned any reasons to show that any prejudice was caused to him. Therefore the learned High Court Judge has quite correctly decided that it has not caused any prejudice to the appellant and dismissed the revision application.

Gunaratne v *Abeysinghe* 1988 (1)

"It was held that breach of a procedural or formal rule should be treated as a mere irregularity if the departure from the terms of the Act is of trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced."

For the same reasons we have assigned in respect of the order made by the learned Magistrate dated 17.05.1996, we find no valid reason to interfere with the order made by the learned High Court Judge of Kandy dated 26.05.2007.

Accordingly we dismiss the appeal without costs.

SISIRA DE ABREW, J. - I agree.

Application dismissed.

TISSERA
v
FERNANDO AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
SARATH DE ABREW, J.
CALA 425/01 (LG)
DC PANADURA 554/L
JUNE 28, 2004
JULY 25, 2006

Civil Procedure Code section 479-763(2) – Act 53 of 1986. Writ pending appeal- Judicature Act 2 of 1979 as amended by Act 37 of 1979 – Ingredients necessary to stay the writ? Defendant a minor – Guardian not appointed – Is it a substantial question of law?

Held:

(1) The law applicable to stay of execution of decree pending appeal is contained in section 23 of the Judicature Act and also in section 763(2) of the Civil Procedure Code.

(2) Where section 23 of the Judicature Act is concerned the rule is the execution of the writ whereas the exception is the stay of the writ.

(3) On the other hand section 763(2) which is not linked to the provision of the Judicature Act stipulates distinctive condition as the court may stay the writ, if the judgment debtor satisfies the court that substantial loss may result to him and security is given by the judgment debtor for the due performance of the decree.

(4) Though if a writ is stayed to avoid substantial loss equally unexpected loss or damage to a certain degree would result to the judgment creditor who is unable to enjoy the fruits of his victory-however what matters is not the balance of convenience or inconvenience of the concerned parties but the fact on the material placed before court, the judgment debtor should discharge the burden placed on him to the satisfaction of court.

(5) Even in the absence of substantial loss, the existence of a substantial question of law is sufficient ground to stay execution of the writ.

(6) There is a duty cast on the judgment debtor to take whatever possible steps to minimize his loss, he cannot fall back on his inaction and inertia and claim substantial loss would be caused to him.

Per Sarath de Abrew J.,

"If the dogmatic and arrogant approach of the judgment debtor is allowed to succeed, no judgment creditor would be safe from the clutches of an unscrupulous judgment debtor who has school going children in a school close to the premises in suit - for if a genuine effort was made, there was a strong likelihood that the judgment debtor could have succeeded in procuring alternative accommodation within striking range of the school his children are attending or was about to attend.

(7) It is evidence that the 3rd defendant was a minor at the time the plaint was filed. The trial judge has failed to comply with the mandatory provisions of section 479 of the code and failed to appoint a *guardian ad litem* on behalf of the minor defendant before proceeding with the case, therefore a substantial question of law will arise as to whether the judgment or decree would be binding on the 3rd defendant-respondent and what would be the effect it would have on the 1-2 defendant-respondents.

Held further

(8) The amount of security should be such as would reasonably safeguard the interest of the judgment creditor in the event of the judgment appealed from being eventually affirmed in appeal.

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

Cases referred to:

1. *Grindlays Bank Ltd.* v *Mackinon Mackenzie & Co. of Ceylon Ltd* 1990 1 Sri LR 19
2. *Esquire Industries Garments Ltd* v *Bank of India* – 1993 – 1 Sri LR 130 (SC)
3. *Saleem* v *Balakumar* – 1981 – 2 Sri LR 74
4. *Kandasamy* v *Ghanasekaram* – CALA 78/81 – C.A.M. 17.7.1981
5. *Shajahan* v *Mahaboob and others* – CALA 117/89
6. *Mustapa* v *Thangamani* – CALA 70/91
7. *Cooray* v *Illukkumbura* – 1999 – 2 Sri LR 63
8. *Fauz* v *Gyl* and *others* – 1999 – 3 Sri LR 345
9. *Mohamed* v *Seneviratne* – 1989 – 2 Sri LR 389
10. *Amarange* v *Seelawathie Weerakoon* 1990 – 2 Sri LR 332
11. *H. Darlin Silva* v *Chithranganie Fernando* – 2 CALR 469 at 473
12. *Lalith Siriwardena* v *Piyasena Munasingha* – 1986 1 CALR 496
13. *Somasundaram* v *Ukku* – 44 NLR 446
14. *W. Sobitha Unnanse* v *Piyaratne Unnanse* – 55 NLR 249

Manohara de Silva PC with *Ms. Anusha Perusinghe* for the plaintiff-petitioner.
Chithral J. Fernando for the defendant-respondent.

Cur.adv.vult

May 30, 2007

SARATH DE ABREW, J.

This is an application for leave to appeal from the order of the learned District Judge of Panadura dated 06.11.2001 (P2) where the petitioner had sought to set aside the aforesaid order of the District Judge staying the execution of the decree pending appeal and thereby sought to have the writ executed pending appeal. Leave had been already granted by this Court on 13.12.2005.

The plaintiff-judgment creditor-petitioner (hereinafter sometimes referred to as the petitioner) instituted the aforesaid action bearing No. 554/L in the District Court of Panadura to evict the defendants from the land and household premises set out in the schedule to the plaint and recover vacant possession thereof. The premises in suit was a 14 perch premises at 14/1, St Joseph Street, Uyana, Moratuwa, where the defendants-judgement debtor respondent (hereinafter sometimes referred to as respondents) were residing. The 2nd and 3rd respondents were the younger brothers of the 1st respondent, whereas the petitioner was an aunt of the respondents. After trial the learned trial Judge entered judgement in favour of the plaintiff, further ordering damages in a sum of Rs. 1000/= per month from 28.04.90 the date of the plaint, payable to the petitioner by the respondents.

Being dissatisfied with the aforesaid judgement, the respondents have lodged an appeal to the Court of Appeal. Thereafter the petitioner has filed an application for the execution of the decree pending appeal. The learned District Judge of Panadura, who had succeeded the learned Judge before whom the trial was conducted, consequent to an inquiry held with regard to the application of the petitioner to enforce the execution of the decree, has made order on 06.11.2001 (P2) refusing the application on the basis that the respondents have succeeded in establishing that substantial loss would be caused to them unless the execution of the decree was stayed pending appeal. While making this order, the learned District Judge had further ordered the respondents to deposit Rs. 1 lakh as

security in Court. In his order, the learned judge has not proceeded to consider the question of the presence of a substantial question of law as he was satisfied as to the existence of substantial loss to the respondents if the decree was to be executed against them. It is against this impugned order dated 06.11.2001 that the petitioner has made the present application to the Court of Appeal.

The law applicable to stay execution of decree pending appeal is contained in the provisions of section 23 of the Judicature Act No. 2 of 1978 as amended by Act No. 37 of 1979 and also section 763(2) of the Civil Procedure Code as amended by Act No. 53 of 1980. Before examining the material placed before Court as to the merits and demerits of this application, its is expedient to examine and assess the implications of the above statutory provisions.

Section 23 of the Judicature Act (as amended by Act No. 17 of 1979) provided as follows:-

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

It is noteworthy to observe that, as far as the above provision is concerned, the rule is the execution of the writ whereas the exception is the stay of the writ. Furthermore, other than the mandatory provision compelling the entering into a bond, the above provision does not spell out or specify any other preconditions as to under what conditions a writ may be stayed but leaves the entire exercise to the judicial discretion of the learned District Judge concerned, to make a fit and proper order as the justice of the case may demand.

On the other hand, section 763(2) of the Civil Procedure Code (as amended by Act No. 53 of 1980), which is not linked to the provision in the Judicature Act, stipulates a distinctive condition as follows,

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

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

(b) Security is given by the judgment-debtor for the due performance of such decree or order as may ultimately be binding upon him.

On a construction of the above provision, the discretion of the learned Judge is not unfettered to the extent that in order to stay a writ, there must be sufficient material placed before Court that substantial loss may result to the judgment-debtor. It goes without saying that if a writ stayed to avoid substantial loss being caused to the judgment-debtor, equally anticipated loss or damage to a certain degree would result to the judgment-creditor who is unable to enjoy the fruits of his victory after protracted litigation.

However, what matters is not the balance of convenience or inconvenience of the parties concerned, but the fact that on the material placed before Court, the judgment-debtor should discharge the burden placed on him to the satisfaction of Court that substantial loss would be caused to him unless the execution of the writ was stayed. Therefore, it is now settled law that writ must be stayed until the final disposal of the appeal if the judgment-debtor satisfies the Court that substantial loss may result to him unless an order for stay of execution is made by Court.

In the case of *Grindlays Bank Ltd.* v *Mackinon Mackenzie & Co. of Ceylon Ltd.*(1), it had been held that Court should be satisfied of the probability of substantial loss resulting to the Judgment-debtor if the writ is not stayed and mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of the decree. Further in the case of *Esquire Industries Garments Ltd. v Bank of India*(2) the concept of substantial loss had been extended not only to include the immediate pecuniary loss of the judgment-debtor but also to include the social and economic impact on the employees in the present social context.

Provisions of section 763 of the Civil Procedure Code is not exhaustive in respect of the relief available to the judgment-debtor. In *Saleem* v *Balakumar*,[3] Abdul Cader, J. with O.S.M. Seneviratne, J. agreeing a substantial question of law to be adjudicated upon at the hearing of the appeal was considered a sufficient ground to stay the writ till the disposal of the appeal. This judgment had been delivered soon after section 763(2) was introduced to the Civil Procedure Code by Amendment Act No. 52 of 1980. A long line of judgments thereafter had followed this concept where it had been held that even in the absence of substantial loss caused to the judgment-debtor, the existence of a substantial question of law to be decided at the appeal was sufficient ground to stay the execution of the writ. In this respect the following cases may be cited.

Kandasamy v *Ghanasekeram*[4].
Shajahan v *Mahaboob and others*[5].
Mustapa v *Thangamani*[6].
Cooray v *Illukkumbura*[7].
Fauz v *Gyl and others*[8].

It was held in the latter case of *Fauz* v *Gyl (supra)* that questions of law arising for determination must be substantial in relation to the facts of the case at hand and that one of the interpretations of the word "substantial" is to mean "actually existing."

Having examined the statutory provisions and other case law authorities governing the subject, I now proceed to examine all the material placed before Court in order to determine the validity and correctness of the impugned order of the learned District Judge of Panadura dated 06.11.2001, with a view to elucidate the presence of any one of the following ingredients in order to justify the stay of execution of the decree.

1) Whether the respondents have placed sufficient material before Court for the learned District Judge to be satisfied that substantial loss would incur to the respondents if the execution of the decree was not stayed.

2) Whether the Court could be satisfied of the existence of a substantial question of law that has arisen for determination at the hearing of the Appeal.

The following are the main contentions raised by the petitioner in her petition and the oral and written submissions tendered to Court.

1) The learned District Judge erred in holding that there was substantial loss caused to the respondents if the writ is executed on the sole basis that the 1st defendant-respondent had school-going children and a child that is going to be admitted to school.

2) The learned District Judge erred in disallowing the application of the petitioner to execute the writ when it was established that the 1st respondent had not made any attempt to find any alternative accommodation.

3) The security ordered by Court was insufficient, in any event.

The following authorities were brought to the notice of Court in support of the above contentions.

Mohamed v *Seneviratne*(9)

Amarange v *Seelawathie Weerakoon*(10)

H. Darlin Silva v *Chithranganie Fernando*(11)

Lalitha Siriwardena v *Piyasena Munasinghe*(12)

Grindlays Bank Ltd. v *Mackinon Mackenzie & Co. Ltd.(supra)*

On the other hand, the oral and written submissions tendered on behalf of the 1st respondent have raised the following contentions.

1) Sufficient material has been placed before Court to show substantial loss or damage would be caused to the 1st respondent if the writ was executed.

2) As the 3rd defendant was a minor at the time plaint was filed on 29.08.90. the failure of the learned Trial Judge to comply with the mandatory provision of section 479 of the Civil Procedure Code in failing to appoint *a guardian ad litem* which was a main ground of appeal, has raised a substantial question of law to be determined at the final appeal.

The following authorities were quoted in support of the above contentions of the 1st respondent.

A. Rahuman Shajaham v *A. Rahuman Mahaboob (supra).*

R. Mohamed v *L.S. Seneviratne (supra).*

Having carefully examined the entirety of the pleadings, proceedings, oral and written submissions and case law authorities submitted by both parties I am inclined to disagree with the learned trial judge's finding that execution of the writ would have caused substantial loss to the 1st respondent, for the following reasons.

The 1st respondent giving evidence had stated that his eldest son attends St. Sebastians College, his elder daughter attends Kusinara School while his younger daughter is due to attend the Convent from the following year. According to him these schools were situated within a radius of 21/2 kilometers from the premises in suit. The learned District Judge had concluded that if the writ was executed it would disrupt the education of the two elder school going children while the respondent will have problems in admitting the youngest child to the intended school due to inability to confirm residence within the area. In his affidavit to Court the 1st respondent had sought to mislead Court by stating that St. Sebastians College was situated next-door to his residence, whereas in cross-examination he has admitted it was situated 11/2 kilometers away.

On the other hand examination of the evidence of the 1st respondent at the writ inquiry clearly reveals that he has stubbornly refused to seek out an alternative place of abode, not only during the period the trial was proceeding from 29.08.1990 to 01.11.2000 when the judgment was delivered, but also for one full year thereafter till the order of the writ inquiry was delivered on 06.11.2001. As there is a duty cast on the judgment-debtor to take whatever possible steps to minimize his loss, he cannot now fall back on his inaction and *inertia* and claim substantial loss would be caused to him. If a genuine effort was made, there was a very strong likelihood that the 1st respondent could have succeeded in procuring alternative accommodation within striking range of the schools his children were attending or was about to attend. There was also the possibility of boarding his children in the respective school itself or other suitable place till the 1st respondent procured suitable alternative accommodation. If the dogmatic and arrogant approach of the judgment-debtor is allowed to succeed, no judgment-creditor would be safe from the clutches of an unscrupulous

judgment-debtor who has school-going children in schools close to the premises in suit. As Justice P.R.P. Perera held in the *Grindlays Bank case* quoted above, substantial loss is much more than mere inconvenience and annoyance which is not enough to take away from the successful party the fruits of victory and the benefit of the decree.

Therefore for the foregoing reasons, I uphold the contention of the petitioner that the learned District Judge had erred in law in coming to the erroneous conclusions that the 1st respondent had placed sufficient material before Court to establish substantial loss.

However, the learned Judge had failed to examine whether a substantial question of law existed to be decided at the final Appeal, even though the respondents had specifically averred so in their petition of appeal. On an examination of the material placed before Court, it is quite evident that the 3rd defendant was a minor at the time plaint was filed. The learned trial Judge had failed to comply with the mandatory provision of Section 479 of the Civil Procedure Code and failed to appoint a *guardian ad litem* on behalf of the minor 3rd defendant before proceeding with the case. In fact the issues 06, 07 and 08 raised by the defendants on this question at the commencement of the trial had been ignored by the learned trial judge in making her final order.

Section 479 of the Civil Procedure Code provides that:-

> "Where the defendant to an action is a minor, the Court on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the action for such minor, and generally to act on his behalf in the conduct of the case."

In *Somasunderam* v *Ukku*[13] it was held that where a decree is entered against a minor who is unrepresented by a guardian he may move to have the proceedings set aside under section 460 of the Civil Procedure Code after he attains majority.

In the instant case, the 3rd defendant-respondent was a minor born on 05.05.1973 and had not yet attained the age of 18 years when the plaint was filed on 29.08.1990. (Page 69 of Proceedings). This is admitted by the plaintiff-petitioner in her evidence. The trial had proceeded without the compliance of section 479 of the Civil Procedure Code. The 3rd defendant had attained majority as the case

proceeded and was no longer a minor when the judgment was delivered. Therefore, a substantial question of law will arise as to whether the judgment or decree would be binding on the 3rd defendant-respondent, and what would be the legal effect it would have on the 1st and 2nd defendant-respondents. This matter has been specifically raised by the respondents in their petition of appeal. The petitioner has chosen to be silent on this issue in the written submissions filed. The learned District Judge too has failed to dwell on his crucial matter in his impugned order of 06.11.2001. Therefore on the basis of the above findings I am satisfied as to the presence of a substantial question of law to be adjudicated at the final Appeal.

Therefore I hold that the order of the learned District Judge to stay the execution of writ is justified not on the grounds of substantial loss to be caused to the 1st respondent, but on the grounds of a substantial question of law being present for adjudication.

It is now opportune to consider the question of quantum of security. The learned District Judge had ordered the deposit of Rs. 100,000/- in cash. In terms of the judgment of the trial Judge, the defendant-respondents were liable to pay Rs. 1000/- per month as damages to the plaintiff-petitioner. By the time the order in the writ inquiry was pronounced, the total amount of damages accrued was in excess of Rs. 1,25,000/-. If the result of the final appeal is in favour of the petitioner, by the time the result is achieved, the amount of total damages payable would be of excessive proportions. In *W. Sobitha Unnanse* v *A. Piyaratne Unnanse*(14), it was held that "the amount of security ordered to be furnished should not be unduly excessive. The amount of security should be such as would reasonably safeguard the interests of the judgment-creditor in the event of the Judgment appealed from being eventually affirmed in appeal."

In view of the above circumstances of this case, I am of the view that the amount of Rs. 100,000/- ordered to be furnished as security is not sufficient to safeguard the interests of the petitioner, but a sum of Rs. 150,000/- in cash would meet the ends of justice.

In view of the foregoing findings and reasons, I make order dismissing the application of the petitioner to set aside the order dated 06.11.2001 of the learned District Judge of Panadura. I affirm the said order subject to the variation that the defendant-respondents are

directed to furnish security in a total sum of Rs. 150,000/- in cash with two sureties acceptable to the learned District Judge of Panadura within a period of 03 months this order is conveyed to them by the District Court, and to enter into a bond for the same amount for the due performance of the decree if and when required once the appeal is finally adjudicated. Taking into account all the circumstances of this case I make no order as to costs.

Accordingly the application is dismissed subject to the above variation.

EKANAYAKE, J. – I agree.

Application dismissed subject to variations.

EMPLOYEES TRUST FUND BOARD
v
SUBASINGHE

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CA (MC) 1/2007
M.C. CHILAW 94331
SEPTEMBER 25, 2007
OCTOBER 12, 2007

Employees Trust Fund Act – 46 of 1980 – section 28 (1), section 28 (2), section 28 (3) – section 39, section 41 – Recovery in Magistrate's Court – Written sanction of the ETF Board necessary? When?

The question arose as to whether written sanction of the ETF Board is required when section 28 (3) is resorted to.

Held:

(1) Section 28 lays down three methods of recovery. First method is by way of summary procedure section 28(1). The Second method is to file a certificate in the District Court to get a writ executed – section 28(2). The Third method is to file a certificate in the Magistrate's Court – section 28(3).

(2) Written sanction of the Board is required only in the event of instituting proceedings under section 39. section 39 attracts prosecution and punishment. It deals with convictions. Sanction is required only in the event of prosecution. Section 28(3) is not with regard to prosecutions and convictions, therefore sanction of the Board is not required.

In the matter of an application in Revision from an order of the Magistrate's Court of Chilaw.

Dulinda Weerasuriya with *H.M.A. Jayantha Kumar* for appellant-petitioner.

Respondent absent and unrepresented.

Cur.adv.vult

October 23, 2007

ERIC BASNAYAKE, J.

The applicant petitioner (applicant) filed a certificate in the Magistrate's Court of Chilaw under section 28(3) of the Employees Trust Fund Act No. 46 of 1980 (the Act) to recover a sum of Rs. 8726.25 from the respondent-respondent (respondent). This sum was on account of contributions payable to the Employees Trust Fund (ETF) in respect of employees. At the inquiry a preliminary objection was taken on behalf of the respondent that this action cannot proceed without the written sanction of the ETF Board. The learned Magistrate on 14.11.2006 upheld the preliminary objection and stayed the case to enable the applicant to file the sanction within a period of one month. The applicant is seeking to have this order revised.

Section 41 of the Act is as follows: - *"No prosecution for an offence under this Act shall be instituted except by or with the written sanction of the Board".*

Section 39 of the Act identifies 3 offences. Section 39 is as follows:-

Every person who-

(a) contravenes or fails to comply with any of the provisions of this Act or any regulations made there under; or

(b) makes defaults in complying with any direction or order made or given under this Act; or

(c) knowingly furnishes or causes to be furnished any false return, or information required to be furnished under section 37 of this Act,

shall be guilty of an offence and shall on conviction before a Magistrate be liable to a fine not exceeding one thousands rupees or to imprisonment of either description for a term not exceeding six months, or to both such fine and imprisonment.

The question that has to be decided is whether the present application, filed in terms of section 28(3) of the Act, is in respect of an offence committed and that the proceedings thus amounts to a prosecution (criminal). Section 28 deals with recoveries. Section 28 lay down three methods of such recoveries. One method is by way of summary procedure (section 28(1)). The second method is to file a certificate in the District Court to get a writ executed (28 (2)). The third method is to file a certificate in the Magistrate's Court (28 (3)). In that case the Magistrate shall issue notice on the employer to show cause as to why he should not pay the amount appearing in the certificate. On failure to show cause the amount shall be deemed to be a fine imposed by a sentence for an offence punishable with imprisonment.

The learned Counsel appearing for the applicant submitted that steps could be taken to recover money due to the Fund from the defaulters under Section 28 or 39 of the Act.

Written sanction of the Board is required only in the event of instituting proceedings under Section 39. When proceedings are instituted under Section 28(3) of the Act, no sanction is needed. The learned Counsel submitted that the object of section 28 is to recover dues and in the event the procedure followed in the District Court is insufficient, a certificate could be filed in the Magistrate's Court which shall impose a default sentence. The learned Counsel submitted that the default payment is not a fine but deemed to be a fine for the purpose of attracting the provisions of the Criminal Procedure Code. The purpose is to recover payment effectively.

The procedure laid down under section 39 appears to be more stringent. The procedure under section 28(3) is simple. It appears that the sole purpose of section 28(3) is effective recovery

of dues. Section 28(3) is resorted to not for the purpose of punishing offenders. Section 28(3) does not deal with offences. It is Section 39 that deals with offences. Section 39 attracts prosecution and punishment. It deals with convictions. Sanction is required only in the event of prosecution. Section 28(3) is not with regard to prosecutions and convictions. Therefore sanction of the Board is not required when proceedings are instituted under Section 28(3) of the Act. The learned Magistrate has therefore erred in upholding the objection on the question of sanctions. The order of the learned Magistrate dated 14.11.2006 is therefore set aside and the learned Magistrate is directed to proceed with the inquiry. The application is allowed without costs.

WIMALACHANDRA, J. – I agree.

Application allowed.
Magistrate directed to proceed with inquiry.

ARAVINDAKUMAR
v
ALWIS AND OTHERS

COURT OF APPEAL
SRIPAVAN, J.
SISIRA DE ABREW, J.
CA1818/2001
JANUARY 10, 2007

Writ of Certiorari – State Lands (Recovery of Possessions) Act 7 of 1979 – Section 3, section 9 – Failure to follow guidelines laid down in Circular – Is there a legal duty to follow the guidelines? – Valid permit or written authority under section 9?

Held:

(1) The Circular which is claimed to have been issued by the 1st respondent Competent Authority has not been signed.

(2) The Circular does not prescribe any duty having statutory potential.

(3) The Circular has not been issued in accordance with any of the provisions of the State Lands (Recovery of Possession) Act; as

such there is no legal duty on the part of the 1st respondent to follow guidelines laid down in the Circular before issuing the quit notice.

Held further

(4) Any person served with a quit notice under section 3 can continue to be in possession/occupation of the land only upon a valid permit or other written authority of the State described in section 9.

APPLICATION for a *Writ of Certiorari.*

Cases referred to:

1. *Piyasiri* v *People's Bank* – 1989 – 2 Sri LR 48
2. *Weligama Multipurpose Co-operative Society* v *Daluwatte – 1984 –* 1 Sri LR 195

P. Sivaloganathan with *S. Rajakulendran* for petitioner.

A.L.S. Devapura for respondent.

Cur.adv.vult

February 9, 2007

SISIRA DE ABREW, J.

The petitioner, invoking the writ jurisdiction of this Court, filed this application for the grant of *writ of certiorari* to quash the quit notice marked P10 issued by the 1st respondent, the Competent Authority. The 1st respondent, by the said quit notice, required the petitioner to vacate the land and the premises described in the said quit notice, in terms of the State Lands (Recovery of Possession) Act No. 7 of 1979. The petitioner, by this application, further seeks a writ of prohibition restraining the 1st, 2nd and 3rd respondents from proceeding to eject the petitioner and his dependants from the land and the premises described in the said quit notice.

The only point raised by the learned counsel for the petitioner was that the 1st respondent before issuing the quit notice P10, had failed to follow the guide lines laid down in circular marked P7 issued by him (1st respondent). The petitioner claims that in view of the said circular, the 1st respondent could not have issued a quit notice on him as a case was pending against him (the petitioner) in Labour Tribunal. The Labour Tribunal dismissed the petitioner's application and the petitioner has appealed against the order of the Labour Tribunal. Learned Counsel for the petitioner, however

conceded that the respondents had not violated any of the provisions of the State Lands (Recovery of Possession) Act in issuing the quit notice P10. It is, therefore, conceded that the respondents have acted in terms of the provisions contained in the Sate Lands (Recovery of Possession) Act in issuing the quit notice P10.

In order to appreciate the contention of learned Counsel for the petitioner, it is necessary to consider whether the circular P7 has any statutory force. In this regard I would like to consider certain judicial decisions. In *Piyasiri* v *People's Bank*(1) Wijerathne, J. discussing the facts stated thus: "The Minister of Finance, under section 42A of the People's Bank Act, gave directions to the Board of Directors to implement the recommendations of a one man commission relating to promotion of Bank clerks and in consequence the Board issued a circular 186/82 formulated to implement the said recommendations."

Wijerathne, J. observed thus: "Mandamus did not lie to compel the Board to call the petitioner, a Bank clerk, for an interview with a view to promotion in terms of the circular as the said circular 186/82 does not have statutory force.

In *Weligama Multi Purpose Co-operative Society* v *Daluwatta*(2) a bench of five judges of the Supreme Court considered the question whether a provision in a circular issued by the Co-operative Employees Commission for the payment of salary to interdicted employees of the Co-operative Societies could be enforced by a writ of mandamus. Sharvananda, J. (as he then was) delivering the judgment observed thus: "A circular is not referable to the exercise of any delegated ligislative power. It does not prescribe any duty having any statutory potential."

The circular P7, in this case, claims to have been issued by the 1st respondent but no one has signed it. Further, this circular does not prescribe any duty having statutory potential. Has this circular been issued in accordance with any of the provisions of the State Lands (Recovery of Possession) Act? The answer is 'no.' Learned Counsel for the petitioner admitted before us that the respondents have not violated the provisions of the said Act in issuing the quit notice P10. Having considered these matters, I am of the opinion

that there is no legal duty on the part of the 1st respondent to follow the guide lines laid down in the circular P7 before issuing the said quit notice. Considering all these matters, I hold the view that there is no legal basis to issue *writs of certiorari* and prohibition as prayed for by the petitioner. The petitioner's application should fail on this ground alone.

The next question that should be considered is whether the petitioner has any valid permit or written authority to occupy the land described in the quit notice. According to the scheme provided in the Act a person who is in possession or occupation of any state land and has been served with quit notice under Section 3 of the Act can continue to be in possession or occupation of the land only upon a valid permit or other written authority of the State described in Section 9 of the Act. In the instant case the petitioner does not have any valid permit or written authority of the State. This was admitted by learned Counsel for the petitioner, at the hearing of this application. Therefore, the petitioner is not entitled to be in possession or occupation of the land described in the quit notice. The petition should fail on this ground as well.

For the reasons set out in my judgment, I dismiss this application with costs fixed at Rs. 5000/-.

SRIPAVAN, J. – I agree.

Application dismissed.

PIRAGALATHAN
v
SHANMUGAM

COURT OF APPEAL
SALAM, J.
CA 235/2000
DC BATTICALOA 284/E/97
MAY 25, 2006

Rent Act 7 of 1972 as amended by Act 12 of 1980 – 912 – Reasonable requirement Section 22(2) (bb), section 22(2) (ii)- One year's notice— Is it mandatory – Could this be split? – Notice to quit a condition precedent – Purchase of property over the Head of the tenant – Reasonable requirement – Is it available? – Fresh issues altering scope of action – Permissibility ? – Blowing hot and cold? – Civil Procedure Code section 46 (2) 1. Action barred by positive Rule of Law ? – Can the plaint be rejected later?

The plaintiff-respondent sued the defendant-appellant for ejectment from the premises in question on the ground of reasonable requirement – after giving him notice of termination of tenancy of 6 months. The District Court after granting the reliefs prayed for by the plaintiff went on to hold that the writ of possession should be deferred by 6 months, to ensure that, no prejudice is caused to the defendant. The position of the defendant was that the length of notice given is inadequate in law to file an ejectment suit under section 22 (6) – it should be one year

Held:

(1) In terms of section 22 (6), if the premises is required by the landlord on the ground of reasonable requirement either for himself or for any member of his family, then one years notice in writing of the termination of the tenancy should be given by the landlord to his tenant.

(2) This being a condition precedent, to the institution of legal proceedings, has to be complied strictly, prior to the institution of an action. Failure to do so, undeniably renders the purported action of the landlord, a mere futile exercise.

(3) The pleadings and evidence without any ambiguities point to the fact that the landlord has purchased the property, subsequent to the specified date over the head of the tenant- thus the plaintiff cannot maintain the action.

Held further

(4) If the suggested issues are permitted, it would not only radically alter the entire basis of the plaintiff's action, but place the defendant-appellant at a remarkably disadvantageous position, causing irreparable loss and immense prejudice to his case.

(5) Having come to Court on the basis that the provisions of the Rent Act would apply to the premises in suit, the plaintiff cannot be allowed to rescile from that position and take up an entirely different position. The doctrine of approbate and reprobate forbids the plaintiff-respondent from being allowed to take up the position that the premises in question is excepted from the operation of the Rent Act.

Per Abdul Salam, J.

"Failure on the part of the landlord to give the tenant proper notice to quit, would disentitle the landlord from maintaining an action for section 46(2)(1) of the Civil Procedure Code provides that when the action appears from the statement in the plaint to be barred by any positive rule of law, the plaint shall be rejected".

(6) Failure of the Court to reject a plaint at the time of presentation, where the cause of action is barred by a positive rule of law does not prevent the Court from rejecting the plaint later when the defect is subsequently brought to its notice – nor is the defendant estopped by the earlier acceptance of the plaint from seeking the rejection of the later.

APPEAL from the judgment of the District Court of Batticaloa

Case referred to:

1. *Hilmy* v *De Alwis* – 1980 – 2 Sri LR 207
2. *S. Ratnam* v *S.M.K. Dheen* – 70 NLR 21
3. *Divisional Forest Officer* v. *Sirisena* – 1990 – 1 Sri LR 44
4. *Kandasamy* v *Gnanasekeram* – SC 16.6.1983; SC App 60/82
5. *Sidebothom* v *Holland* –1895 – 1 QB 378, 383

S. Mandaleswaran with *P. Peramunagama* for defendant-appellant.
Faiz Musthapha PC with *Thushani Machado* for plaintiff-respondent.

Cur.adv.vult

April 30, 2007

ABDUL SALAM, J.

The plaintiff sued the defendant, his tenant, for ejectment from the residential premises in suit, (hereinafter at times referred to as "premises") on the ground of reasonable requirement. It was admitted that the premises is governed by the Rent Act and the plaintiff had purchased it while the defendant was in occupation as a tenant. The learned District Judge held that the plaintiff reasonably required the premises for his occupation, within the meaning of the Provisions of Rent Act No. 7 of 1972 and gave judgment for the plaintiff, to eject the defendant.

As regards the notice of termination of tenancy, which is considered to be a pre-requisite under the Act, the learned District Judge arrived at the finding that the plaintiff should have given notice of termination of tenancy of one year. However, he refrained from ruling that the said notice which extended to a period of 6 months, as being void in law, although he was persistently invited by the defendant to do so. Conversely, the learned trial judge held that the writ of possession should be deferred by 6 months, presumably to ensure that no prejudice is caused to the defendant- appellant by reason of the defective notice, relating to the termination of tenancy which fell short of 6 months of the required period as contemplated by section 22 (6). The present appeal has been preferred by the defendant-appellant against this judgment.

It is common ground that the plaintiff respondent by notice dated 30/9/1996, sought to terminate the tenancy upon the lapse of six months, on the ground that the premises was reasonably required by him, for his occupation. The defendant in his answer took up the position *inter alia*, that the said length of notice is inadequate in law to file an ejectment suit against him on the ground stated therein. One of the issues that came up for determination before the learned District Judge was the propriety of the notice of the termination of tenancy. The issue recorded at the commencement of the trial, pertaining to the notice of termination of tenancy, included the following.

1. Did the plaintiff by his letter dated 30/9/1996 terminate the said tenancy as the premises described in the schedule to the plaint were required for its own use and occupation?

2. If issue No: 1 is answered in the affirmative, is the defendant in unlawful possession of the said premises from 1/4/97, paying damages at Rupees 1000/- per month to the plaintiff?
3. If the issues No: 1 and 2 are answered in the affirmative, is the plaintiff entitled for judgment as prayed for in the plaint?
4. Does the notice of the plaintiff dated 30/9/1996 conform to law?
5. If issue No: 4 is answered in the negative, can the plaintiff maintain his action?

The learned District Judge answered the above issues in the following manner.

1. Yes.
2. The defendant is in unlawful possession.
3. Only prayer (a) of the plaint is allowed.
4. The period of notice required to terminate the tenancy was one year but only six months notice of termination has been given.
5. According to the answer given to issue No. 4, the issue of writ of possession will be deferred by six months.

As far as the present appeal is concerned, the factual existence of the reasonable requirement of the respondent, to repossess the rented premises was not seriously disputed. Consequently, the findings of the learned District Judge, relating to the comparative need of the landlord to repossess the rented premises, as opposed to the necessity of the tenant, to continue with his possession of the same, need not be addressed. However, it will be necessary to clear up one preliminary matter, in respect of which arguments were advanced at some length by the learned Counsel appearing for both sides. It relates to the question as to whether a landlord who purports to send out a notice to a tenant terminating the tenancy, which falls short of the required period, (contemplated by section 22(6) of the Act, as amended by section12 of Act No. 55 of 1980) can have and maintain an action, successfully for ejectment of the tenant on the ground that the premises is reasonably required for his occupation.

The question that the standard rent of the premises (as determined under section 4) and also as to whether the said

premises exceeds the relevant annual value, were never disputed at the trial. As a matter of fact, the trial proceeded on the tacit admission that the provisions of the Rent Act, were applicable to the premises in question and that the contract of tenancy was governed by the Act. This is quite clear from the averment contained in the plaint and the unqualified admission made in the answer. (paragraphs 3 of the plaint and 5 of the answer).

Arising from the above the learned trial judge, categorically held that the subject matter of the action is governed by the provisions of the Rent Act. He also proceeded to deliver his judgment, on the premise that the standard rent of the premises, is above Rs 100/-. It is clear from the record that the plaintiff respondent has not come to Court in ejectment of the tenant on the ground that he is the owner of a single residential premises as is contemplated by section 22(2)(bb) of the Rent Act. In other words the action in ejectment is based on section 22(2) (ii) of the Rent Act. In terms of section 22 (6) of the Rent Act, the nature of the written notice required to be given to the tenant of such premises should extend to a period of one year, as opposed to the proceedings in ejectment of premises let to a tenant, whether before or after the date of commencement of the Rent Act, on the ground of reasonable requirement of the premises for the occupation as a residence of the landlord or any member of his family, IF SUCH LANDLORD BE THE OWNER OF NOT MORE THAN ONE RESIDENTIAL PREMISES. section 22 (2)bb. (emphasis added). Hence, the learned District Judge has had no mis-apprehension as to the application of the relevant law, when he came to the conclusion that the nature of the notice required to terminate the tenancy of the defendant, was one that should extend to a year.

Despite the finding that one year's notice of termination of tenancy was imperative, to institute proceedings against the defendant, the learned District Judge held that the action was nevertheless maintainable, when instituted after notice of six months, as was admittedly dispatched to the defendant by the plaintiff. This line of reasoning presumably appears to be the out come of the approach adopted by the learned trial judge to regularize the patently defective notice of termination of tenancy.

The learned trial Judge has been greatly influenced by the unreasonable attitude of the defendant's failure to give up the

tenancy, despite the fact that he owned two residential premises in the same vicinity, of which he has disposed of one for valuable consideration, subsequent to his receiving the notice to quit. Motivated by his enthusiasm to meet out justice to both, the learned trial judge has disregarded the patent defect in the said notice and went on to defer the writ of possession by six months. This seems to be the solution, Court was able to find, to make good the damage caused by the defective notice of termination of tenancy. The attempt of the learned judge, to regularize the notice in question has had the outcome of the tenant being compelled to receive, notice to quit in piecemeal, in that 6 months notice by the Landlord prior to the institution of the action and yet a similar term of notice by Court, simultaneously with the pronouncement of the judgment. This has been done ensure that the defendant factually had one year notice, before he is forced out of the premises. Such a notice, in my judgment invariably lacks coherence and hardly be said to constitute a proper notice. In short the notice contemplated in this respect, as far as the length of it is concerned, should be continuous and indivisible. It lacks the essential characteristic of a *notice to quit*, (emphasis added) no sooner the required period is identified as divisible and interruptible.

It is urged on behalf of the defendant appellant that the action of the plaintiff-respondent was not maintainable in law, without a proper notice of termination of tenancy. Such a notice according to the defendant-appellant should stretch out for a period of one year at least, so as to enable the tenant to find alternative accommodation, before he elects to face the consequences of being dragged into Court. Such a notice has the effect of extending a grace period of one full year to the tenant to find alternative accommodation, with a view to avoid litigation.

The learned Counsel of the defendant-appellant has submitted that the notice to quit, unlike an agreement, represents a unilateral act by the landlord without involving the tenant to consent to it and therefore must be technically perfect as one man's act terminates another man's right. I am unable disagree with this contention.

It is interesting to note the several type of notices required to be given to a tenant, prior to the institution of an action under the Rent Act. The length of notice required to be given varies, depending on

the ground on which the tenancy is terminated and the category in to which the rented premises falls under section 22. As far as an action in ejectment from a residential premises, on the ground of reasonable requirement is concerned, the length of notice required to be given to the tenant, terminating the tenancy, is determined *inter alia* on the following considerations.

(A) Standard rent (determined under section 4)

(B) Date on which the tenancy agreement commenced and

(C) In certain type of residential premises based on whether the landlord is the owner of a single residential premises.

As far as the instant action is concerned, it is section 22 (6) read with 22 (2) (b) of the Rent Act, which determines the length of notice required to terminate the tenancy. As has been correctly held by the learned District Judge, the length of notice required to be given to the tenant in this connection, should extend to a year. Admittedly, the tenant has been given six months notice of the purported termination of tenancy. In terms of section 22 (6), notwithstanding anything in any other law a landlord of any premises referred to in section 22 (2) [save and except when he is the owner of not more than one residential premises] shall not be entitled to institute any action or proceedings for the ejectment of the tenant of such premises, on the ground that such premises is required for occupation as residence for himself or any member of his family, if the Landlord has not given to the tenant of such premises one year's notice in writing of the termination of tenancy. In terms of the aforesaid section, irrespective of the commencement of the date of tenancy, if the landlord is the owner of a single residential premises, perhaps in recognition of the urgent need of the landlord to recover possession of his property, it is laid down that six month's notice of termination of tenancy, would suffice for the institution of proceedings in ejectment.

Mr. Mandaleswaran has submitted on behalf of the defendant-appellant that there is no proper notice to quit and as a result the condition precedent to the institution of the action has not been satisfied by the plaintiff respondent. In the case of *Hilmy* v *De Alwis*[1] cited by the learned District judge, it was held that notice to quit is a condition precedent to the filing of an action. In that case Victor

Perera, J. delivering the judgment of the Supreme Court held that Section 22 (6) had altered the law by providing that if the premises is required by the landlord on the ground of reasonable requirement either for himself or any member of his family, then one year's notice in writing of the termination of tenancy shall be given by the landlord to the tenant. This new provision thus gave the tenant a period of one year to find out alternative accommodation and was a condition precedent to the institution of the action. Emphasizing the significance of one year's notice, the Supreme Court further observed that the requirement of one year's notice, relieved to some extent, a burden that may have been laid on a landlord.

Section 22 (6) of the Rent Act is quite clear on this point. The manner in which this section has been couched, leaves no doubt that no landlord of any premises referred to therein, shall be entitled to institute any action or proceedings for the ejectment of the tenant of such premises, on the grounds referred to therein, unless one year's notice has been given in writing of the termination of the tenancy and during the said period of one year the tenant has failed to hand over vacant possession of the rented premises. This being a condition precedent to the institution of legal proceedings, has to be complied strictly, prior to the institution of an action. Failure to do so, in my opinion undeniably renders the purported action of the landlord, a mere futile exercise.

In the case of *S.Ratnam* v *S.M.K Dheen*[2] it was held that the failure on the part of the landlord to give the tenant proper notice to quit, would disentitle the landlord from maintaining an action, for section 46(2) (i) of the Civil Procedure Code provides that when the action appears from the statement in the plaint to be barred by any positive rule of law, the plaint shall be rejected. Since the defendant-appellant has failed to advert the learned District Judge to the prohibition against the maintainability of the action, when it is barred by positive rule of law, to be precise, without proper notice of termination of tenancy, the court has failed to take such a step under section 46 (2) (i).

In the case of *Divisional Forest Officer* v *Sirisena*[3] it was held that under section 33 (1) of the Forest Ordinance a person whose claim has been rejected under section 32 may within one month from the date of the rejection institute a suit to recover possession of the timber claimed. When such a suit was filed after the lapse of one

month and was therefore barred by a positive rule of law, it was held that it should have been rejected as provided in section 46 (2) (i) of the Civil Procedure Code.

In dealing with the omission on the part of the judge to reject the plaint at the inception, it was stated by Wijetunga, J. in the said case that the failure of the Court to reject a plaint at the time of presentation, where the cause of action is barred by a positive rule of law does not prevent the Court from rejecting the plaint later when the defect is subsequently brought to its notice. Nor is the defendant estopped by the earlier acceptance of the plaint from seeking the rejection of the plaint later. In passing it must be mentioned that if the original Court had recourse to section 46 (2)(i) and rejected the plaint, the plaintiff-respondent in actual fact would have gained in the long run, for such a rejection shall not of it's own force preclude him from presenting a fresh plaint in respect of the same cause of action, provided the defective notice is regularized.

Mr. Mandaleswaran further submitted that conduct of the court, in stepping down from its high pedestal, in acting as landlord to cover the shortfall of six months, by staying writ cannot legally be sanctioned. Taking in to consideration the several legal authorities on the matter and the clear wordings of section 22 (6) of the Rent Act, I find it difficult to justify the step taken by the learned District Judge to keep alive a notice which is of no force or avail in law. In the circumstances, I am of the view that the learned District Judge should have answered issue No. 4 in the negative and 5 in favour of the defendant-appellant.

In any event, the pleadings and the proceedings in the case, amply bare out, that the premises in question has been purchased by the landlord over the head of the tenant. As a matter of fact in terms of paragraph 3 of the plaint, notice of attornment has been given in the year 1996. The premises has been purchased by the plaintiff-respondent from the former landlord of the defendant-appellant, by deed No. 3259, attested by D.C Chinnaiah, Notary of Batticaloa, on 25th May 1996. In terms of subsection 7 of section 22 of the Rent Act, in so far as it is applicable to the instant matter, notwithstanding anything in section 22 (1) to 22 (6), *NO ACTION OR PROCEEDINGS FOR THE EJECTMENT OF A TENANT OF ANY PREMISES SHALL BE INSTITUTED ON THE GROUND OF REASONABLE REQUIREMENT,*

WHERE THE OWNERSHIP OF SUCH PREMISES WAS ACQUIRED BY THE LANDLORD ON A DATE SUBSEQUENT TO THE SPECIFIED DATE BY PURCHASE. (emphasis added) Thus the pleadings and evidence in this case without any ambiguities point to the fact that the landlord has purchased the property, subsequent to the specified date, over the head of the tenant. Consequently, I have no hesitation in concluding that the issues pertaining to the second preliminary objection taken up by the defendant-appellant, as to the maintainability of the action of the plaintiff-respondent, should also be upheld.

In the course of the trial before the commencement of the cross examination of the plaintiff, two additional issues, suggested by the defendant-appellant, which are numbered as 8 and 9 were allowed by Court. By the said issue, the learned trial judge was invited to adjudicate as to the maintainability of the plaintiffs action in the light of the provisions contained in section 22 (7) of the Rent Act, which *inter alia* bars the institution of an action or proceedings for the ejectment of a tenant of any premises referred to in subsection (1) or (2) (i) of section 22, where the ownership of such premises was acquired by the landlord on a date subsequent to the specified date, by purchase. Upon the said issues having been allowed, the plaintiff-respondent in turn suggested two more additional issues, meant to be numbered as 10 and 11, inviting the Court to rule on the question as to whether the subject matter is a residential premises occupied by the owner on 1.1.1980 and let on or after that date. Arising on the said suggested issue the plaintiff-respondent further invited Court to adjudicate as to whether the subject matter is excepted premises in terms of section 2 (4) (c) of the Rent Act.

The learned District Judge by his order dated 30/11/1999, refused to accept the said additional issues *inter alia* on the grounds that such issues would radically alter the entire basis of the plaintiffs action, as the plaintiff-respondent having come to court that the provisions of the Rent Act would apply to the premises in suit, cannot be allowed to resile from that position and take up an entirely different position. In other words the learned trial judge concluded his order stating that the doctrine of "approbate and reprobate" forbids the plaintiff-respondent, from being allowed to take up the position that the premises in question is excepted from the operation of the Rent Act.

Mr. Faiz Musthaffa, P.C. has contended that in order to meet the new position of the defendant-appellant, as to the maintainability of the action in terms of section 22 (7) of the Rent Act, as suggested by issues 8 and 9 that his client should have been allowed to raise the issues relating to the exemption of the premises from the operation of the Rent Act.

The learned Counsel of the defendant-appellant's contention is that the attempt made by the plaintiff-respondent to include the suggested issues 10 and 11, was to take advantage of the omission of the parties and/ or the Court to record the admission that the Rent Act, applies to the premises in suit, notwithstanding the fact that the plaintiff-respondent, defendant-appellant and the Court proceeded on the basis that the Rent Act was applicable to the premises in suit. He has further submitted that in other words that there has been throughout the case an implied admission that the provisions of the Rent Act are applicable to the subject matter.

It is also contended on behalf of the defendant-appellant that issues 8 and 9 arise from the provisions of the Rent Act itself, as opposed to the attempt of the plaintiff-respondent to take the case outside the purview of the Rent Act, by raising the additional issues 10 and 11.

Upon a consideration of the arguments placed by both Counsel, I am of the view that the learned District Judge has rightly held that as stated in the judgment of the *Kandasamy* v *Gnanasekaram*[4] on the basis of common sense and also common justice, that a man should not be allowed to blow hot and cold, to affirm at one time and deny at another.

Even otherwise, it must remembered that the plaintiff-respondent suggested the additional issues, at a belated stage, as late as when the defendant himself had closed his case. In my assessment, if the said issues are permitted, it would not only radically alter the entire basis of the plaintiffs action, but place the defendant-appellant at a remarkably disadvantageous position, causing irreparable loss and immense prejudice to his case. In the circumstances, I am not inclined to endorse the submission made by the learned President's Counsel that the learned District Judge should have allowed the purported consequential issues. My line of

reasoning to justify the refusal of the trial Judge's to accept the additional issues of the plaintiff-respondent is based upon the belatedness of the application of the plaintiff-respondent, namely after conclusion of the trial, linked with the principle relating to the doctrine of "approbate and reprobate".

As regards the notice of tenancy, it must be emphasized that the learned trial Judge has failed to adopt a reasonable and balance approach in interpreting the imperative provisions of the Rent Act. No doubt, the validity of a notice to quit, as was stated by Lindley, J. in the case of *Sidebotham* v *Holland*[5] "Ought not to turn on the splitting of a straw". Nevertheless, it is absolutely irrational to justify a notice of termination of tenancy, which fell short of six months, when if fact the clear intention of the legislature is that the tenant, should be tolerated for one full-year and given the option to find alternative means of shelter, above his head. To disregard these provisions of the law and to resurrect an absolutely void notice, would amount to undermining the legitimate right of the tenant to enjoy the immunity from being sued for one year. Furthermore, he is permitted in law to be in lawful and unencumbered possession of the rented premises, either by the Landlord or at his instance, for one full year even after he is noticed. His possession becomes unlawful only upon the expiration of the period set out in valid notice, which he is legally entitled to have. Any approach by the learned trial Judge, which is capable of rendering such legislative provision and the clear intention of Parliament, meaningless and absurd, should be discouraged.

For the foregoing reasons, I set-aside the judgment and decree of the learned District Judge and enter judgment as prayed for in the answer of the defendant, in the original Court. Accordingly the plaintiff's action stands dismissed, subject to costs payable in this Court and in the District Court by the plaintiff-respondent.

Appeal allowed.

NALINDA KUMARA

v

OFFICER-IN-CHARGE TRAFFIC POLICE KANDY AND ANOTHER

SUPREME COURT
BANDARANAYAKE, J.
MARSOOF, J.
SOMAWANSA, J.
SC 57/2006
SC Spl LA 31/2006
HC KANDY 141/2006
MC KANDY 53583
MARCH 21, 2007
MAY 23, 2007
JULY 19, 23, 2007

Motor Traffic Act as amended by Act 40 of 1984 – section 151 (1) (B), section 214, section 216– Regulations – Breathalyzer test – Quantum of alcohol in the blood – Procedure to befollowed– Death caused by driving a motor vehicle after consumption of alcohol – Penal Code section 298 – Driving after consuming alcohol and driving under the influence of liquor?

The accused was charged with (i) driving a private car on a public highway negligently and causing the death of one R. Offence punishable under section 298 – Penal Code (ii) driving after consuming liquor – under section 215 of the Motor Traffic Act –read with section 151 (1) B of Act 31 of 1979 – Punishable under section 216 of the Act and 5 other counts.

The Magistrate found the accused guilty on all counts. The High Court in appeal varied the sentence imposed in respect of counts 2, 3 and 4. The appellant appealed against the conviction and sentence on count 2. Special leave was granted on the questions.

(i) Does the evidence led to establish that the consumption of alcohol was above the quantum contemplated by regulations?
(ii) Does the evidence establish that the appellant caused the death by driving the motor vehicle after the consumption of alcohol?

Held:

(1) In order to establish the concentration of alcohol in the blood the police officer was required to carry out a breathalyzer test using an alcolyser. The procedure to carry out a breathalyzer test using the Alcolyser is found in IG Circular 697/87.

(2) For a positive reading, it is necessary to read that, the yellow crystals have changed to green and the green stain has extended to the red line at the centre of the tube.
There is no mention in the observations of the police officer regarding the green stain extending to the red line at the centre of the tube.

(3) In terms of the circular the parties in question should blow only once and should not blow thrice as alleged. In order to ascertain as to whether a suspect driver had been under the influence of liquor, it is apparent that, 15 second period of one continuous blowing is extremely important to obtain the reading of an assume content of 0.08 gms per 100 millilitres of blood.

Per Shirani Bandaranayake, J.

"It is evident that a serious doubt has been created as to the concentration of blood in the appellant's blood at the time of the accident.

Held further:

(4) Section 151 (1)B of the Motor Traffic Act was introduced by the Motor Traffic Act 31 of 1979 (amended), with the amendment to section 151, "any person who drives a vehicle on a highway after he has consumed alcohol or any drug and thereby causes death or injury to any person shall be guilty of an offence under the Act".

Prior to the amendment which came into effect in 1979 the known concept was on the basis of "under the influence of liquor – section 151(1) read as "no person shall drive a motor vehicle on a highway when he is "under the influence of liquor" or any drug.

(5) The question whether the ingredients that has to be proved under section 151 (1) B be limited to the appellant having consumed alcohol, driving on the highway and causing the death – a mere statement to indicate that a person had consumed alcohol is not enough. Section 15(c), section 151(1)B.

Section 151(1c) (a) and section 151 (1C) (c) clearly have provisions for the police either to obtain a breath test or a medical report to ascertain and establish that the driver, whom the police officer suspects had consumed alcohol/drug and in order to facilitate the process of these tests, the amendment had made provision to make regulations – section 151 (1D).

Such regulations in terms of the Motor Traffic Act were introduced under I.G. Circular 679/87 of 1.9.87. The circular clearly stipulated the need for a breath test.

Per Shirani Bandaranayake, J.

"It is evident that when a person is charged in terms of sections 151 for having committed an offence under the said section having consumed alcohol the prosecution has to prove that the said person had a minimum concentration of 0.08 grams of alcohol per 100 millilitres in his blood Regulations 1.3, 1.4, 1.5, 1.6.

(6) The prosecution has failed to prove that the appellant had a minimum concentration of 0.08 of alcohol per 100 millilitres in his blood – the appellant should be acquitted on count 1.

APPEAL from the Judgment of the High Court of Kandy.

Faiz Musthapha PC with *Amarasiri Panditharatne* and *Neomal Perera* for accused-appellant-appellant.

Riad Hamza SSC with *Harshika de Silva* SC for respondent-respondent-respondent.

December 12, 2007

SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the Provincial High Court of the Central Province holden in Kandy dated 09.12.2005. By that judgment the learned Judge of the High Court acquitted the accused-appellant (hereinafter referred to as the appellant) from counts 1 and 5 and affirmed the convictions in respect of counts 2, 3, 4, 6 and 7. The learned Magistrate had found the appellant guilty of all counts and in respect of count 1, the Magistrate has imposed a sentence of one year's rigorous imprisonment and on counts 6 and 7, a fine of Rs. 1000/- each with a default sentence of 3 months simple imprisonment had been imposed.

The appellant had appealed from that order against the conviction and sentence to the Provincial High Court of the Central Province. The High Court varied the sentences imposed by the learned Magistrate in respect of counts 2, 3 and 4 and imposed the following sentences.

count 2 – mandatory sentence of two (2) years rigorous imprisonment and cancellation of his driving licence.

count 3 – Rs. 500/- fine with a default sentence of three (3) months simple imprisonment.

count 4 – Rs. 1000/- fine with a default sentence of three (3) months simple imprisonment.

There was no variation in regard to the sentences imposed by the learned Magistrate in respect of counts 6 and 7. The appellant appealed to this Court for which special leave to appeal was granted on the following questions:

(1) Does the evidence led in the trial establish that the concentration of alcohol in the appellant's blood was above the quantum contemplated by regulations framed under the Motor Traffic Act?

(2) Does the evidence led in the trial establish that the appellant caused death or injury by driving the motor vehicle after the consumption of alcohol as contemplated by section 151(1)B of the Motor Traffic Act?

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

The appellant, a 24-years old junior executive of a Bank, at the time of the alleged offence, was charged in the Magistrate's Court, Kandy for the following offences:

(1) driving private car No. 17-0332 on a public highway negligently, *viz.*, at an excessive speed and without due care and control and consideration for other users of the road and causing the death of one Saraswathi Rajendran and thereby committing an offence punishable under section 298 of the Penal Code.

(2) driving on the highway after consuming liquor and thereby committing an offence under section 214 of the Motor Traffic Act, read with section 151(1)B of Act, No. 31 of 1979 and punishable under section 216 of the said Act;

(3) driving a vehicle on a highway negligently, *viz.* –
  (a) at an excessive speed under the circumstances,
  (b) without necessary control,
  (c) without due care,
  (d) without due consideration for other users and colliding with a pedestrian crossing the road and causing her death

and thereby committing an offence under section 214(1)A of the Motor Traffic Act read with section 151(3) of the Motor Traffic Act read with section 271(2) as amended by Act, No. 40 of 1984.

(4) failing to avoid an accident due to -

(a) driving at an excessive speed,

(b) without due precaution,

(c) without taking due care and colliding with a pedestrian crossing the road and thereby committing an offence under section 214 of Motor Traffic Act punishable under section 224 as amended by Act, No. 24 of 1984.

(5) failing to drive the vehicle on the left side thereby committing an offence under section 214(1) of the Motor Traffic Act punishable under section 224 of the said Act.

(6) not possessing a valid third party insurance cover for the vehicle an offence punishable under section 218 of the Motor Traffic Act.

(7) not possessing a valid revenue licence for the vehicle an offence punishable under section 214(A) of the Motor Traffic Act.

The incident relevant to this appeal took place near Royal Mall Hotel on the William Gopallawa Mawatha, Kandy around 11.30 p.m., on 06.07.2001. Ramaiah Rajendran, the husband of the deceased had attended a function of the Lions Club with his wife at the Royal Mall Hotel situated along William Gopallawa Mawatha, Kandy. After the function, Rajendran had walked across the road with his wife to get into their car parked on the opposite side, close to the rail road. While Rajendran had been in the process of opening the car door, his wife was hit by the appellant's vehicle and was thrown 6 feet forward. The appellant had also attended a function on that night at the Earls Regency Hotel in Kandy, where the Rotary Club had presented scholarships to selected students and the appellant had been one of the recipients. He had been returning with his friend, one Samitha Wickramaratne, and was driving towards the said friend's home at Pilimatalawa, when this incident had occurred.

Having stated the facts of this case, let me now turn to examine the questions on which special leave to appeal was granted.