THE

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[2007] 1 SRI L.R. – PARTS 13,14 & 15

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DIGEST

Pages

(2007) 1 Sri L. R. Parts 13, 14 and 15

(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?

Learned President's Counsel for the appellant contended that, to establish the concentration of alcohol in the appellant's blood the police officer was required to carry out a breathalyzer test using the apparatus known as an Alcolyzer. It was further contended that the procedure to carry out a breathalyzer test using the Alcolyzer was stipulated in I.G. Circular No. 697/87. Learned President's Counsel for the appellant therefore submitted that among the procedures contained in the said Circular, the following were extremely vital and crucial to the case in question.

(a) Clause 3.7 of I.G. Circular 697/87

Order shall be given by the police officer conducting the test to the person concerned to first take a deep breath and continuously without a break, blow into the breathing bag for 15 seconds.

(b) Clause 3.9 of I.G. Circular 697/87

At the conclusion of such a test the police officer is required to provide the person concerned with a report containing the details of the breathalyzer test bearing the signature and rank of the said police officer.

Learned Counsel for the appellant submitted that the aforementioned procedures were not followed by the police officer, as the police officer had got the appellant to blow into the Alcolyzer breathing bag three (3) times in succession and on the third time, a positive reading had been obtained. The contention of the learned President's Counsel for the appellant was that the procedure adopted by the police officer had created a serious doubt as to the accuracy of the reading.

It was also contended that the police officer had not provided the appellant with the signed test report containing the details of the breathalyzer test carried out, in terms of the I.G. Circular No. 697/87.

Further learned President's Counsel contended that the breathalyzer test carried out by the police officer in question had

not followed the procedure laid down in the I.G. – Police Circular of 07.09.2002, as the evidence led at the trial does not establish that the concentration of alcohol in the blood of the appellant at the time of the accident had exceeded 0.08 grams of alcohol per 100 millilitres of blood.

Learned President's Counsel for the appellant strenuously contended that the Provincial High Court had erred in failing to give due consideration to a serious doubt that was created as to whether the appellant could have been intoxicated to a level reflecting a reading of 0.08 grams per 100 millilitres of blood. His contention was that the appellant in his evidence had stated that he had suffered a head injury, which required him to undergo medical treatment for five (5) years. Due to this injury the appellant on medical evidence had been requested to abstain from consuming alcohol.

Learned State Counsel for the respondents conceded that the breath test should be carried out in terms of the provisions stipulated by I.G.'s Circular No. 697/87 dated 01.09.1987 and 28.11.1988. She also submitted that in terms of the applicable regulations, if the concentration of alcohol in the appellant's blood was at or above 0.08 milligrams of blood per 100 millilitres of blood then it should be established that the concentration of alcohol in the appellant's blood was above the quantum contemplated by the regulation made under the Motor Traffic Act. Having made that submission, learned State Counsel for the respondent contended that such a position could be established only if the breath test for alcohol had revealed that result.

Based on the aforementioned submissions two questions arise, which are as follows:

(A) did the police officer carry out the relevant test in terms of the I.G.'s Circular No. 697/87?

(B) did the police officer, who carried out the test give the appellant a written statement stating the concentration of alcohol in the appellant's blood?

Admittedly, the breathalyzer test had been carried out by Police Sergeant 6589 Weerasinghe (hereinafter referred to as Weerasinghe) of the Kandy Police who, in his evidence (Magistrate's Court Proceedings pp. 163-176) had stated the

manner in which he had carried out the test. Describing the steps he had taken after visiting the scene of accident, Weerasinghe had stated that he had observed a difference in the appellant's behaviour. At that stage Weerasinghe had smelled his mouth wherein Weerasinghe had found that his breath was smelling of liquor. He had thereafter arrested the appellant and had brought him to the Kandy Police Station.

At the Police Station Weerasinghe had carried out a breathlyzer test on the appellant. He had described the procedure he had followed in carrying out the said test, which was as follows:

"2004/12 මයට වලංගු අංක 313005 දරණ ශ්වයන පරීක්ෂණ නලය ගෙන්වා මුහුට කට යේදීමට ජලය ශ්වල්පයක් දී විනාඩි 15 ක් පමණ ගිය පසු ශ්වයන පරීක්ෂණ නලය පිඹීමට දුන්නා. ඒ අනුව මධ්‍යසාර සාන්ද්‍රණය මි. ලි. 100 ට 0.08 ක් බවට පෙනී ගියා. ඉන් පසුව ශ්වයන පරීක්ෂණය යම්බන්ධයෙන් පවත්වන ලද ..... මුල් පිටපතක් රියදුරුට බාර දුන්නා."

Weerasinghe's evidence thus describes that he had carried out the breathalyzer test in terms of the provisions laid down by the I.G. Circular and further that he had handed over the original of the report to the appellant.

Learned President's Counsel for the appellant strenuously contended that the police officer, who conducted the breathalyzer test had not followed the procedure stated in I.G. Circular No. 697/87. Referring to clause 3.7 of the said Circular referred to above, learned President's Counsel for the appellant stated that in terms of the said clause a suspect driver should only blow once into the alcolyzer and in this instance the appellant was asked to blow three (3) times against the procedure laid down by the said Circular.

Clause 3:7 of the I.G. Circular No. 697/87 specifically stated that the person in question should 'blow through the mouthpiece into the bag by one deep continuous exhalation for 15 seconds'. It is thus apparent that the person in question should blow only once and should not blow thrice as alleged by the appellant.

Learned State Counsel for the respondent submitted that the contention of the appellant is contrary to the evidence of the police officer and that the appellant had taken this position only at the point, when he was cross-examined.

It is however to be borne in mind that the appellant in his evidence had stated that the police officer in his effort to determine the appellant's blood alcohol concentration had got the appellant to blow into the alcolyzer breathing bag three (3) times in succession and only on the third consecutive attempt a positive reading was obtained. In his evidence, the appellant had clearly stated that,

"මට ස්වසන නලයක් දුන්නා. ස්වසන පරීක්ෂණ නලය පිඹින්න කිව්වා. ඊට පසු එක පාරක් පිම්බා. ඒ වෙලාවේ මොනවත් නිබුනේ නැහැ. 3 න් පාරක් පිම්බා."

The learned State Counsel for the respondent has not denied the fact that the appellant in his evidence has stated that he blew three (3) times continuously into the breathing bag. It is also not denied that this position is contrary to the evidence of Weerasinghe. Considering the test carried out 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 assumed content of 0.08 grams per 100 millilitres of blood.

In the circumstances, it is evident that a serious doubt has been created as to the concentration of alcohol in the appellant's blood at the time of the accident.

The contention of the learned President's Counsel for the appellant is further strengthened on an examination of the position regarding the aforementioned question on the observation of the breathalyzer test.

The police officer Weerasinghe in his evidence had stated that he had given the original of the report to the appellant. The appellant however in his evidence had clearly stated that he was not given the said report. It is common ground that the report in question was not produced before Court. The importance of the report is that it should contain the observations of the police officer regarding the test and should state that,

(i) the time at which such test was carried out,

(ii) the place, where such test was conducted, and

(iii) the concentration of alcohol in that person's blood as was reflected by the device used.

Clause 3:9 of the I.G. Circular No. 697/87 had explained as to what the police officer should state under (iii) above. Accordingly it should be stated that,

> *" '0.08 grams per 100 millilitres of blood'*
>
> *If the yellow crystals have changed to green and the green stain has extended to the red line at the centre of the tube."*

With regard to the breathalyzer test the said Circular in clause 3:8 had further stated that,

> *"The tube is then removed from the bag. The tube is then examined. If the yellow crystals have changed to green and the green stain extends to the red line at the centre of the tube the alcohol level in the blood corresponds to the prescribed limit."*

According to the proceedings of the Magistrate's Court (Pg. 143) the findings of the test was recorded as follows:

> "මුද්‍රා තබන ලද කවරයක බහාලූ ප්‍රස්වාය නලය ඉ/කරයි. එය විත්තිකරු යහ නී/මහතුන් ඉදිරිපිට දී විවෘත කරන ලදී. එහි අඩංගු ද්‍රව්‍යය කොළ පැහැ ගැන්වී ඇති බව නී/මහතුන් සහ විත්තිකරු පිලිගනී. විත්තිකරු නවු වාර්තාව අත්සන් තබයි."

It is therefore quite evident that the said description is not in terms with clauses 3:8 and 3:9(c) iii of the I.G. Circular No. 697/87, which clearly that, 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."*

Admittedly, there was no mention whatsoever, in the observations of the police officer regarding the green stain extending to the red line at the centre of the tube.

On a consideration of the aforesaid, it is apparent that the procedure adopted by the police to ascertain the level of alcohol in the appellant's blood had created a serious doubt as to whether the said concentration of alcohol in the appellant's blood was above the quantum contemplated by regulations framed under the Motor Traffic Act.

In the circumstances, question No. 1 is answered in the negative.

(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?

Section 151(1) B of the Motor Traffic Act was introduced by the Motor Traffic (Amendment) Act, No. 31 of 1979, with the amendment to section 151. The said section 151(1)B reads as follows:

> *"Any person who drives a motor 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 this Act."*

Prior to the amendment, which came into effect in 1979, the known concept was on the basis of 'under the influence of liquor' and the original section 151(1) therefore read as follows:

> *"No person shall drive a motor vehicle on a highway when he is under the influence of alcohol or any drug".*

The concept of driving after a person has 'consumed alcohol' therefore had been introduced by the amendment to the Motor Traffic Act in 1979.

Referring to section 151(1)B of the Motor Traffic (Amendment) Act of 1979, learned State Counsel for the respondent submitted that the ingredients to be proved under the said section 151(1)B would consist of driving a motor vehicle, on a highway, after consumption of alcohol and causing death or injury to any person and that there is no added requirement to prove that the appellant had acted negligently. The contention of the learned State Counsel for the respondent was that negligence was inherent on the fact that the appellant had consumed alcohol and driven a motor vehicle on the highway thereby causing the death of the deceased.

Considering the contention of the learned State Counsel for the respondent, the question that arises would be whether the ingredients that has to be proved under section 151(1)B would be limited to the appellant having 'consumed alcohol, driving on the highway and causing the death of the deceased'.

As stated earlier, section 151(1)B introduced in terms of the amendment to the Motor Traffic Act in 1979, brought in the new concept of driving a motor vehicle after a person had consumed alcohol.

Accordingly, when a person is charged under section 151(1)B, it would be necessary to establish that the said person had been driving the vehicle in question after he had consumed alcohol.

Would a mere statement to indicate that a person had 'consumed alcohol' be sufficient for this purpose? My answer to this question is clearly in the negative for the reasons which could be derived from the rest of the provisions contained in section 151 of the Motor Traffic (Amendment) Act.

Section 151(1)C and its sub-sections clearly deal with the situation dealt with in section 151(1)B regarding consumption of alcohol by a person, who had been driving a motor vehicle. Section 1C(a) states that,

> "Where a police officer suspects that the driver of a motor vehicle on a highway has consumed alcohol he may require such person to submit himself immediately to a breath test for alcohol and that person shall comply with such requirement."

Further section 1C(c) provides for the officer to produce a driver, whom he suspects had consumed alcohol or any drug before a Government Medical Officer for examination.

Thus sections 1C(a) and 1C(c) clearly have made provisions for the police officers either obtain a breath test or a medical report to ascertain and establish that the driver, whom the police officer suspects, had consumed alcohol or any drug.

In order to facilitate the process of the aforementioned tests, the amendment had made provision to make Regulations and Section 1D thus reads as follows:

> "Regulations may be made prescribing –
>
> i. the mode and manner in which the breath test for alcohol shall be conducted;

ii. the concentration of alcohol in a person's blood at or above which a person shall be deemed to have consumed alcohol;

iii. the mode and manner in which any examination may be conducted to ascertain whether a driver of a motor vehicle had consumed any drug; and

iv. the concentration of any drug in a person's blood at or above which a person shall be deemed to have consumed any drug."

Such Regulations in terms of the Motor Traffic (Amendment) Act, were introduced under I.G.'s Circular No. 679/87 dated 01.09.1987. The said Circular has clearly stipulated the need for a breath test and the concentration of alcohol in a person's blood that is necessary to establish that the person in question has 'consumed alcohol'. The relevant Regulations are as follows:

*"1.3 In terms of the amendment it is **now** an offence for any person to drive a motor vehicle on a highway "AFTER HE HAS CONSUMED ALCOHOL' or any drug.*

*1.4 In terms of the **regulations** made by the Minister of Transport under sections 151 and 237 of the Motor Traffic Act as amended by Act No. 31 of 1979 and Act No. 40 of 1984, a person is deemed **'TO HAVE CONSUMED ALCOHOL'** if the concentration of alcohol of that person's blood is at or above 0.08 grams of alcohol per 100 millilitres of blood (0.08 grams = 80 milligrams).*

1.5 The concentration of alcohol in a person's blood is determined by a breath test for alcohol carried out by a Police Officer by means of a device approved for that purpose by the Inspector-General of Police.

1.6 The device approved by the Inspector-General of Police for the purpose is the 'ALCOLYSER (Breath-alyzer) manufactured by Liens Laboratories of U.K."

Thus it is evident that when a person is charged in terms of section 151 of the Motor Traffic (Amendment) Act 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. If this cannot be proved it is evident that the prosecution had failed to establish an important ingredient of the offence.

In this appeal the prosecution had failed to prove that the appellant had a minimum concentration of 0.08 grams of alcohol per 100 millilitres in his blood and therefore the appellant should be acquitted on count 2. Accordingly, I answer this question as well in the negative.

As stated earlier the appellant was convicted on all seven (7) counts by the learned Magistrate and learned Judge of the High Court has set aside the conviction and sentence on counts 1 and 5. Out of the remaining counts 2, 3, 4, 6 and 7, for the reasons aforementioned, I set aside the conviction and sentence on count 2 and acquit the appellant on that count.

Since the appellant is acquitted on count 2, the order made by the learned Judge of the High Court to cancel the driving licence of the appellant is set aside.

The appellant has not appealed against the judgment regarding counts 3, 4, 6, and 7. Accordingly this appeal, which is only confined to count 2, is allowed and to that extent the judgment of the High Court of the Central Province holden in Kandy dated 09.12.2005 and the judgment of the Magistrate's Court, Kandy dated 20.09.2004 are varied.

I make no order as to costs.

MARSOOF, J. – I agree.
SOMAWANSA, J. – I agree.

Appeal allowed-partly.

MILTON SILVA
v
SUMANASIRI

COURT OF APPEAL
EKANAYAKE, J.
SARATH de ABREW, J.
CALA 412/2000 (LG)
DC KALUTARA L/4611
FEBRUARY 10, 18, 2005
JUNE 23, 2006

Civil Procedure Code – Section 76 3 (2) amended by Act 53 of 1980 – section 149 – Judicature Act 2 of 1978 – section 23 – Amended by Act 37 of 1979 – Writ pending appeal – Substantial loss – Substantial questions of law – Burden on whom – Discretion of Court to make a fit and proper order as justice may demand – Issue framed after proceedings were concluded – Bad in law?

Held:

(1) The law applicable to stay execution of decree pending appeal is contained in section 23 of the Judicature Act 2 of 1978 as amended by Act 37 of 1979 and section 763 (2) of the Civil Procedure Code as amended by Act 53 of 1980. However these two provisions are not linked.

Per Sarath de Abrew, J.

"It goes without saying that if a writ is 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".

(2) 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 suffered party the benefits of the decree.

(3) As far as 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. Other than the mandatory provision compelling the entering

into a bond, section 23 does not spell out or specify any other precautions as to under what conditions writ may be stayed, but leaves the entire exercise to the judicial discretion of the District Judge concerned to make a fit and appropriate order.

(4) In assessing loss pecuniary or otherwise, the mere expectation or belief of the defendant as recited by him unsupported by other credible material may not be sufficient to satisfy Court of its existence – in the instant case the defendant has failed to discharge his burden.

Held further:

(5) The learned District Judge by raising an issue without notice to parties after the judgment had been reserved to the effect that what had been leased is the business only and not the premises – raises the question of the existence of substantial questions of law.

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

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. *Shajehan* v *Mahabooh and others* – CALA 78/81 – CAM 17.7.81
6. *Mustapa* v *Thangamani* – CALA 70/91
7. *Cooray* v *Illukkumbura* - 1996 - 2 Sri LR 263
8. *Fauz* v *Gyl and others* – 1999 – 3 Sri LR 347
9. *Charles Appuhamy* v *Abeysekera* – 56 NLR 243
10. *Sediris Singho* v *Wijesinghe* – 70 NLR 181
11. *Sokkal Ram Sait* v *Nadar* – 41 NLR 89

Wijayadasa Rajapakse PC with *Rasika Dissanayake* and

Ananda De Silva instructed by *Nimal Dissanayake* for the plaintiff-petitioner-petitioner.

Defendant-respondent-respondent absent and unrepresented.

Cur.adv.vult

February 23, 2007

SARATH DE ABREW, J.

This is an application for leave to appeal from the order of the learned District Judge of Kalutara dated 02.10.2002 (P11) 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 execute the decree pending appeal. Leave had been duly granted by this Court on 30.01.2004.

The plaintiff-petitioner-petitioner (hereinafter referred to as the plaintiff) instituted the aforesaid action bearing No. 4611/L in the District Court of Kalutara to recover vacant possession of the land and shop premises belonging to him bearing assessment number 461, Galle Road, Kalutara, wherein a bakery business under the name and style of "Pradeepa Bake House" had been conducted by the defendant-respondent-respondent (hereinafter referred to as the defendant) in terms of the lease agreement No. 35 (marked P1 at the trial), on the basis that the aforesaid lease expired on 10.02.1977. After trial, judgment was entered in favour of the plaintiff.

Being dissatisfied with the judgment, the defendant lodged an appeal to the Court of Appeal. Thereafter the plaintiff filed an application for the execution of the decree pending appeal. The then learned District Judge of Kalutara, who had succeeded the learned Judge before whom the trial was conducted, consequent to an inquiry held with regard to the application made by the plaintiff, made order on 02.10.2002 (P11) refusing the application for the execution of the decree pending appeal. It is against this order that the plaintiff has made the present application in 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 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 it is opportune to examine and assess the implications of the above statutory provisions.

Section 23 of the Judicature Act (as amended by Act No. 37 of 1979 provides as follows:

> *"Any party who shall be dissatisfied with any judgment, decree or order pronounced by a District Court may (excepting where such right is expressly disallowed) appeal to the Court of Appeal against any such judgment, decree or order from any error or in fact committed by such Court, but no such appeal shall have the effect of staying the execution of such judgment, 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 judgment 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 judgment-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 is 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 a 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. 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 *Ghanasekaram* (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* 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".

Therefore, with regard to the impugned order of the learned District Judge of Kalutara dated 02.10.2002 (P11), in order to determine the correctness of the order, the material placed before Court should be carefully examined as to the presence of any one of the following requirements in order to justify the stay of the execution of the writ.

1) Whether the defendant (judgment-debtor) has placed sufficient material before Court for the learned District Judge to be satisfied that substantial loss would incur to the defendant if the execution of the writ was not stayed.

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

On a perusal of the written submissions filed by the petitioner and the oral submissions tendered, the petitioner had argued that neither of the above requirements were present in this case. Though the respondent was absent and unrepresented when the matter was taken up for argument, in the written submissions filed on behalf of the respondent, it was the contention of the respondent that both the above requirements were present in this case that justified the stay of execution of the writ.

I shall now proceed to consider the grounds urged by the defendant upon which he claimed substantial loss unless execution was stayed.

The following grounds had been urged on behalf of the defendant in this regard.

1) The defendant was carrying on a bakery business "Pradeepa Bake House" in the premises in suit.
2) About eight employees were working under him in the said business.
3) The defendant had been carrying on the said business for well over ten years from the date of the lease agreement 10.08.1992 to the date of the impugned order of the District Judge of Kalutara, namely 02.10.2002, and built up goodwill with regard to his business.
4) The defendant made efforts to find an alternative location for his business but failed.
5) The defendant is married and having three children, two of them of school going age, and the entire family is supported from the proceeds of this business.

The learned District Judge in his impugned order had failed to evaluate the evidence in order to determine whether substantial loss would be caused to the defendant but has erred in law and based his decision to stay the execution of the writ on the following grounds.

1) The fact that several questions of law had been raised on behalf of the defendant. The learned Judge had not considered whether they were substantial questions of law.
2) The fact that eight employees working under the defendant would loose their livelihood.
3) On a balance of convenience, the loss caused to the defendant would be much greater than that caused to the plaintiff.

However, on a careful perusal of the material available to Court, on a consideration of the grounds urged by the defendant in order to sustain substantial loss. I am inclined to take the view that

the defendant had failed to satisfy Court as to the existence of substantial loss for the following reasons.

Though the defendant had stated he has eight employees working under him, he has failed to satisfactorily explain why he cannot deploy them at an alternative place of business. Further, on a perusal of the documents produced with regard to ETF payments, document P7R7 reveals only six names, while the other documents P7R8 to P7R10 reveal only the name of one employees, namely Premalal Perera. Further the defendant had failed to produce any supporting documentary evidence such as attendance registers or duty rosters as proof that such employees were working under him.

The defendants claim that he made efforts to find an alternative place of business in close proximity to the premises in suit is only supported by a purported newspaper advertisement inserted in the Silumina of 16.09.2001 (P7R6). Judgment had been delivered against the defendant on 07.03.2001 (P1) while the defendant had filed objections against the execution of writ on 08.06.2001 (P4). Therefore it is quite evident that placing a newspaper advertisement more than six months after the judgment as the writ inquiry approached cannot be considered a genuine effort on the part of the defendant to find a suitable alternative place of business. Furthermore it is quite significant to find the defendant's address in the pleading given as 497/1, Galle Road, Nagoda, Kalutara which is in close proximity to the premises in suit, 461, Galle Road, Kalutara. Therefore it appears that the defendant held and possessed an alternative premises in close proximity where he may have continued his bakery business without affecting the goodwill.

In assessing substantial pecuniary or otherwise, the mere expectation or belief of the defendant as recited by him unsupported by other credible material may not be sufficient to satisfy Court of its existence. Therefore on a consideration of the totality of the above factors militating against the defendant. I have to determine that the defendant has failed to discharge the burden cast on him to satisfy Court of substantial loss caused to him.

Therefore the first ground with regard to stay of execution of writ cannot succeed.

Now it is left for Court to determine whether the defendant can succeed on the second ground, namely the existence of a substantial question of law to be determined at the final appeal. The following grounds have been urged by the defendant as substantial question of law, denied by the petitioner in his written submissions.

1) The action of the learned trial judge in formulating issue No.2A without notice to parties after judgment had been reserved, purportedly under Section 149 of the Civil Procedure Code, is bad in law.
2) As the issue thus framed changed the scope of the action and allowed no opportunity for the defendant to answer this issue and give evidence, this occasioned a failure of justice.
3) In any event the learned trial Judge had erred in law by giving an incorrect construction to the lease agreement (P1) by holding only the business was given on lease, whereas a proper construction of the instrument apparently indicates that the land and building together with the business had been rented out, in which case the defendant was entitled to the protection of the Rent Act, and therefore the action should have been decided in favour of the defendant.

I have considered the totality of the material placed before Court inclusive of the written submissions tendered by both parties and the oral submissions tendered by the petitioner. I have also considered the authorities submitted by the petitioner in the course of oral submissions, namely:

Charles Appuhamy v *Abeysekera*[9] – Nagalingam, S.P.J.

Sediris Singho v *Wijesinghe* [10] – Sansoni, CJ.

Sokkal Ram Sait v *Nadar* [11]– Keuneman, J.

On a perusal of the above, I am strongly of the view that the defendant has succeeded in establishing the existence of substantial questions of law for adjudication at the appeal, for the following reasons.

1) The opening passage of the judgement of the learned trial Judge dated 07.03.2001 indicates that issue No. 2A had been framed outside Court proceedings after all the proceedings were concluded when the matter was due for judgement, without notice to the parties, purportedly under Section 149 of the Civil Procedure Code.

2) On a perusal of the issues raised at the trial, issue No. 01 raised by the plaintiff relates the lease agreement to the land, hotel building and implements mentioned in the lease. However the learned trial Judge, while referring to the condition "ඵ" of the lease, on his own, had apparently raised issue 2A to the effect that what had been leased out is the business only and not the premises. Having answered this issue in the affirmative, the learned trial Judge had decided the case in favour of the plaintiff, whereas had this additional issue not been raised, and if the learned Judge allowed the case to proceed solely on the issues framed by the parties, the lease agreement would have been construed as a lease of land and premises with the business, in which case the defendant would have received the protection of Rent Act, and the judgement would have been in favour of the defendant.

3) Perusal of the lease agreement indicate that the subject matter of the lease was a 13 perch land with a bakery shop premises and other utensils used for bakery business as clearly stated in the schedule thereto, even though there are restrictive clauses in the instrument with directions as to how to run the bakery business.

On the strength of the above findings, I am satisfied that substantial questions of law exist for determination at the final appeal. Therefore the stay of the execution of the writ is justified on the above ground.

On the basis of my findings and reasons enumerated earlier in this judgement, I hold therefore that the impugned order of the learned District Judge of Kalutara dated 02.10.2002 to stay the execution of the writ is correct, though not for the reasons given by the learned Judge in his order, but for the reasons specified by me above.

In view of the foregoing findings and reasons, the application of the plaintiff-petitioner to set aside the order dated 02.10.2002 of the learned District Judge of Kalutara is hereby dismissed with costs fixed at Rs. 7500/-. However, I set aside that part of the aforesaid impugned order which required the defendant-respondent to enter into a bond for Rs. 1,50,000/- before the Registrar, and instead make order for the defendant-respondent judgement-debtor to furnish security in a sum of Rs. 100,000/- in cash with two sureties acceptable to the learned District Judge of Kalutara and enter into a bond for the same amount for due performance of the decree if and when required once the appeal is heard.

EKANAYAKE, J. – I agree.

Appeal dismissed.

IN RE ATTORNEY-AT-LAW

SUPREME COURT
JAYASINGHE, J.
UDALAGAMA, J.
DISSANAYAKE, J.
SC RULE 2, 2004 (D)
NOVEMBER 17, 2004
MAY 3, 2005
JUNE 27, 2005
SEPTEMBER 14, 2005
OCTOBER 5, 18, 2005
NOVEMBER 7, 22, 2005
DECEMBER 5, 2005
JANUARY 20, 2006
FEBRUARY 21, 2006
MARCH 24, 2006
APRIL 28, 2006
JUNE 16, 2006
JULY 18, 2006
SEPTEMBER 12, 27, 2006
OCTOBER 23, 2006

Rule against an Attorney-at-Law – Rule 60, 61 of SC (Rules) Conduct of Etiquette for Attorneys-at-Law – Judicature Act S44 (2). What amounts to professional misconduct ? – disgraceful dishonourable conduct – Should an Attorney-at-Law who is before Court on allegation of criminal misconduct be precluded from appearing in Court?

Held:

(1) The Rule is not based on the professional conduct as an Attorney-at-Law but on a personal relationship with his wife.

(2) As regards charge (c) which relates to Criminal Misconduct – Bigamy – it will not be gone into as Magistrate Courts proceedings are still pending.

Per Nihal Jayasinghe, J.

"Where an Attorney-at-Law is before Court on allegation of criminal misconduct, such Attorney-at-Law should be precluded from appearing

before Court for the reason that his integrity is being assailed and consequently suffers in his reputation as an Attorney-at-Law."

(3) Suspension of the respondent will not be removed until the Magistrate's Court proceedings are terminated.

Rule against an Attorney-at-Law.

K.A.P. Ranasinghe SSC for Attorney-General

Manohara de Silva PC for respondent

Rohan Sahabandu for the Bar Association of Sri Lanka

December 6, 2006

NIHAL JAYASINGHE, J.

This Rule was issued on the respondent calling upon him to show cause why he should not be suspended from practice or removed from the office of attorney-at-law of the Supreme Court in terms of Section 42(2) of the Judicature Act read with Rule 60 and 61 of the Supreme Court (Conduct of Etiquette for attorneys-at-law) Rules. The complaint was made by one Athula Munasinghe.

The rule issued contained eight allegations classified as (a) to (h). On 28.4.2006 the Senior State Counsel informed Court that as no evidence in respect of the charges of misconduct alleged in counts (b), (f) and (g) has been led, the respondent was called upon to meet the allegations in respect of charges (a), (c), (d), (e) and (h).

We have very carefully considered the evidence placed before us in respect of charge (a) We are in agreement with the submissions of the learned President's Counsel that the rule is not based on his professional conduct as an attorney-at-law but on a personal relationship with his wife. We are also mindful of the fact that his estranged wife Vasantha Munasinghe had never taken any positive step against the petitioner even though she was very explicit regarding the treatment she received at the hands of the respondent. We are also mindful of the fact that these proceedings were initiated on a complaint by the brother of the said Vasantha Munasinghe.

The charge (c) relates to the marriage to one Pushpa Chandani. The said Pushpa Chandani had obtained a divorce from the respondent on the ground of malicious desertion. The said Pushpa Chandani did not give evidence at the inquiry. This charge has nothing to do with the respondent's responsibility as an attorney-at-law.

Charge (d) consists of two limbs. Firstly, it alleges that the respondent fraudulently enticed two women through advertisements and secondly abused them both sexually and physically. There was no evidence before us the advertisement was placed by the respondent nor was the paper notice produced. One Gnanawathie who gave evidence denied any sexual assault.

On consideration of the evidence placed in respect of charges (a), (c) and (d) we are unable to hold that the conduct of the respondent could reasonably be regarded as disgraceful or dishonourable of an attorney-at-law of good repute and competency and to hold that this respondent has acted in breach of rule 60 and consequently unfit to remain an attorney-at-law.

However charge (e) relates to criminal misconduct, in that the respondent entered into a marriage with one Thilaka Malini Bope Weeratunga when the divorce action in respect of the previous marriage was infact pending in the District Court of Mount Lavinia. We will not go into the charge (h) as case No. 47297 is yet pending in the Magistrate's Court of Galle.

We have given serious consideration to the written submissions of Mr. Rohan Sahabandu appearing for the Bar Association of Sri Lanka. He has strenuously argued citing authorities where, an attorney-at-law is before Court on the allegation of criminal misconduct, such attorney-at-law should be precluded from appearing before Court for the reason that his integrity is being assailed and consequently suffers in his reputation as an attorney-at-law and strenuously objects to the present suspension of the respondent being removed until the Magistrate's Court proceedings are terminated. We are of the view that there is merit in this submission.

While we clear the respondent of the allegations set out in (a), (c), and (d) we are of the view that no finding be made in respect

of the allegations set out in (e) as the respondent is being charged in respect of the allegations set out in (h). We accordingly direct the Magistrate of Galle to conclude the trial against the accused within three months hereof. If the accused is acquitted by the Magistrate these proceedings will be treated as terminated. In the event the respondent is found guilty the Supreme Court will take appropriate steps.

UDALAGAMA, J. - I agree.

DISSANAYAKE, J. - I agree.

Respondent cleared of all allegations, no finding is made in respect of the allegations which are pending before the Magistrate's Court (charge of Bigamy).

Directions given to Magistrate's Court to conclude the trial within 3 months.

Editor's Note

The Attorney-at-Law was subsequently acquitted in the Magistrate's Court. The State lodged an appeal. The Rule was discharged by the Supreme Court.

DISTILLERIES COMPANY OF SRI LANKA
v
DEPUTY COMMISSIONER OF LABOUR

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA (PHC) 76/2005
HC GALLE (REV) 91/2001
MC GALLE 52480

Payment of Gratuity Act, 12 of 1983 – Section 5 (1) Amendment 62 of 1992 – section 5 (1) section 5(4) – Companies Ordinance – Conversion of Public Corporations or Government owned Business Undertakings into Public Companies Act No. 23 of 1987 – section 2 – Corporation converted into a company – Liability to pay surcharge on gratuity payable to an employee – Is it mandatory? Alternative remedies available – Exceptional circumstances? Rule 3(1) a of the Court of Appeal Rules 1990 – stare decisis.

The petitioner company sought to revise the order of the High Court which held that the petitioner company was liable to pay a surcharge under the Payment of Gratuity Act. The employee concerned was employed by the Distilleries Corporation which was later converted into the petitioner company in terms of the provisions of Act 23 of 1987. The petitioner company contended that, the employee was not entitled to gratuity for the period he served as a workman under the Corporation. The Magistrate's Court held that, the petitioner is liable to pay. The High Court rejected the revision application on technical grounds. The petitioner sought to revise the said orders. It was contended by the respondent that under section 3 2(1)b of Act 23 of 1987 the petitioner is liable in law to pay gratuity for the entire period of service in both the Company and Corporation, and the liability to pay the surcharge is a mandatory provision.

Held:

(1) Section 5(1) of the Payment of Gratuity Act, No. 12 of 1983 imposes on employees' liability to pay gratuity to workman employed under them. The liability arises on termination of the services and gratuity has to be paid within a period of 30 days. Section 5(A) introduced by the amending Act 62 of 1992 makes an employer liable to pay a surcharge if gratuity is not paid as provided under section 5(1).

(2) Section 3 2(1)b of Act 23 of 1987 clearly envisages that the petitioner is liable to pay gratuity for the entire period of service in both the Company and the Corporation.

Per Sarath de Abrew, J.

"Where the Superior Courts interpret the provisions of the Payment of Gratuity Act to mean that the petitioner company is liable to pay gratuity to its employees on termination even for the period they served under the Corporation, the liability to pay arrears is not from the date of the correct interpretation but from the due date – that is within one month of the termination."

(3) Invoking revisionary powers of an appellate court is a discretionary remedy and its exercise cannot be demanded as of right unlike a statutory right of appeal.

(4) The doctrine of *stare decisis* would mean that people in arranging their affairs are entitled to rely on a decision of the Highest Court which appears to have prevailed for a considerable length of time.

APPLICATION in Revision from an order of the High Court of Galle.

Cases referred to:

(1) *Abeysundara* v *Abeysundara* – 1998 – 1 Sri LR 185.

(2) *T. Varapragasam and another* v *S.A. Emmanual* – CA (Rev) 931/84 - CAM. 24.7.1991.

Dulinda Weerasuriya with *Amila Vithana* for respondent-petitioner-petitioner.

Ganga Wakistarachchi SC for appellant-respondent-respondent.

November 30, 2007

SARATH DE ABREW, J.

The Respondent-Petitioner-Petitioner (hereinafter sometimes referred to as the petitioner), namely Distilleries Company of Sri Lanka Ltd, has filed this application to revise and set aside the respective orders of the learned High Court Judge of Galle dated 21.02.2005 (P16) in case No. Rev. 91.2001 and of the learned Magistrate of Galle dated 20.09.2001 (P9) in case No. 52480 holding that the petitioner company was liable to pay surcharge amounting to 14,917.50 under the provisions of Payment of Gratuity Act No. 12 of 1983 as amended by Acts No. 41 of 1990 and 62 of 1992. The Applicant-Respondent-Respondent (hereinafter sometimes referred

to as the respondent), namely the Deputy Commissioner of Labour has filed action against the petitioner to recover surcharge on gratuity payable to an employee of the petitioner company one J.A.D. Peter. As the learned Magistrate has upheld the application for recovery and determined that the petitioner was liable to pay, the petitioner has sought to revise this order in the High Court of Galle where the learned High Court Judge has refused relief upholding a preliminary objection that the petitioner had violated Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990, by failing to submit originals or duly certified copies of the documents. The present application to this Court of the petitioner is to challenge the above impugned orders by way of revision.

A perusal of the petition dated 17.02.2005 unravels the factual background to this application. The Distilleries Corporation was converted into the petitioner company namely the Distilleries Company of Sri Lanka Ltd. on 17.22.1989 under section 02 of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987. The employee material to this application, one J.A.D. Peter joined the service of the aforesaid Corporation on 27.03.1974 and on reaching age of 55 years, retired from the service of the aforesaid petitioner company on 20.11.1998 with a last drawn salary of Rs. 6630/- and was entitled to receive gratuity as a retrial benefit.

The question arose for determination as to whether J.A.D. Peter was entitled to gratuity for the period he served as a workman under the Corporation too under the provisions of Payment of Gratuity Act No. 12 of 1983. Around this time, in a similar matter involving another employee who had retired earlier, one K.A.D. Abeynayake, the High Court of Colombo in Case No. HCA 812/96 (P2) had given an interpretation to the provisions of the Payment of Gratuity Act on 03.04.1998 holding that the petitioner was liable to pay gratuity to a workman only for the period such workman had served the petitioner company and not for the period he served under the Corporation. Guided by this authority, the petitioner therefore has paid gratuity to J.A.D. Peter only for the period he served under the company.

However, the Labour Department moved in revision and in the Application No. C.A. 58/98, the Court of Appeal had overturned the

aforesaid High Court judgment and held on 23.06.2000 that the petitioner company was also liable to pay gratuity to the workman concerned for the period he had served under the Corporation as well (P3). As the Application for Special Leave to Appeal to the Supreme Court has been refused (P4), the aforesaid latter interpretation of the provisions of Payment of Gratuity Act became settled law on the matter.

Henceforth, the petitioner Company has belatedly taken steps to pay gratuity to J.A.D. Peter for the period he has served under the Corporation on 20.10.2000. Arising out of this situation, the respondent has filed action in the Magistrate Court of Galle in case No. 52480 to recover unpaid gratuity amounting to Rs. 64,642.50 on the basis that gratuity has not been paid to J.A.D. Peter for the total period 27.03.1974 to 19.11.1998 (P5). However the respondent has later limited the claim to Rs. 14,977.50 being the amount due on the surcharge. The learned Magistrate allowed the application and made order holding the petitioner liable for recovery of the surcharge. The revision application to the High Court was rejected on technical grounds. Hence arose the petitioner's present application in revision to this Court.

I have carefully perused the petition, statement of objections, counter objections filed in this case together with all the annexed documentation. In addition to the oral arguments presented by both parties I have also perused the illuminating written submissions tendered by both the petitioner and the respondent.

The solution to the dispute basically rests on the correct interpretation that should be given to the provisions with regard to the mechanics as to the generation of liability in respect of surcharge on gratuity as contained in the provisions of Payment of Gratuity Act and its amendments.

The main contention of the petitioner company is that it paid gratuity to the employee concerned within 30 days the petitioner company became liable to pay gratuity and therefore as there is no default, a surcharge cannot be imposed. Accordingly, the petitioner has argued as follows:

a) The key words in section 5(4) of the Act are the words "liable to pay any sum as gratuity."

b) For the period of service under the petitioner company, J.A.D. Peter has been paid gratuity within 30 days of the due date, namely the date of retirement.

c) For the period of service under the Corporation, the petitioner company became liable to pay gratuity only after the delivery of the Supreme Court order (P4) on 29.09.2000 refusing Special Leave, and accordingly within 30 days from the date liability arose, namely on 20.10.2000, the petitioner has paid the gratuity and therefore the petitioner is not liable for payment of surcharge.

In support of its arguments with regard to the question as to how and when the liability arises, the petitioner has chosen to adduce *Abeysundara* v *Abeysundara*[1] where I had the good fortune of pronouncing the original judgment in the Magistrate's Court of Galle in 1992.

On the other hand, the learned State Counsel appearing on behalf of the respondent has raised the following contentions.

a) the issue that has to be decided is the liability to pay surcharge on payment of gratuity which is a mandatory statutory provision and is not a question of law.

b) No exceptional circumstances are urged by the petitioner to attract revisionary jurisdiction.

c) Section 3(2)(1)(b) of the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act No. 23 of 1987 clearly envisages that the petitioner is liable in law to pay gratuity for the entire period of service in both the Company and the Corporation.

d) The attempt on the part of the petitioner to seek refuge under the defence that it paid gratuity in conformity with the order of the learned High Court Judge (P2) cannot succeed as the High Court order was only persuasive and not binding, as the petitioner was well aware that the matter has been challenged in the higher forum, namely the Court of Appeal.

e) There is no discretion attached in law in determining the applicability of the surcharge as it is a mandatory provision of the law.

f) The petitioner has not exercised the alternative remedy available to him in law. (paragraph 13 of the statement of objections).

g) The petitioner has suppressed material facts (paragraph 13 of the objections)

Before dealing with the several contentions raised by both parties it must be reiterated that invoking revisionary powers of this Court is a discretionary remedy and its exercise cannot be demanded as of right unlike the statutory remedy of Appeal. Certain pre-requisites have to be fulfilled by a petitioner to the satisfaction of Court in order to successfully invoked the exercise of such discretionary power. This is best illustrated in *T. Varapragasam & another* v *S.A. Emmanuel*[2] where it was held that the following facts have to be applied before the discretion of the Court of Appeal is exercised in favour of a party seeking the revisionary remedy.

a) the aggrieved party should have no other remedy.

b) if there was another remedy available to the aggrieved party, then revision would be available if special circumstances could be shown to correct it.

c) the aggrieved party must come to Court with clean hands should not have contributed to the current situation.

d) the aggrieved party should have complied with the law at that time.

e) the acts complained of should have prejudiced his substantial rights.

f) The acts or circumstances complained of should have occasioned a failure of justice.

In the above context, the following features in this application militate against the successful invoking of revisionary jurisdiction.

a) Failure on the part of the petitioner to seek the alternative remedy of Appeal against the impugned order of the High Court. (P16).

b) The refusal of relief by the High Court is on a technical ground and not on a consideration of the substantive merits

of the application. No exceptional circumstances have been urged in relation to the Order of the learned High Court Judge.

c) The failure of the aggrieved party to comply with the mandatory provisions of the Payment of Gratuity Act and its amendments has contributed to the current situation.

d) The petitioner has suppressed a very material fact and has failed to show *uberima fides* towards the Court due to the following reasons. J.A.D. Peter has retired from service on 20.11.1998 according to the petition. Paragraph 13(iv) of the statement of objections by the respondent alleged that the petitioner has paid gratuity for the first time on 24.12.1998; which is more than one month from the due date of retirement and is therefore liable for a surcharge to be imposed. This averment in the statement of objections is not specifically denied in the counter objections filed by the petitioner. Therefore the contention of the petitioner that there was no default even on the first occasion of payment of gratuity appears to be a myth. On the above ground enumerated (a) to (d) above alone this application is liable to be dismissed.

However, in her written submissions, the learned State Counsel has taken up the position that the argument in this case by the petitioner would only be confined to the question whether the petitioner is liable to pay the surcharge on the gratuity paid as demanded by the respondent. The learned Magistrate in his Order on 20.09.2001 (P9) has answered this question in the affirmative but apparently has not adduced good and sufficient reasons. As the present application before this Court is also to revise and set aside the Order of the learned Magistrate, based on an important question of law, the above could be construed as sufficient special circumstances for this Court to explore and analyse the several contentions and come to a finding.

Section 5(1) of the Payment of Gratuity Act No. 12 of 1983 imposes liability on employers to pay gratuity to workman employed under them. The liability arises on termination of the services and gratuity has to be paid within the period of 30 days.

Section 5(4) introduced by the Amending Act No. 62 of 1992 states "Any employer who being liable to pay any sum due as gratuity to a workman or his heirs, as the case may be under subsection (1), fails or defaults to pay that sum on or before the due date, he shall be liable to pay that workman or his heirs, as the case may be, in addition to the sum due as gratuity, a surcharge on that sum calculated in the following manner .....

The key words in this section are "he shall be liable to pay a surcharge on that sum". The liability arises on the failure to pay the sum due on or before the due date, that is within one month of the termination of employment of the workman concerned, and not within one month of the correct interpretation of the statue by a Superior Court. The petitioner cannot seek refuge behind an erroneous order made by a single Judge in the High Court as the decision of such a single Judge is only persuasive and has no binding effect as a compelling authority. No finality can be attached to such a decision. Once the Supreme Court has interpreted the statute correctly, the correct interpretation operates not from the date of interpretation but from the date where liability arises in the first place, that is within one month of the termination of employment. The petitioner should have been well aware that the order of the learned High Court Judge (P2) has no binding effect as the matter was being canvassed in a higher forum. The doctrine of *stare decisis* would mean that people in arranging their affairs are entitled to rely on a decision of the highest Court which appears to have prevailed for a considerable length of time. Therefore the contention of the petitioner in this regard should fail.

In the interpretation of statues the final arbiter is the Superior Court by virtue of its appellate and supervisory jurisdiction. Once the meaning of an Act of Parliament has been authoritatively interpreted, that interpretation become law unless it is thereafter changed by Parliament. Even though it is the function of Court alone to declare the legal meaning of an enactment, the legal effect of the proper construction or interpretation of the statue concerned will take effect not from the date of the interpretation but from the date of the operation of the said statute. Therefore where the Superior Courts interpret the provisions of Payment of Gratuity Act to mean that the petition company is liable to pay gratuity to its

employees on termination even for the period they served under the corporation, the liability to pay arises not from the date of the correct interpretation but from the due date, that is within one month of the termination.

On the basis of the above findings, the question of law raised by the petitioners has to be decided in favour of the respondent. Therefore, the contentions raised by the petitioner company with regard the liability to pay surcharge on gratuity cannot succeed.

In view of the above finding, and for the reasons set out earlier in this judgment, this Court is of the view that this is not a fit case to invoke the discretionary revisionary powers of this Court in favour of the petitioner. Therefore, I refuse to grant any of the reliefs sought by the petitioner in the prayer to the petition. Therefore the application of the petitioner is dismissed. In all circumstances in this case I make no order as to costs.

The Registrar is directed to forward copies of this oder to the learned High Court Judge and learned Magistrate of Galle.

IMAM, J. – I agree.

Application dismissed.

VELUN SINGHO AND ANOTHER
v
SUPPIAH AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
SARATH DE ABREW, J.
CA 1200/89
DC MT. LAVINIA 19/93 P
DECEMBER 11, 2002
SEPTEMBER 12, 2006
OCTOBER 13, 2006

Partition Law 21 of 1977 amended by Act 17 of 1997 – Section 22, section 48(3), section 49, Fraud and collusion, alleged by persons who were not parties – Revisionary jurisdiction invoked ? – Finality of a partition decree – Could it be assailed? Duty to investigate title – Laches – Exceptional circumstances – Restitutio in Integrum – Is it available only to a party? Severability. - Evidence Ordinance – Section 44.

The petitioners who were not parties sought to revise the judgment, interlocutory decree and the final decree and also sought Restitutio in integrum – on the basis of fraud and collusion on the part of the respondents, under section 48(3) of the Partition Law.

Held:

(1) The powers of revision and Restitutio in integrum are not affected by the provisions of section 48(3) Partition Law. When a partition decree obtained by fraud or collusion has occasioned a failure of justice, the Superior Courts are empowered to set aside and strike off such impugned decree in achieving the objective of due administration of justice and and correction of errors in order to avert a miscarriage of justice.

Per Sarath de Abrew, J.

"The concept of finality which was unknown to the Roman Dutch Law, has been incorporated into our law borrowed from the English Law drawing inspiration from the English Statute of 1677, however utilizing the proviso to section 48(3) a long line of authorities of the Supreme Court and the Court of

Appeal acting in revision and *Restitutio-in-integrum* has tendered to erode the finality of a partition decree, in order to avert a failure of justice for good and valid reasons".

(2) Revisionary jurisdiction can be invoked even by a person who was not a party to the case in the original Court provided he is an aggrieved person but relief by way of *Restitutio in integrum* cannot be granted if the petitioner has not been a party to the action.

Per Sarath de Abrew, J.

"The petitioners are placed in the jeopardy of forfeiture of their right title and interest in the land in suit due to the impugned partition decree and therefore qualify as aggrieved persons, even though they had no opportunity to participate in the original court proceedings, therefore notwithstanding the relief claimed by way of *Restitutio in integrum*, the relief by way of revision does lie to the petitioners".

(3) On a consideration of the totality of the repelling circumstances, the balance of proof title in favour of the petitioners in that on a strong *prima facie* case emerges leading to the conclusion that the respondents acting in collusion among family members have contrived to obtain partition title to the *corpus*; when the deeds establish the fact that the legal ownership of the land is in the petitioner.

(4) The trial Judge has also failed to discharge his paramount duty to investigate title.

(5) Although the revision application has been filed around 3 years and 7 months later, the circumstances which led to this delay have been explained in the pleadings, therefore the facts and circumstances do not preclude the petitioners' right to relief by way of revision due to laches having regard to the exceptional circumstances that have surfaced which has occasioned a failure of justice.

Per Sarath de Abrew, J.

"A separate case for damages under section 49 is now not possible as more than 5 years have elapsed since the entering of the final decree, in view of section 22 of the Amendment 17 of 1997, therefore injustice will result unless the extra ordinary power of revision is exercised to avoid miscarriage of justice.

APPLICATION in revision to set aside the final decree in a partition action entered in the District Court of Mt. Lavinia.

Cases referred to:

1. *Soysa* v *Silva* – 2000 – 2 Sri LR 235
1a. *Piyasena Perera* v *Margaret Perera* – 1984 – 1 Sri LR 57.
2. *Fernando* v *Marshall Appu* – (1923) – 23 NLR 370.

3. *Piyaseeli* v *Mendis and others* – 2003 – 3 Sri LR 273.
4. *D. Wanigabahu* v *R. Mahindapala and another* – CA 1812/2001 – CAM of 14.12.2005.
5. *Kannangara* v *Silva* – 35 NLR 1.
6. *Somawathie* v *Madawala* – 1983 – 2 Sri LR 15.
7. *Ratnawalie Hemaratne* v *Wadugiyapillai and another* – CA 1340/90 (Rev.) – CAM of 26.3.92.
8. *Mariam Beebee* v *Seyed Mohammed and others* – 1965 – 68 NLR 36.
9. *Dissanayake* v *Elsinahamy* – (1978-79) – 2 Sri LR 118.
10. *Kularatne* v *Ariyasena* – 2001 – 4 Sri LR 118
11. *Galagoda v Mohideen* – (1987) 40 NLR 92.
12. *Sumanawathie and others* v *Andreas and others* – 2003 – 3 Sri LR 324.
13. *Gnanapandithan and another* v *Balanayagam and another* – 1998 – 1 Sri LR 391 (S,C,)

Dr. Jayatissa de Costa for 1st and 2nd petitioners.
Nihal Fernando PC for 1st, 2nd and 3rd respondents.

May 12, 2007.

SARATH DE ABREW, J.

This is an application for revision and/or Restitutio in integrum filed by the petitioners to set aside the judgment, Interlocutory Decree and Final Decree of the learned District Judge of Mt. Lavinia in a partition action filed by the Plaintiff-Respondent who sought to apportion the 10.4 perch corpus equally between himself and the 1st defendant-respondent subject to the life interest of the 2nd defendant-respondent. The petitioners, who were not parties to this partition action, have sought this relief on the basis of fraud and collusion on the part of the respondents referred to above under section 48(3) of the Partition Law. The 2nd defendant-respondent has been substituted in place of the now deceased 1st defendant-respondent. The learned District Judge, having recorded the evidence of the plaintiff-respondent, had made order on 09.08.1994 apportioning 1/2 share each of the land in suit equally between the plaintiff and the defendant and accordingly Interlocutory Decree and Final Decree had been entered respectively on 09.08.1994 and 12.02.1996. Being aggrieved of the above impugned orders, the petitioners have invoked the revisionary jurisdiction of this Court.

The petitioners have filed their petition on 08.12.1999 with documents marked A-Z and AA and in response to the objections filed by the respondents on 07.05.2000, have filed their counter objections on 20.06.2000. Both parties have filed two sets of written submissions in 2002 and 2006.

The salient facts relating to this dispute in briefly set out as follows. According to the 1st petitioner he had become the owner of the land called Kandawalawatte Lot 17B, in extent 10.4 perches, situated at Jaya Mawatha, Ratmalana by virtue of Deed No. 2160 dated 12.09.1984, the property described in the schedule to the petition and the *corpus* of the partition action in question. The 1st petitioner had transferred 6 perches of the aforesaid land to one W.A. De Silva by Deed No. 994 of 04.03.1997. The said W.A De Silva had transferred this 06 perches to the 2nd petitioner by Deed No. 329 of 01.10.1998. The contention of the petitioners was that the (now deceased) 1st defendant-respondent was occupying the said land with the leave and licence of the petitioners' predecessor in title, and continued to occupy the same with the permission of the 1st petitioner having accepted his title once the 1st petitioner became the owner. The 1st petitioner used to visit the land periodically and on one such visit on 17.08.98, the 1st petitioner had observed a fence erected by the 1st defendant-respondent obstructing free movement and entry to the land. As the 1st defendant-respondent refused to remove this obstruction, the 1st petitioner lodged a complaint at the Mt. Lavinia Police Station on 19.08.1998 and thereafter filed as 66(1) B application in Mt. Lavinia Magistrate Court on 03.09.98. During the course of this inquiry, the petitioners contend, they became aware for the first time of the collusive partition action filed by the respondents where the Final Decree had been entered on 12.02.96. After the culmination of the 66 application on 04.05.99 where the respondents were confirmed in their possession, the petitioners have filed this revision application on 08.12.99 as title holders to the land in suit in order to vindicate their rights by having the partition decree set aside on the basis of fraud and collusion under section 48(3) of the Partition Law.

On the statement of objections filed by the defendants on 07.05.2000 they have taken up the position that the 1st defendant-

respondent came into occupation and possession of the land in question on or about 1960, built a permanent structure there, and lived therein continuously and uninterruptedly till their possession was disturbed by the 1st petitioner around August 1998. The 1st defendant-respondent has further denied that he entered the land and continued in possession as a licensee under the 1st petitioner or his predecessor in title. The contention of the 1st defendant-respondent was that he had acquired prescriptive title over the land and gifted on undivided 1/2 share of the *corpus* by Deed No. 5991 of 29.06.1990 to the plaintiff-respondent who in turn filed the partition action in District Court, Mt. Lavinia on 16.06.1993 to equally apportion the undivided 1/2 shares between themselves. In answering the averments on paragraph 07 of the petition, the respondents in their statement of objections neither specifically deny the allegation of fraud and collusion raised by the petitioners nor specifically challenge the title to the land of the 1st petitioners but has prayed for the dismissal of the application and confirmation of the impugned partition decree. It is also pertinent to observe that in their statement of objections the respondents have chosen not to disclose the deed of declaration No. 5880 dated 22.02.1990 given in evidence and marked P1 at the trial in the partition case where the 1st defendant-respondent had got a deed of declaration written in his name. On an examination of the plaint filed in the partition action on 17.06.93 it is also significant to note that the plaintiff-respondent has taken the precaution not to reveal the degree of relationship among the respondents, whereas the substitution papers filed of record indicate that the 2nd defendant-respondent (Gurusamy Sinnakka) is the wife of the now deceased 1st defendant-respondent (Suppan Suppiah Mukan).

On a perusal of the petition of the petitioners together with documents marked A-Z and AA, the counter objections and the written submissions tendered to Court, the following contentions raised by the petitioners arise for consideration and adjudication.

(1) The petitioners are the legitimate holders of legal title to the land in suit.

(2) The 1st defendant-respondent entered the land and continued in possession with the leave and licence of the predecessors in title of the 1st petitioner and continued in

occupation with the permission of the petitioners, and therefore the respondents could not have acquired prescriptive title.

(3) By suppressing the 1st petitioners title to the land, and by the promulgation of a self-serving deed of declaration No. 5880 and deed of gift No. 5991, the respondents acted in fraud and collusion to obtain partition title.

(4) The learned trial judge had totally failed to investigate title.

(5) The conduct of the respondents by making contradictory statements on different occasions as to the circumstances of entry into the land and continuation in possession thereof are glaring pointers to the fact that they acted in fraud and collusion to obtain partition title fraudulently, which has occasioned a failure of justice.

(6) The fact that all deeds through which the petitioners claim title to the land in suit are duly registered in the volume. Folio M 1280/142 of the Land Registry (document AA), whereas the purported self serving deeds of the respondents are not so registered.

On the strength of the above contentions, the petitioners have urged that notwithstanding the finality of the partition decree envisaged in section 48 of the Partition Law, this is a fit and proper case for this Court to exercise its wide powers of revision in order to avoid a miscarriage of justice.

On the other hand, the respondents have raised the following contentions in their statement of objections and written submissions.

(1) The deed upon which the 2nd petitioner claims title is subsequent to the entering of the Partition Decree.

(2) The petitioners are both guilty of laches and therefore not entitled to any relief by way of revision.

(3) The petitioners application for *restitutio in integrum* should fail as they were not parties to the original partition action and relief had not been sought with promptitude.

(4) No evidence of possession of the corpus has been set out by the petitioners and as such failed to set out a *prima facie* case for relief.

(5) Petitioners cannot move in revision as revision will lie only at the instance of a party to an action.

(6) Vague allegations of fraud is not sufficient to vitiate the finality attached to a partition decree.

Having perused the entirety of the pleadings, documentation, written submissions and case law authorities submitted by both parties, I now propose to analyse the same in order to arrive at a just and fair conclusion in this case. The petitioners in this case have sought to set aside an interlocutory and final decree of partition. The finality of such decrees is embodied in section 48 of the Partition Law No. 21 of 1977.

However section 48(3) of the Partition Law reads as follows:

"The interlocutory decree and the final decree of partition entered in a partition action shall have the final conclusive effect declared by section (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.

The powers of the Supreme Court by way of revision and restitutio in integrum shall not be affected by the provisions of this section."

Section 44 of the Evidence Ordinance states as follows:

"Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion."

However, the proviso to section 48(3) of the Partition Law has made it abundantly clear that the superior courts in exercising broad powers of revision and restitutio in integrum are not inhibited by this qualification in that, where a partition decree obtained by fraud or collusion has occasioned a failure of justice, the superior courts are empowered to set aside and strike off such impugned decree in achieving the objective of due administration of justice and correction of errors in order to avert a miscarriage of justice.

This sound principle is succinctly stated in *Soysa* v *Silva*[1] where it was held that "The power given to Superior Court by way of revision is wide enough to give it the right to revise any order made by the original court. Its object is the due administration of justice and correction of errors sometimes committed by the court itself in order to avoid a miscarriage of justice."

Therefore where it is manifestly clear that the impugned partition decree has been obtained by fraud or collusion resulting in a failure of justice, the finality attached to such decree could be assailed by the exercising of broad revisionary powers, in a fit and proper case.

The concept of finality which was unknown to the Roman-Dutch Law, has been incorporated into our law borrowed from the English Law, drawing inspiration from the English statute of 1677. However, utilizing the proviso to section 48(3), a long line of authorities of the Supreme Court and the Court of Appeal, acting in revision and restitutio in integrum, has tended to erode the finality of a partition decree, in order to avert a failure of justice, for good and sound reasons, as enumerated below.

(a) The *corpus* not being sufficiently identified.
(*Piyasena Perera* v *Margret Perera* [1a])

(b) Decree obtained by fraud and collusion.
(*Ennis J.* in *Fernando* v *Marshall Appu*[2])

(c) Lack of proper investigation of title.
(*Piyaseeli* v *Mendis and others*[3])

(d) Order of trial judge manifestly erroneous.
(*D. Wanigabahu* v *R. Mahindapala and another*[4])

(e) Decree entered without trial and without notice to parties.
(*Kannangara* v *Silva*[5])

Therefore if is now settled law that the finality of a partition decree can be assailed in exceptional circumstances in order to avert a miscarriage of justice (eg. *Somawathie* v *Madawala*[6]). Having reached this conclusion, it is now left to examine the several contentions raised by both parties in this case.

It is now opportune to consider the contention of the Respondents that the Petitioners cannot succeed as they were not parties to the original partition action.

In *Ratnawalie Hemaratne* v *Wadygiyapillai and another.*(7) it has been held that revisionary jurisdiction can be invoked even by a person who was not party to the case in the original Court provided he is an aggrieved person.

In the Supreme Court 05 Judge Bench judgment in *Mariam Beebee* v *Seyed Mohamed and others*(8) Sansoni, J. held that, "when an aggrieved person who may not be party to the action, brings to the notice of court the fact that unless the revisionary power is exercised, injustice will result, the extraordinary power of revision may be exercised in order to avoid a miscarriage of justice."

However in *Dissanayake* v *Elisinahamy*(9) the Court of Appeal has taken the view that relief by way of restitutio-in-integrum could not be granted as the petitioner had not been a party to the action.

The petitioners in this application are placed in the jeopardy of forfeiture of their right, title and interest in the land in suit due to the impugned partition decree, and therefore qualify as aggrieved parties even though they had no opportunity to participate in the original court proceedings. Therefore notwithstanding the relief claimed by way of restitutio-in-integrum, on the strength of the authorities cited above, I am inclined to reject the contention of the respondents that relief by way of revision does not lie to the petitioners.

On a consideration of the above authorities, it is abundantly clear that, even though the petitioners were not parties to the original action, if they were sufficiently aggrieved by the partition decree entered by the trial judge which occasioned a failure of justice, the petitioners were entitled to claim relief by way of revision, provided they satisfy court that the respondents had obtained the impugned decree by way of fraud and collusion, and thereby inducing the trial judge to enter interlocutory decree without a proper investigation of title.

I now propose to deal with the contention of the respondents that vague allegations of fraud are not sufficient to vitiate the finality

attached to the impugned partition decree. Paragraph 07 of the petition of the petitioners raises a definite allegation of fraud and collusion, supported by other averments in the petition. Paragraph 07 states "in the course of the said application, the petitioners for the first time came to know that a fraudulent and collusive partition action bearing No. 19/93/Partition had been filed by Mukkan Suppiah, Suppan Suppiah Mukkan and Gurusamy Sinnakka – the members of the same family suppressing and willfully concealing the petitioners ownership of the land in question." Rule 04 of the Court of Appeal (Appellate Procedure) Rules of 1990 has provided the respondents the opportunity to meet the averments and allegations in the petition by filing a comprehensive statement of objections. However, on an examination of the statement of objections filed by the respondents on 07.05.2000, especially paragraph 07 of the said objections that had answered the averments in paragraph 07 of the petition, the following matters come to light.

(a) There is no specific denial of the allegation of fraud and collusion, on which the respondents have chosen to remain silent.

(b) There is no specific denial of the petitioners allegation that the 03 respondents are members of the same family.

(c) There is no special denial of the petitioners allegation that the respondents willfully suppressed the petitioners ownership of the land.

(d) There is no specific denial that the petitioners for the first time came to know of the respondents partition action during the course of the section 66 application filed by the petitioners.

If the respondents were truthful and genuine, it is quite questionable and irrational as to why the respondents chose to remain silent or advert a low profile on crucial issues which they could have easily vehemently denied in detail, which inescapably generates a grave doubt as to the credibility of the respondents.

Furthermore, a perusal of the pleadings and the proceedings gives a clear insight as to the implied attempt on the part of the respondents to steadfastly hide the fact that they are members of the same family. Perusal of the plaint filed in the partition action, the

evidence given in court by the plaintiff-respondent at the trial, other pleadings in the partition action and the section 66 application, and the statement of objections filed in this revision application substantiates this position. The substitution papers filed in this court on the demise of the 1st defendant-respondent indicate that he is the husband of the 2nd defendant-respondent. Applying the objective test of a normal course of conduct of a rational human being, it is difficult to refrain from arriving at an adverse inference as to why the respondents repeatedly failed to disclose their family relationship, if not for an ulterior motive, fearing that collusion will be spotlighted.

One other aspect that springs to the eye is that the respondents in their statement of objections have not disclosed the deed of declaration No. 5880 of 22.02.90 which has been marked P1, and given in evidence at the partition trial. This declarative deed apparently was the bedrock upon which the 1st defendant-respondent founded his ownership to the land in suit from which he gifted an equal 1/2 share to the plaintiff respondent 04 months later by deed No. 5991 of 29.06.90, paving the way for the partition action that ensued 03 years later. While the latter deed has been prominently mentioned in paragraph 7(a) of the statement of objections of the respondent, the former deed No. 5880 has been left out. If the 1st defendant-respondent was absolutely convinced about his prescriptive title and the validity of the declarative deed No. 5880, it is nothing but reasonable to infer that he would display it in his statement of objections as the source of deriving of title, unless in his own mind he knew it was a self serving instrument which the 1st defendant-respondent was loath to flout around in adversity.

Last but not the least, when one examines the various contradictory statements made by the respondents at different intervals at different forums as to the circumstances the 1st defendant-respondent entered the *corpus* and continued in possession, one cannot turn a blind eye on the thread of fraud and collusion weaving through entire transaction. These inconsistent instances may be enumerated as follows.

(a) Partition plaint 9 (marked B) – obtained ownership by lengthy possession and due to inheritence.

(b) Evidence in partition trial – prescriptive title by lengthy possession and by way of deed of declaration No. 5880.

(c) Police statement of 19.09.98 (marked U) – entered the land as licensee of original owner one Chettiyar and thereafter filed partition action and obtained decree.

(e) Petition in the section 66 application (marked N) – purchased the land from one Chettiyar.

(f) Statement of objections in the Court of Appeal – lengthy possession and obtained prescriptive title.

It is very pertinent to observe that the 1st defendant-respondent had volunteered to admit to the Mt. Lavinia police that he entered the land in suit as a licensee of the original owner one Chettiyar and continued in occupation in such circumstances that he could not have acquired prescriptive title.

On the consideration of the totality of the repelling circumstances illustrated above, the balance of proof tilts in favour of the petitioners in that a strong *prima facie* case emerges leading to the conclusion that the respondents acting in collusion among family members have contrived to obtain partition title to the corpus, whereas examination of deed Nos. 2160, 994 and 329 produced by the petitioners establish the fact that legal ownership of the land has devolved on the 1st petitioner even before the purported partition action.

Irrespective of the question of fraud and collusion, the petitioners have raised another contention in their written submissions, namely the failure on the part of the trial judge to properly examine title. After the evidence of the plaintiff-respondent was recorded without a contest, the trial judge in his order of 09.08.94 has stated as follows.

"පැමිණිලිකරු සාක්ෂි දෙන ලදී. මෙම නඩුවේ බෙදා වෙන්කිරීමට ඉල්ලා ඇත්තේ, ජය මාවත අංක 31/21 දරණ දේපලයි. එය ජේ. එන්. වික්‍රමරත්න මිනින්දෝරු මහතා විසින් අංක 104 දරණ පිඹුරේ පෙන්වා ඇති අතර එම පිඹුර "X" වශයෙන් ද අදාල වාර්තාව "X1" වශයෙන් ද පෙන්වා ඇත. පැමිණිලිකරු සාක්ෂි දී ඇති අතර නඩුව භබයකින් නොරව විභාග විය. මෙම සාක්ෂිය ගැන සැහීමකට පත් වී ඒ අනුව පහත සඳහන් ආකාරයට බෙදා වෙන් කරමි ....."

It is quite apparent that learned judge had based his findings on the admissions made in evidence of the plaintiff-respondent. There had been no attempt to examine whether the corpus mentioned in the schedule to the plaint tallies with the extent and boundaries of the land mentioned in deed No. 5880 and 5991 marked in evidence. There had been no attempt to ascertain whether the above deeds

are duly registered in the proper Folio No. 1280/142 at the land registry or whether there are other deeds duly registered in the proper folio pertaining to the same land. In other words the learned trial judge had merely acted as a rubber stamp without discharging his burden under the Partition Law in properly investigating title. In such situations, it may be gainsaid, the conduct of the learned trial judge unknowingly contributes to the perpetrating of a fraud by parties acting in collusion.

In *Kularatne* v *Ariyasena*(10) it was held that "The duty of a Judge in a partition action is to ascertain who the actual owners of the land are and it is an imperative duty of the court to fully investigate and decide on the title of each party to the action on evidence and not on any admissions."

In *Galagoda* v *Mohideen*(11) it was held that "the Court should not enter a decree in a partition action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property."

In *Sumanawathie and another* v *Andreas and others*(12) it has been further held that "On an appeal in a partition action, if it appears to the Court of Appeal that the investigation of title has been defective it should set aside the decree and make an order for proper investigation."

Further, G.P.S. De Silva, CJ in *Gnanapandithan and another* v *Balanayagam and another*(13) held that, "There was a total want of investigation of title. The circumstances were strongly indicative of a collusive action. In the result, there was a miscarriage of justice in the case, and the appellants were entitled to a revision of the judgment of the District Judge notwithstanding delay in seeking relief."

On the strength of the above authorities it is evident that the trial judge failed to discharge his paramount duty to investigate the title properly before making his order which has occasioned a failure of justice to the detriment of the petitioners. The following matters have escaped the scrutiny of the trial judge.

(a) Though the plaint in the partition action (marked B) speaks of the 1st defendant-respondent acquiring ownership by way of inheritance, the learned trial judge had failed to investigate this aspect.

(b) The respondents have failed to establish that they were in possession from 1960 by cogent evidence other than through an admission on the part of the plaintiff-respondent while giving evidence. The respondents have also failed to establish possession adverse to that of any person holding legal title to the land.

(c) Though the respondents claim that they were in possession from 1960, the extract of plan No. 865/1961 of Licensed Surveyor Dias Abeygunawardane had been prepared only on 12.02.1980, while the deed of declaration executed only on 22.02.1990, and finally the partition action filed only on 16.06.1993.

Therefore for the foregoing reasons and on the strength of the authorities cited above, I uphold the main contentions raised by the petitioners in that –

(a) The respondents were party to fraud and collusion in obtaining the impugned partition decree.

(b) The total failure by the trial judge to investigate title vitiates the finality of the partition decree.

I am also satisfied that the above two ingredients have occasioned a failure of justice to the detriment of the petitioners, in which event they are entitled to relief by way of revision.

The next question to be examined is whether the petitioners are disqualified in obtaining this relief due to laches and undue delay. The 1st petitioner has obtained legal title to the land in suit by deed No. 2160 dated 12.09.84. According to him he has permitted the respondents to continue in occupation and has periodically visited the land. He had not observed anything amiss until 17.08.93 when he saw a fence erected obstructing his ingress. Thereafter the 1st petitioner made a complaint at the Mount Lavinia police station and filed a section 66 application (Case No. 34567) in M.C. Mt. Lavinia forthwith. During the course of this inquiry, the respondents had produced the impugned partition decree which the petitioners had then become aware of for the first time. The section 66 case culminated on 04.05.09 and as the order was adverse to the petitioners, they filed this revision application in this court on

08.12.99, around 07 months later. The final decree in the D.C. Mt. Lavinia Case No.19/93/P had been entered on 17.04.96. Therefore the revision application to set aside this decree has been filed around 3 years and 07 months later. The circumstances which led to this delay are explained in the pleadings submitted by the petitioners. During this period, once they become aware of the actions of the respondents, the petitioners have not displayed inaction over their rights but have filed a police complaint and a section 66 case and awaited its outcome before invoking the revisionary powers of this court. Therefore the facts and circumstances of this case do not preclude the petitioners right to relief by way of revision due to laches having regard to the exceptional circumstances that have surfaced in this case which has occasional a failure of justice.

In this context, it is appropriate to quote from *His Lordship former Chief Justice G.P.S. De Silva, CJ* in the case of *Gnanapandithan* v *Balanayagam (supra)* where he held

> *"The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and exceptional circumstances of the case, the appellants were entitled to the exercise of the revisionary parties of the Court of Appeal."*

Therefore for the foregoing reasons, I reject the contention of the respondents with regard to laches and undue delay and hold that the petitioners are entitled to relief by way of revision.

The petitioners have lost their opportunity to appeal against the impugned partition decree for no fault of theirs. A separate case for damages under section 49 of the Partition Law is now not possible as more than 05 years have elapsed since the entering of the final decree, in view of section 22 of Partition (Amendment) Act No. 17 of 1997. Therefore injustice will result unless the extraordinary powers of revision are exercised to avoid miscarriage of justice.

Therefore, acting in revision I make order setting aside the judgment and other proceedings, interlocutory Decree and the Final Decree in District Court Mt. Lavinia Case No. 19/93 Partition as prayed for in sub-paragraph (1) of the prayer to the petition. I make further order directing the learned District Judge of Mount Lavinia to commence partition proceedings *de novo* on the plaint filed by the

respondents while allowing the petitioners too to intervene in the action and file their statement of claims and thereafter fully investigate title and make an order and enter interlocutory decree and final decree according to law in compliance with the provisions of the Partition Law. On a consideration of all the circumstances of this case I award costs in sum of Rs. 25,000/- to the petitioners.

Accordingly Application is allowed.

EKANAYAKE, J. – I agree.

Application allowed.
Trial de novo ordered.

Editors Note:

Special leave to appeal No. SC Spl. LA 158/2007 to the Supreme Court was refused by the Supreme Court on 6.9.2007.

ATTORNEY-GENERAL
v
AUSLANKA DEVELOPMENT AND CONSTRUCTION COMPANY LTD.

COURT OF APPEAL
WIJAYARATNE, J. (P/CA)
CA 789/1995 (F)
CA 790/1995 (F)
DC COLOMBO 6449/M, 6195/M
SEPTEMBER 22, 2006
JANUARY 12, 2007

Civil Procedure Code – Section 75 (e), section 84, section 85, section 87(2) – section 143 Action dismissed – Counsel gone abroad – Not a personal ground – Claim in reconvention postponed – Application to purge default dismissed as earlier application was on the same ground.

The plaintiff-appellant (State) instituted two actions against the defendant-respondent. The State Counsel made an application for postponement of the trial on personal grounds – Counsel going abroad. This was refused by Court. The claim in reconvention inquiry was postponed as State was not ready.

The application made under section 87(2) was refused by Court stating that, the application is made on the same facts as earlier, Court has no jurisdiction to make any order on the same facts.

Held:

(1) The District Judge completely misdirected herself on law when she stated that Court had no jurisdiction to vacate the *ex parte* decree. The Court was unmindful of the fact that it inquired into an application entertained by Court on specific provisions of section 87 vesting jurisdiction in the same Court which entered decree *ex parte* to make an order either setting aside *ex parte* decree or refusing to set aside same. There is a clear error of law.

(2) The adjournment of the hearing of an action is governed by section 143 and undisputedly it is the discretion of the Court to grant an adjournment or not.

(3) The correct procedure in terms of section 75(e) read with section 84 and section 85 would have been to proceed with the hearing *ex parte* of the claim in reconvention immediately upon the dismissal of the plaint. Instead the trial Judge had adjourned the hearing of same thereby placing the defendant at an advantage against the plaintiff because even in the event of defendant not been ready to proceed with his claim he gained an adjournment at the expense of the plaintiff who was caused prejudice and loss and damage in the process.

Per Wijayaratne, J. (P/CA)

"This process which cannot by any measure of reasoning, be described or presumed as judicious is a special circumstance of this case that warrants the interference by this Court sitting in appeal over the matter in issue here."

Per Wijayaratne, J. (P/CA)

"The fact that the plaintiff has made an application by way of motion 5 days earlier has no mention whatsoever on the days proceedings and from the content it is apparent that the Counsel who objected to the application chose to keep mum about this motion a copy of which was received by his client and the Court which received the motion however minuted it much after the trial date."

(4) If the fact of the plaintiff not being ready for hearing is not good ground for granting adjournment of trial of the plaintiff's case, it should not justifiably be considered as good ground for adjournment of hearing of the claim in reconvention.

APPEALS from two orders made by the trial Judge in the District Court of Colombo.

Case referred to:

(1) *Colgate Palmolive Co.* v *Hemas (Drug) Ltd.*

Sobitha Rajakaruna SSC for plaintiff-appellants.
Geoffrey Alagaratnam for defendant-respondent.

February 19, 2007

WIJAYARATNE, J. P/CA

The plaintiff-appellant instituted two actions relevant to these two appeals against the defendant-respondent. Both actions, after the filing of defendants answer and the replications fixed for trial on the same day on the understanding of the parties that the two cases being among the same parties and on similar facts, be tried together. However, the trial of the two cases had been postponed on two occasion at the request of the Counsel for the plaintiff and the date appointed for the trial also had been changed to suit the convenience of the Counsel for the plaintiff and ultimately fixed for trial on 12.12.1994.

On 12.12.94 State Counsel appeared in Court and made application for postponement of the trial on personal grounds of Senior State Counsel who represented plaintiff. The President's Counsel representing defendant objected to any adjournment being granted on the basis that in terms of the Judicial Service Circulars, a Counsel going abroad is not considered a personal ground.

The Court observing that plaintiff has been given two adjournments on application by the Counsel for the plaintiff, accepting the objections of the Defence Counsel based on J.S.C. Circular refused the application for adjournment and dismissed the plaintiffs actions subject to costs. When the Counsel for the defence mentioned that the claim in reconvention too is fixed for trial, it was noted that the State Counsel representing the plaintiff is not ready for the trial of the claim in reconvention, adjourned the trial of the claim in reconvention and appointed another day for *exparte* trial of the same. However the Court has not recorded anything in relation to the fact whether the Counsel for the defendant was ready to proceed with the trial of the claim in reconvention *exparte* or not, before adjourning the same on the footing that the Counsel for the plaintiff is not ready stating that the adjournment is for the above reasons. (ඉහත කරුණු මත).

The plaintiff then made an application in terms of section 87(2) of the Civil Procedure Code supported by the affidavits which included an affidavit from the Senior State Counsel concerned dated 23.04.1994. The same was objected to by the defendant by its statement of

objections which was countered by the plaintiff by a statement supported by further affidavits of the Senior State Counsel dated 24.04.1995.

When the matter came up for inquiry the learned additional District Judge made order dated 11.12.1995 stating that the application is made on the same facts as averred on 12.12.94 and considered by the Court which made order dismissing plaintiff action and therefore the Court did not have jurisdiction to make any order on the same fact and vacate that order dismissing the plaint. Aggrieved by the said order, the plaintiff preferred these appeals in the two respective cases.

When the appeals are taken up for argument both Counsel representing respective parties agreed on facts which are matters of record and further agreed that in view of similarity of facts and the law relevant to both matters are the same and as matters between the same parties, both appeals be argued together and one judgment should be binding on both cases. Thereafter they made submissions in writing.

It is observed that all the submissions made are on the order of dismissal of the plaint on 12.12.94 and nothing is mentioned on the order appealed from i.e. the order dated 11.12.1995 refusing to vacate the *exparte* decree made on the basis of lack of jurisdiction of Court. It should be noted first and foremost that the learned Additional District Judge has completely misdirected herself on law. When she stated that Court had no jurisdiction to vacate the decree *exparte*. The Court was obviously unmindful of the fact that it inquired into an application entertained by Court on specific provisions of section 87 of the Civil Procedure Code vesting jurisdiction in the same Court which entered decree *exparte*, to make an order either setting aside the decree *exparte* or refusing to set aside the same. The refusal to set aside the decree *exparte* not on facts, but on grounds that Court lacked jurisdiction therefore is a clear error of law and accordingly set aside in appeal.

The learned trial Judge, refused to vacate *exparte* decree not upon a consideration of relevant facts, but on an erroneous basis of lack of jurisdiction only. It is therefore necessary to consider the application of the plaintiff-appellant on its merits.

Perusal of the proceedings and the order dated 12.12.94 it is apparent that the facts of the trial being adjourned twice before and

travel abroad is not considered a personal ground in terms of JSC Circular are two main factors that received consideration of the trial judge. It is conceded that the adjournment of the trial was sought on 'personal grounds' of the Senior State Counsel who was said to have travelled abroad "for the participation as an official of the Sri Lanka" of the contingent of participants at 12th World Karate Championship-Malaysia on the approval by the Minister – Vide copy of letter of Senior Asst. Secretary to the Ministry of Youth Affairs ... etc, dated 28.11.94 marked ඇ and produced along with the application.

The adjournment of the hearing of an action is governed by the provisions of section 143 of the Civil Procedure Code and undisputedly it is the discretion of the Court to grant an adjournment or not. In the case of *Colgate Palmolive Company* v *Hemas (Drugs) Ltd.*[1] *and another.*

The Supreme Court held

> "an order fixing the trial or reusing grant of an adjournment is a typical exercise of pure discretionary power and would be interfered with by a Court sitting in appeal only in exceptional circumstances."

Accordingly my task will be to ascertain whether there are exceptional circumstances that warrant interference by this Court sitting in appeal and in such exercise it is prudent to consider whether the trial Judge used his discretion judiciously and in keeping with the practices of the Court.

In examining the order dismissing the plaint itself, it is clear that the practice of the Court in granting adjournments was to consider convenience of the Counsel and the fact of a party not being ready for trial on the date appointed. In this particular instance of Junior Counsel for the plaintiff seeking adjournment was on the basis of inconvenience of the Senior Counsel for the plaintiff occasioned by his travel abroad as an official of the Sri Lanka contingent of participant of an event taking place in Malaysia. Though the application was categorized as a "personal ground application" it is not a 'personal ground' in its strict sense as regulated by rules.

The fact that the plaintiff has made an application by way of motion dated 06.12.1994 has no mention whatsoever on the days of

proceedings and from the content of the proceedings it is apparent that the Counsel who objected to the application chose to keep mum about this motion a copy of which was received by his client and the Court which received this particular motion however minuted it much after the trial date (Vide JE No. 29 dated 04.01.1995 in case No. 6195/M and JE No. 27 of the same date in case No. 6449/m). The fact of the plaintiff-appellant seeking an adjournment by way of motion has not been brought to the notice of the trial Judge obviously due to the registry of the Court not keeping to the due practice of submitting such application to the Judge in due course.

The learned District Judge considering the objection of the Counsel for the defendant considering such grounds of objection appear to have accepted the same in the exercise of his discretion in refusing the adjournment, however did not consider such grounds with regard to the adjournment of the trial *ex parte* of the claim in reconvention of the defendant. He did not even record whether the defendant was ready to lead evidence in support of his claim in reconvention. On the face of the order it appears that the trial Judge has adjourned the hearing of the claim in reconvention on ground that the Counsel who represented the plaintiff is not ready for trial of claim in reconvention either.

To me this appears as an instant of the trial Judge exercising his discretion in a manner which is not judicious, because, if the fact of the plaintiff not being ready for hearing is not a good ground for granting adjournment of trial of the plaintiff's case, it should not justifiably be considered as a good ground for adjournment of hearing of the claim in reconvention. Further the adjournment of the hearing of the claim in reconvention was granted even without ascertaining whether defendant is ready for the hearing. The days proceedings are silent on such fact. The Counsel for the defendant who strenuously objected the application of the plaintiff for an adjournment, does not appear to have at least indicated to Court whether he is ready to proceed with the prosecution of his claim in reconvention. The correct procedure in terms of the provisions of section 75(e) read with sections 84 and 85 of the Civil Procedure Code would have been to proceed with the hearing *exparte* of the calm in reconvention immediately upon the dismissal of the plaint. Instead the learned trial Judge adjourned the hearing of the same and thereby placing the defendant at an advantage against the plaintiff because even in the event of defendant not being ready (which facts were not ascertained by court) to proceed

with his claim, he gained an adjournment at the expense of the plaintiff who was caused prejudice and loss and damage in the process.

This process which cannot by any measure of reasoning, be described or presumed as judicious is a special circumstances of this case that warrant the interference by this Court sitting in appeal over the matter in issue here.

In all the circumstances of this case, I am of the view that the learned District Judge has not used his discretion in refusing to grant the adjournment, judiciously and in the interest of justice it is necessary that this Court sitting in appeal should set aside the order dated 12.12.94 dismissing plaintiff's action.

In the result the appeals are allowed and the order dated 12.12.94 and the order refusing to vacate order dismissing plaintiff's action and dated 11.12.1995 are both set aside and vacated. Further order is made that the two actions should proceed from the stage before the dismissal of the plaintiffs action, according to law.

Appeal allowed.

ANANDA
v
DISSANAYAKE

COURT OF APPEAL
WIMALACHANDRA, J.
RANJIT SILVA, J.
CALA 148/2005
DC COLOMBO 36162/MS
AUGUST 29, 2006
DECEMBER 5, 2006

Civil Procedure Code – Cap 53– Section 704, Section 706 – Summary Procedure on liquid claims – Defendant objecting to jurisdiction and that promissory note is not valid in statement of objections – Praying for leave to defend unconditionally – Validity – Judicature Act section 39 – Action barred by positive rule of law – Objections when? – Matters involving Law Merchant, which Court has jurisdiction? – Debtor seeking creditor – Past consideration – No consideration? – Bills of Exchange Ordinance, section 27 and 91 – Prima facie sustainable defence.

The plaintiff instituted action to recover a certain sum of money with interest owning to him on a promissory note -- under Cap 53 of the Code. The petitioner without filing petition/affidavit filed a statement of objections/affidavit and a number of documents praying that, the case be dismissed for want of jurisdiction as the parties were residing outside the jurisdiction of the District Court of Colombo and on the ground that the promissory note was not a valid note, as there was no valuable consideration. The application was dismissed by the District Court.

Held:

(1) Objection to jurisdiction must be taken at the earliest opportunity if no objection is taken and the matter is within the plenary jurisdiction of the Court, the Court will have jurisdiction to proceed with the matter. Where the action is barred by a positive rule of law objection must be taken before pleading to the merits of the case.

(2) In a matter involving "Law Merchant" English Law (Common Law) has to be applied. It is the debtor who should seek the creditor. Therefore the plaintiff must file action in the District Court having jurisdiction within which he resides.

(3) In the instant case, there is ample evidence to show the intention of the parties that the payment must be made at the office of the defendant-petitioner. Evidence indicates that the place of residence of the defendant-petitioner is within the jurisdiction of the District Court of Colombo.

(4) Although the general rule is past consideration is no consideration there are exceptions to this rule – Sections 27/91 Bills of Exchange Ordinance once the petitioner admitted the receipt of money and a Promissory Note signed in the absence of any documentary evidence to the contrary, it is not in the mouth of the petitioner to argue that he has a *prima facie* sustainable defence.

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

Cases referred to:

(1) *David Appuhamy* v *Yassassi Thero* – 1987 – 1 Sri LR 253.

(2) *Actalina Fonseka and others* v *Dharshani Fonseka* – 1989 -- 2 Sri LR 95 at 100.

(3) *Ponnaiya* v *Kanagasabai* – 35 NLR 128 (distinguished)

Roland Munasinghe with *G.W.R. Dammika* for defendant-petitioner.

W. Dayaratne for plaintiff-respondent.

January 24, 2007

RANJIT SILVA, J.

This is an application for leave to appeal filed by the Defendant-Petitioner (referred to as the Petitioner hereinafter) challenging the order made by the learned District Judge of Colombo on 18.04.2005 in case No. 36162/Ms disallowing the application of the petitioner to file answer and defend unconditionally. By the said impugned order marked Z, the learned District Judge rejected the objections taken by the petitioner to the exercise of jurisdiction, on the following grounds.

1) that the plaintiff's did not reside within the territorial limits of the jurisdiction of the District Court of Colombo.

2) that the promissory note marked X3 relied on by the plaintiff-respondent-respondent was not a valid promissory note for want of consideration and granted leave to the petitioner to appear and defend on the condition that the petitioner should enter into a bond for the full sum claimed on the promissory note in a sum of Rs. Eight Million (Rs. 8,000,000/-).

When this matter came up for inquiry before a different bench on 14.12.2005 the matter proceeded to inquiry and the order was reserved for 24.02.2006 on which date order was pronounced granting leave to the petitioner and the matter was fixed for argument. The parties made their oral submissions on 29.08.2006. The Counsel for the petitioner moved for a date to cite authorities and as undertaken the Counsel for the petitioner furnished to Court the authorities by way of written submissions dated 05.12.2006.

The facts and the Law

The respondent instituted action in the DC of Colombo to recover a sum of Rs. 8,000,000/- together with interest due and owing to her on a promissory note signed by the petitioner on 12.05.2004. The main action was filed under Chapter LIII of the Civil Procedure Code under the Summary Procedure on Liquid Claims. According to and in terms of the plaint the petitioner had paid only a sum of Rs. 160,000/- as interest due on the promissory note and thereafter defaulted payment. Therefore the respondent by letter of demand A2 filed along with the plaint demanded the said capital and the interest due on the note but the petitioner did not respond to the letter of demand.

As the petitioner was in default the respondent filed the aforesaid action to recover the said sum together with interest thereon.

The petitioner was duly served with summons in terms of section 704 of the CPC. In terms of section 706 of the CPC on receipt of summons one has to obtain leave of Court to appear and defend the action with or without conditions. If one could establish that there is a *prima facie* sustainable defence the court must grant leave to appear and defend unconditionally yet if the Court entertains any doubt as to the good faith (*bona fides*) of the defence the Court can still grant conditional leave to appear and defend, as it was done in this case. The petitioner instead of filing petition and affidavit filed a statement of objections together with an affidavit and a number of documents marked X1 to X12 praying that the case be dismissed for want of jurisdiction as the parties were residing outside the jurisdiction of the District Court of Colombo and also on the ground that the particular promissory note was not a valid promissory note as there was no valuable consideration in respect of the said promissory note.

The petitioner further argued that the Court had no jurisdiction to issue summons under form 19 of the CPC and in the alternative and in addition to the aforesaid relief prayed that he be permitted to file answer and defend the action unconditionally.

The respondent argued that the petitioner had no right to take up the objection with regard to the lack of territorial jurisdiction at that stage of the action and that he could do so only in his answer after the petitioner was granted leave to appear and defend. This argument is not tenable and ought to be rejected in limine. It was held in *David Appuhamy* v *Yassassi Thero*(1) that I quote "an objection to jurisdiction must be taken at the earliest opportunity. If no objection is taken and the matter is within the plenary jurisdiction of the Court, the court will have jurisdiction to proceed with the matter and make a valid order. In *Actalina Fonseka and others* v *Dharshani Fonseka*(2) it was held that where the action is barred by a positive rule of law objection must be taken before pleading to the merits of the case.

Section 39 of the Judicature Act reads thus

Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of first instance neither party shall afterwards be entitled to object to the jurisdiction

of such Court, but such Court shall be taken to have jurisdiction over such action proceeding or matter.

For these reasons I am of the view that the petitioner was entitled to take up want of jurisdiction as an objection together with an application seeking permission or leave to appear and defend unconditionally. Passing I must emphasize that section 39 of the Judicature Act covers only instances of Patent want of jurisdiction and as far as a Patent want of jurisdiction is concerned no amount of consent, acquiescence or waiver can cure such defect and such an objection in regard to a Patent want of jurisdiction could be taken any time even in appeal for the first time. Such an attack can be made even in collateral proceedings. The objection taken by the petitioner with regard to the form of the summons served on him does not deserve any consideration by this Court and could be disregarded. On the other hand I am of the opinion that the petitioner has made a valid application to Court seeking leave to appear and defend the action, whether such application was made in addition or as an alternative to other relief claimed has no significance also the argument that instead of a petition the petitioner filed a petition of objection and therefore there is no valid application before Court must also be rejected out of hand as I find no merit in that argument too.

Issues of facts – valuable consideration

It is admitted by the petitioner that the respondent gave him Rs.8,000,000/- at least not refuted. However, the petitioner contended that the money was given to him some time prior to the execution of the promissory note and therefore did not constitute valid valuable consideration for the promissory note and hence it was not a valid promissory note. His contention was that for the money lent to him there was a previous agreement and that the respondent tore the document containing the said agreement into pieces in front of the petitioner and several others and took away even the torn pieces of paper with him. Once the petitioner admitted the receipt of the money and promissory note signed, in the absence of any documentary evidence to the contrary, it is not in the mouth of the petitioner to argue that he has a *prima facie* sustainable defence that warrants the granting of unconditional leave for the petitioner to file answer, appear and defend the case.

Although the general rule is 'past consideration is no consideration' there are exceptions to this rule, one of the exceptions is found in section 27 of the Bills of Exchange Ordinance."

Section 27 of the Bill of Exchange the relevant portion is;

Sub section (1) Valuable consideration for a bill may be constituted by

(a) .....

(b) an antecedent debt or liability, such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

Sub (2) .....

This provision is made applicable to promissory notes by section 91 of the Bills of Exchange.

Section 91(1) reads as follows:

"Subject to the Provisions in this past, and except as by this section provided, the Provisions of this Ordinance relating to Bills of Exchange apply, with the necessary modifications, to promissory notes.

For these facts and the Law I find that the learned District Judge cannot be faulted for the conclusions drawn by him on the facts and for the findings reached based on the facts, namely that the Promissory note was a valid promissory note.

Jurisdiction

"The petitioner raised an objection as to the jurisdiction in the District Court of Colombo on the grounds that both the respondent and the petitioner were residing outside the territorial limits of the said District Court.

This objection was subsequently restricted to the fact that the District Court of Colombo lacked jurisdiction as the respondent (plaintiff) resided outside the jurisdiction of the District Court of Colombo (para 06 of the Objections)

In a matter involving "Law Merchant" English Law (Common Law) has to be applied. According to the English Common Law it is the

debtor who should seek the creditor. Therefore, the plaintiff in a case must file action in the District Court having jurisdiction within which he resides (*Ponnaiya* v *Kanagasabai*[3]).

In this case I find that the intention of the parties with regard to the place of payment is clear. In paragraph 04 of the Petition of objections the petitioner himself has admitted that a receipt which is marked X12 was issued to the respondent at his office in Colombo in respect of the payment of Rs. 178,000/- as interest on the capital amount borrowed by him from the respondent according to X8 one of the documents marked and produced by the petitioner himself the address given therein as the place of his residence is No. 5, Mahakumarage Mawatha, Grandpass, Colombo 14 is also within the jurisdiction of the District Court of Colombo. X8 was the reply to the letter of Demand marked A2. In A2 the address of the petitioner is stated as No. 5, Mahakumarage Mawatha, Grandpass, Colombo 14 the same address referred to in X8. In X8 the petitioner has not refuted or disputed the address of the petitioner but has expressly confirmed and admitted the address given in A2 as correct.

The petitioner has cited *Ponnaiya* v *Kanagasabai (supra)* in support of his argument based on 'want of jurisdiction'. In the said judgment it was held that "the rule of English Law seems to be this; that you must discover the place of payment from the intention of the parties. Here there was no express intention the note was silent as to the place of payment and the learned Commissioner was dissatisfied with such evidence as was addressed to him on that point. There in the absence of anything from which one can fairly deduce what was the intention of the parties as to the place of payment one is thrown back on what seems to be the English Rule that the debtor must seek out the creditor at his residence or place of business."

In the instant case there is ample evidence to show the intention of the parties that the payment must be made at the office of the petitioner. What is more there is evidence, X8 and A2 to indicate that the place of residence of the petitioner is within the jurisdiction of the District Court of Colombo. On the other hand there is no proof whatsoever that the respondent is living at Homagama or at some place outside the jurisdiction of the District Court of Colombo. Therefore, I hold that the decision in *Ponnaiya* v *Kanagasabai*

(supra) has no application to the facts and circumstances of this case, and that the District Court of Colombo has jurisdiction over the matter.

For the reasons adumbrated I find no jurisdiction to interfere with the order made by the learned District Judge of Colombo on 18.04.2005 in case No. 36162/MS. I dismiss this appeal with costs fixed at Rs. 7,500/- to be paid to the respondent by the petitioner.

WIMALACHANDRA, J. – I agree.

Appeal dismissed.

ELANGAKOON
v
OFFICER-IN-CHARGE, POLICE STATION, EPPAWALA AND ANOTHER

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA (PHC) APN 99/2006
HC ANURADHAPURA 15/2004
MC THAMBUTTHEGAMA 24789
MARCH 6, 2006
FEBRUARY 23, 2007
MAY 5, 2007
JUNE 25, 2007
JULY 11, 2007

Penal Code Section 140, Section 419 – Code of Criminal Procedure Act Section 27, 179, 185, 279, 320(1) – Guilty – Appeal against conviction – Appeal is it after sentence? – Validity – Laches – Alternative remedies – Exceptional circumstances – Petition of appeal irregularly drawn – Presented to wrong Court – Fatal? – High Court of the Provinces (Sp. Pro) Act 19 of 1990 – Section 5(e), Section 9 – Constitution , Articles 138(1) and 154(6) – Document not filed – Fatal?

The petitioner was found guilty and convicted under section 419 of the Penal Code read with section 179 of the Criminal Procedure Code, and being aggrieved by the verdict of guilty without waiting for the sentence to be imposed on the 14th day after the conviction the petitioner preferred an appeal against the conviction to the

High Court in terms of section 320(1). On the following day the Magistrate imposed the sentence and sent up the record for hearing of the appeal to the High Court. On an objections being lodged that, the High Court lacked jurisdiction since the appeal had been lodged on a date before the imposition of punishment, the appeal was dismissed, for want of jurisdiction.

The petitioner moved in Revision to set aside the order of the High Court refusing to take cognizance of the petition of appeal.

Held:

(1) The petitioner has failed to file a copy of the petition of appeal filed in the High Court. It is fatal.

(2) The petition of appeal filed in the High Court is addressed to His Lordship the Chief Justice and their Lordships in the Supreme Court, though the caption states "In the Court of Appeal bearing a Court of Appeal number.

As the intention of the petitioner appears to be to invoke the revisionary jurisdiction of the Court of Appeal under Art 138 of the Constitution this is a fundamental defect as the purported petition and affidavit is not addressed to the Hon. President and the other Lordships of the Court of Appeal. The petitioner has not made any attempt even on a later date under Rule 3(8) to amend his pleadings – This is fatal.

(3) The pleadings (petition of appeal and affidavit in the High Court) are in total disarray and are ambiguous. In a revision application the pleadings should not be ambiguous and specific - the petition should be rejected on this ground alone.

(4) The Court of Appeal does not have appellate jurisdiction in terms of Art 138 (1) read under Art 154(6) in respect of decisions of the Provincial High Court made in the exercise of appellate jurisdiction and it is the Supreme Court that has jurisdiction in respect of appeals from the High Court – Section 9 High Court of the Provinces (Sp. Pro) Act 19 of 1990.

The petitioner should have appealed to the Supreme Court under section 9 of Act 19 of 1990 and not to the Court of Appeal.

(5) The petitioner has not pursued the alternative remedy available, by filing a legally tenable appeal before seeking to invoke the revisionary powers of the Court of Appeal.

Held further:

(6) The judgement or final order appealable under section 320(1) of the Code does not encompass an order of verdict of guilty as contemplated under section 185 of the Code. section 279 clearly stipulates that in a case of conviction, the judgment comprises of the verdict and sentence. Hence the appealable final order or judgment contemplated in section 320(1) would necessarily be after the passing of sentence.

Section 279 reads "The judgment ..... shall be pronounced in Open Court after the verdict is recorded or save as provided in section 203 at some *subsequent time* – therefore the petitioners claim that the fact that the judgment was not pronounced on the day the verdict was recorded was an illegality is clearly unfounded.

Held further

(7) It is also abundantly clear that the petitioner has not specifically or expressly pleaded such exceptional circumstances in the body of the petition other than the substantial questions of law.

Held further

(8) The impugned order is dated 16.3.2006 while the petition has been filed on 24.7.2006 entailing an unexplained delay of 4 months and 8 days – in the absence of an explanation to the contrary this delay be considered unreasonable.

APPLICATION in revision from an order of the High Court of Anuradhapura.

Cases referred to:-

1. *T. Varapragasam and another* v *S.A. Emmanuel* – CA (Rev.) – 931/84 – CAM 24.07.91.
2. CA (Rev) 149/86 – CAM 17.11.1998.
3. *M.A. Sirisena* v *C.D. Richard Arsala and others* CA 536./84 – CAM 24.10.90.
4. *W.K.M.B. Perera* v *People's Bank* – SC 141/94 – SCM 12.05.95.
5. *Dharmaratne and another* v *Palm Paradise, Colombo and others* – 2003 – 3 Sri LR 179.
6. *UDA* v *Ceylon Entertainments Ltd.. and another* CA 1319/2001 – CAM 05.04.2002.
7. *Wickremasekera* v *Officer in Charge, Police Station, Ampara* – SC 1/2003 – SCM 30.03.2004.
8. *Camilus Ignetius* v *OIC Uhana and others* – CA Rev. 907/89.
9. *H.S. Watuhewa* v *S.B. Guruge* – CA 141/90 – CAM 25.09.1990.
10. *Biso Menike* v *Ran Banda and others* – CA 95/98 – CAM 09.01.2002
11. *U. Tilakaratne* v *OIC Kekirawa* – CA 346/01 – CAM 16.12.1992.
12. *Forest* v *Leefe* – 13 NLR 119

Upul Jayasuriya with *P. Radhakrishnan* for appellant-appellant-petitioner.
Ayesha Jinasena SSC for 1st and 2nd respondent-respondents.

October 4, 2007

SARATH DE ABREW, J.

This is an application for revision filed by the 2nd Defendant-Appellant-Petitioner (hereinafter referred to as the Petitioner) to set aside the impugned order dated 16.03.2006 (P3) of the High Court of

Anuradhapura refusing to take cognizance of the Petition of Appeal dated 01.03.2004 preferred to that Court by the Appellant-Petitioner. In this case the 2nd defendant-appellant-petitioner and 04 others were charged in the Magistrate Court of Thambuttegama with committing offences of unlawful assembly and mischief by fire punishable under section 140 and section 419 respectively of the Penal Code. After trial on 11.02.2004 the 1st, 3rd, 4th and 5th accused were acquitted and discharged of the aforesaid charges while the 2nd defendant-appellant-petitioner was acquitted and discharged with regard to the 1st charge but found guilty and convicted of the 2nd charge under section 419 of the Penal Code read with section 179 of the Code of Criminal Procedure, and identification and sentence was put off to 02.03.2004. Being aggrieved of the aforesaid verdict of guilty, without waiting for the sentence to be imposed, on the 14th day after the conviction, on 01.03.2004, the petitioner preferred an Appeal against the conviction to the High Court of Anuradhapura in terms of section 320(1) of the Code of Criminal Procedure. On the following day 02.03.2004, the learned Magistrate of Thambuttegama, after perusal of the finger-print report which revealed no previous convictions, imposed a sentence of Rs. 1500/- fine and imprisonment for a period of one year on the petitioner and sent up the record for hearing of the Appeal to the High Court of Anuradhapura.

On hearing of the Appeal at the High Court, the prosecution had raised a preliminary objection of law as to the maintainability of the said Appeal on the following grounds.

(a) That the High Court lacked jurisdiction since the appeal had been lodged on a date before the imposition of punishment.

(b) That an Appeal in terms of section 320(1) of the Code of Criminal Procedure shall be only against a judgment or final order of the Magistrate and that since the order dated 11.07.2004 does not include the sentence, it is not a judgment or final order which attracts the appellate jurisdiction of the High Court.

The learned Judge of the High Court of Anuradhapura, after due inquiry, had delivered the impugned order on 16.03.2006 upholding the aforesaid preliminary objection of the prosecution and accordingly had dismissed the Appeal of the petitioner for want of jurisdiction. It is

against the aforesaid impugned order (P3), that the petitioner is seeking to invoke the revisionary powers of this Court in order to set aside the abovementioned order of the High Court refusing to entertain the Appeal, urging on his behalf questions of law and fact listed (a) to (i) in paragraph 09 of the petition dated 15.07.2006.

The respondents-respondents (hereinafter referred to as the respondents) did not file objections but on the inquiry date of 06.12.2006 the learned Senior State Counsel on behalf of the respondents raised a two-fold preliminary objection on questions of law to be argued and decided, before the main matter is adjudicated on its merits. Thereafter the matter was fixed for inquiry with regard to the following preliminary objection raised by the respondents.

(a) *Has the petitioner exhausted other remedies available to him before filing this Revision Application?*

(b) *Has any delay being caused in filing this Revision Application?*

On the question of the aforesaid preliminary objection, both parties have filed two sets of written submissions with case law authorities and have also tendered oral submissions when the matter was argued on 23.05.2007. In order to arrive at a just and reasonable conclusion with regard to the aforesaid preliminary objection, this Court has perused the entirety of the petition and affidavit of the petitioner and P1-P3 documents and the copious but illuminating written submissions and case law authorities filed by both parties.

The revisionary powers of this Court is a discretionary power and its exercise cannot be demanded as of right unlike the statutory remedy of Appeal. Certain pre-requisities have to be fulfilled by a petitioner to the satisfaction of this Court in order to successfully catalyse the exercise of such discretionary power. This is best illustrated in *T. Varapragasam & another* v *S.A. Emmanuel*(1) where it was held that the following tests have to be applied before the discretion of the Court of Appeal is exercised in favour of a party seeking the revisionary remedy.

(a) The aggrieved party should have no other remedy.

(b) If there was another remedy available to the aggrieved party then revision would be available if special circumstances could be shown to warrant it.

(c) The aggrieved party must come to Court with clean hands and should not have contributed to the current situation.

(d) The aggrieved party should have complied with the law at that time.

(e) The acts complained of should have prejudiced his substantial rights.

(f) The acts or circumstances complained of should have occasioned a failure of Justice.

Based on sound principles that have been repeatedly built up, upheld and handed down by our Superior Courts during the last millenium, the following too could be added to the aforesaid list of pre-requisites in order to successfully invoke revisionary discretion.

(a) There should not be any unreasonable delay in filing the application(2)

(b) There should be full disclosure of material facts and show *uberrima fides* as non-disclosure is fatal.

(eg. *M.A. Sirisena* v *C.D. Richard Arsala & others.*(3))

(c) As the conduct of the petitioner is intensely relevant to the granting of relief, such conduct should not be repellant to the attraction of exercise of revisionary power.

(eg. *W.K.M.B. Perera* v *The People's Bank.*(4))

(d) The petitioner should plead or establish exceptional circumstances warranting the exercise of revisionary powers.

(eg. *Dharmaratne and another* v *Palm Paradise Colombo Ltd. and others.*(5))

(e) The existence of exceptional circumstances should be expressly pleased in the petition.

(eg. *UDA* v *Ceylon Entertainments Ltd. & another.*(6))

In the light of the above principles that govern the invoking of revisionary powers of our Superior Courts, It is now pertinent and opportune to identify and examine the several points in dispute and the several contentions of law which springs to the eye with regard to the preliminary objection raised on behalf of the respondent, which may be briefly set out as follows:

(a) Has the petitioner pursued the alternative remedy of filing an Appeal against the impugned order P3.

(b) If so has the petitioner produced this Petition of Appeal which is a document material to this application under Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990.

(c) Has the petitioner filed this Appeal under the correct provisions of law to the correct forum.

(d) Even if an Appeal is pending or not, does it preclude the petitioner from invoking the revisionary powers of this Court, provided there are exceptional circumstances.

(e) If so has the petitioner expressly pleaded or established such exceptional circumstances.

(f) Notwithstanding the above has the petitioner successfully established an error or illegality on the face of the record to warrant intervention by the exercise of revisionary powers.

(g) Is there an unreasonable and unexplained delay in filing this revision application.

(h) Has the petitioner suppressed material facts or failed to show *uberrima fides* towards Court.

(i) Has the very conduct of the petitioner contributed to the current situation and was the conduct of the petitioner repellant towards the attraction and invoking of the discretionary revisionary powers.

Before this Court proceeds to examine the aforesaid contentions it is pertinent to note that the very petition and affidavit of the petitioner is *per se* defective for the following reasons.

(a) Firstly, though the caption states "In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka" and bears the Court of Appeal Revision Application No. CA (PHC) APN 99/2006, both the Petition and the Affidavit are addressed "To His Lordship the Honourable Chief Justice and the other Honourable Justices of the Supreme Court of the Democratic Socialist Republic of Sri Lanka." As the intention of the petitioner appears to be to invoke the revisionary jurisdiction of the Court of Appeal under Article 138 of the

Constitution, this is a fundamental defect as the purported Petition and Affidavit is not addressed to the Honourable President and the other Honourable Justices of the Court of Appeal. The petitioner has not made any attempt to correct this position and amend his pleadings even on a latter date under Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules of 1990.

(b) Secondly, the Petition has been drafted in such a way where it appears to be a mixture of a Petition of Appeal and a Petition in a Revision application. Paragraph 09 of the petition refers to "the appellant respectfully prefers this Appeal to Your Lordships Court" while the prayer to the petition states "where the appellant respectfully prays that Your Lordship's Court be pleased to" and sub-paragraph (a) to the prayer states "Issue notice of this Appeal to the respondents-respondents." On the other hand the caption of the Petition speaks of a "Revision Application" while paragraph 10 of the Petition speaks of "Revision Jurisdiction."

On an analysis of the juxtaposition of words Appeal and Revision in the purported Petition and the contraplex meanings generated by the Petition as to whether the relief is sought from the Supreme Court or the Court of Appeal, it appears to this Court that the pleadings of the petitioner are in total disarray and are ambiguous giving rise to the conclusion that draftsman of the pleadings was either totally negligent or was completely lost in the realms of revision and appeal, confused as to whether the relief should be sought in what form or what forum.

In a revision application of this nature the pleadings should not be ambiguous but specific and negligence on the part of the draftsman of the pleadings should accrue to the disadvantage of the petitioner and the Petition must be rejected on this ground alone.

However as this matter has escaped the attention of Court at the time of support and issue of notice and has not been canvassed by the respondents at the inquiry, this Court would now proceed to examine the validity of the Preliminary objection raised by the respondents.

The main contention of the respondent was that the petitioner had not exhausted other remedies available to him before filing this

Revision Application. The bone of contention was that even if the petitioner had filed an Appeal against the impugned order (P3), it has not been directed to the proper forum under the proper provision of the law inasmuch as no proper legally tenable Appeal is pending. In Paragraph 11 of the petition, the petitioner had averred that the petitioner had preferred a Petition of Appeal to the High Court of Anuradhapura against the impugned order addressed to the Court of Appeal. The learned Senior State Counsel for the respondents, quoting several case law authorities, had argued that there was no provision in law for the petitioner to file a second Appeal against the learned Magistrate's order to the Court of Appeal, but the Appeal against the impugned High Court order should have been directed to the Supreme Court section 09 of the High Court of the provinces (Special Provisions) Act No. 19 of 1990, with leave from the High Court or Special Leave from the Supreme Court.

For the following two-fold reasons this Court is inclined to decide the issue in favour of the respondents in that the petitioner has failed to satisfy Court that he has pursued an alternative remedy of a legally tenable Appeal before filing this Revision Application.

(A) Firstly, the petitioner had failed to file a copy of this Petition of Appeal filed in High Court Anuradhapura along with the Petition and Affidavit at the time of filing this revision application, though he had filed same marked X1 very much later along with his written submissions filed on 11.07.2007. Rule 3(1)(a) and (b) of the Court of Appeal (Appellate Procedure) Rules of 1990 is clear as crystal on this matter. All copies of documents material to the application has to be filed along with the petition and affidavit. Where a person is unable to tender any such document, he shall state the reason for such inability and seek leave of Court to furnish such document later. This Petition of Appeal filed against the impugned order is a vital document material to the application to bolster the Petitioner's position that he has pursued the alternative remedy of Appeal. However, the petitioner has neither produced same at the time of filing of the application nor sought permission to furnish it later. This is a clear violation of Rule 3(1)(a) and (b) and therefore the petitioner is precluded from producing the document later and using it to support his written submissions.

(B) Secondly, in the 03 Judge Bench Supreme Court decision in *Wickremasekera* v *Officer-in-Charge, Police Station, Ampara*(7) it was

held that the Court of Appeal does not have appellate jurisdiction in terms of Article 138(1) of the Constitution read with Article 154(6) in respect of decisions of the Provincial High Court made in the exercise of its appellate jurisdiction and it is the Supreme Court that has the jurisdiction in respect of appeals from the High Court as set out in section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. Therefore, in the light of the above authority, the petitioner should have appealed to the Supreme Court under section 09 of the Act No. 19 of 1990, and not to the Court of Appeal. The proposition that Appeals from the High Court exercising appellate jurisdiction should be directed to the Supreme Court and not the Court of Appeal in further strengthened by the provision in section 5C of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006 where the Supreme Court is vested with appellate jurisdiction from civil appeals heard by the High Court. Therefore, for the aforesaid reasons, this Court has to conclude that the petitioner has failed to satisfy court that he has pursued the alternative remedy of filing a legal Appeal before seeking to invoke the revisionary powers of this Court.

However, it is manifestly clear and well settled law that whether or not the alternative remedy has been pursued or exhausted revision would lie in the following situations.

(a) Presence of profound exceptional circumstances where revision would lie to avert a miscarriage of Justice.

(b) Presence of an error or illegality on the face of the record which would occasion a failure of Justice.

The legal principle with regard to (a) above is succinctly stated in *Camillus Ignatius* v *OIC Uhana & others*[8] where it was held that "the powers of the Court of Appeal are wide enough to embrace a case where an appeal lies but in such a case an application for revision should not be entertained save in exceptional circumstances." The above principle of law is also contained in the following case law authorities.

Eg.(1) *M.A. Sirisena* v *C.C. Richard Arsala & others (supra).*

(2) *H.S. Wattuhewa* v *S.B. Guruge*[9].

Therefore in processing this application of the petitioner, notwithstanding the fact whether the alternative remedy has been pursued or not, it is the duty of this Court to examine and verify as to the presence of such exceptional circumstances before opening the gateway for revision.

Existence of exceptional circumstances is the process by which the Court should select the cases in respect of which the extraordinary power of revision should be adopted. This practice has taken deep root in our law and got cemented into a rule of procedure when dealing with revision applications. The exceptional circumstances would vary from case to case and their degree of exceptionality must be correctly assessed and gauged by Court taking into consideration all antecedent circumstances using the yardstick whether a failure of justice would occur unless revisionary powers are invoked. Exceptional circumstances could broadly be categorized under three limbs as follows.

(a) Circumstances exceptional in fact bound to lead to a miscarriage of justice.

(b) Circumstances exceptional in law, such as an error or illegality on the face of the record bound to lead to a failure of Justice.

(c) Circumstances exceptional in both fact and law, which would be a mixture of both (a) and (b) above, having the same result.

In the light of the above findings and observations it is now pertinent to peruse the petition and written submissions of the petitioner in order to determine whether the petitioner has pleaded or established such exceptional circumstances. It is abundantly clear that the petitioner has not specifically or expressly pleaded such exceptional circumstances in the body of the petition other than the substantial questions of law referred to in paragraph 09 of the Petition in the format of an Appeal.

In *Biso Menika* v *Ranbanda & others*(10) and followed by *Urban Development Authority* v *Ceylon Entertainments Ltd. & another (supra)* the rigid rule was formulated that in order to justify the exercise of revisionary jurisdiction of the Court of Appeal on examination of either the petition or affidavit must reveal a specific plea as to the existence of special circumstances. If the above rigid test is to be applied in this case, then necessarily the application of the petitioner should be dismissed for want of a specific plea as to the presence of exceptional

circumstances. However, in *Dharmaratne and another* v *Palm Paradise Cabones Ltd. and others (supra)* the Supreme Court adopted a much less rigid approach in that it was held that the petitioner should plead or establish exceptional circumstances warranting the exercise of revisionary powers.

Therefore it is now open to this Court to ascertain from a perusal of the written submissions filed by the petitioner whether he has successfully established such exceptional circumstances. On a perusal of paragraph 05 B and C of the aforesaid written submissions it is explicit that the petitioner has based his argument as to the presence of exceptional circumstances on the bedrock of illegalities on the face of the record as enumerated in paragraph 05C of the aforesaid written submissions. The crux and thrust of the petitioners argument basically is that a verdict of guilty entered under section 185 of the Code of Criminal Procedure Act No. 15 of 1979, is a judgment or final order contemplated in section 320(1) of the above code against which an appeal lies, and a different interpretation given by the learned High Court Judge of Anuradhapura in her impugned order (P3) would amount to an illegality in law which constitute sufficient exceptional circumstances to enable the opening of the gateway to the revisionary remedy.

For the following reasons, this Court is not in a position to agree with the aforesaid contention of the petitioner.

(a) Section 185 of the Code states as follows:-

> "If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and record such sentence". It is abundantly clear that the finality of the order does not stop with the recording of a verdict of guilty but flows beyond that in the same natural transaction to the recording of a sentence, where then only, the entire process would come to a halt and reach finality.

Therefore the judgment or final order appealable under section 320(1) of the Code does not encompass an order of verdict of guilty as contemplated under section 185 of the Code.

(b) In paragraph 05 C (ii) of the written submissions, in interpreting section 279 of the Code, the petitioner is clearly attempting to mislead Court by suppressing the latter portion of the section

which is to his disadvantage. Section 279 reads "The judgment in every trial under this Code shall be pronounced in open Court after the verdict is recorded or save as provided in section 203 at some subsequent time ..... . Therefore the petitioner's claim that the fact that the judgment was not pronounced on the day the verdict was recorded in the Magistrate's Court of Thambuttegama was an illegality is clearly unfounded and is a figment of his imagination. On the contrary, the wording of section 27 clearly stipulates that in a case of conviction, the judgment comprises of the verdict and sentence. Hence the appealable final order or judgment contemplated in section 320(1) would necessarily be after the passing of sentence.

(c) Though the petitioner has argued that the learned Magistrate has taken 19 days to pass sentence in contravention of section 203 of the Code, section 203 relates to passing of judgment in High Court trials and has no relevance at all to the matter in hand which relates to a trial in the Magistrate's Court. The conduct of the petitioner in making irrelevant and misleading submissions should accrue to his disadvantage.

(d) On a corollary of the above findings it is abundantly clear that the word "judgment" contemplated in section 320(1) of the Code against which an appeal lies, consists of the verdict and sentence to make it a final order. This view has been also expressed in *U. Tilakaratne* v *OIC, Kekirawa.*(11)

(e) The petitioner submitted *Forest* v *Leefe*(12) in support of his argument that the verdict of guilty constituted a final judgment which was appealable under section 320(1) of the Code. In the above case the learned Magistrate has made an order absolute under section 109 of the then Code of Criminal procedure in order to abate a Public Nuisance. This Order was considered a final judgment against which an appeal would lie. This case could be distinguished from the matter in hand where a verdict of guilty will not reach finality until the sentence is passed. Hence the petitioner's argument in this respect is rejected.

Due to the aforesaid findings, this Court has no alternative but to conclude that the petitioner has miserably failed to substantiate presence of exceptional circumstances by way of illegality or error on the face of the record, and accordingly his plea for invoking of discretionary revisionary powers of this Court must necessarily fail.

As the first preliminary objection of the respondent should succeed in view of the above findings, it is purely academic to discuss the 2nd preliminary objection as to the question of delay. Suffice it to say that the impugned order (P3) is dated 16.03.2006 while the petition has been filed on 24.07.2006, entailing an unexplained delay of 04 months and 8 days. In the absence of an explanation to the contrary this delay could be considered unreasonable. The ill-health of the instructing Attorney, as pronounced from the Bar Table, may not be considered a satisfactory explanation as the same Counsel who appeared in this Court for the petitioner had also defended his rights in the High Court of Anuradhapura.

Therefore, taking into consideration the entirety of the submissions adduced by both parties, this Court upholds the preliminary objection raised by the respondents, and for several other reasons set out in this judgment, conclude that this is not a fit and proper case to invoke the discretionary revisionary powers of this Court. Accordingly we dismiss the application of the petitioner. In all the circumstances of this case, we make no order as to costs.

IMAM, J. – I agree.

Application dismissed.

LIGHT WEIGHT BODY ARMOUR LTD.
v
SRI LANKA ARMY

SUPREME COURT
TILAKAWARDANE, J.
DISSANAYAKE, J.
SOMAWANSA, J.
SC (HCA) 27A/2006
SCHCLA 69/2005
HC COLOMBO 125/4
OCTOBER 27, 2006
NOVEMBER1, 27, 2006

Arbitration Act – 11 of 1995 – Section 25, Section 26, Section 31, Section 32(1) – Award – Grounds of Challenge? – Award against public policy? Is it a ground? – 1958 New York convention.

A dispute in relation to the payment of a certain sum of money by the respondent to the claimant-appellant was referred for arbitration. The matter

contested at the arbitration focused on the quality of the body armour supplied by the claimant-appellant, as to whether it met the specification as set out in the tender documents.

The award was in favour of the claimant appellant. The respondent preferred an application under section 32(1) of the Arbitration Act seeking to set aside the award to the High Court. The High Court set aside the award.

In appeal, in the Supreme Court, it was contended by the appellant, that there was a valid award in terms of section 25(2) and that the award was not against public policy and merits or findings of the award could not be challenged.

Held:

(1) Section 32 contains the sole grounds upon which an award may be challenged or set aside Courts have no jurisdiction to correct patent and glaring error of law in an award unless the error can be established to be a jurisdictional error or can be shown to be of such a nature as to render the award contrary to public policy.

The Arbitration Act – contemplates that the award is not susceptible and not vulnerable to any challenge except that permitted under the Act. This is on the basis that it is conclusive as a judgment between the two parties and could only be set aside on the grounds explicitly set out in section 32.

Per Shiranee Tilakawardane, J.

"In exercising jurisdiction under section 32 Court cannot sit in appeal over the conclusions of the Arbitral Tribunal by scrutinizing and reappreciating the evidence considered by the Arbitral Tribunal. The Court cannot re-examine the mental process of the Arbitration Tribunal contemplated in its findings nor can it revisit the reasonableness of the deductions given by the arbitrator – since the arbitral tribunal is the sole judge of the quantity and quality of the mass of evidence led before it by the parties – the only issue that needs consideration is whether the purported fundamental flaws of the award in question would tantamount to a violation of public policy."

(2) The doctrine of public policy is somewhat open ended and flexible capable of wide and expansive definition, it is this flexibility leading at times, to inconsistency and unpredictably in application, which has led to judicial censure of the doctrine and earned it the reputation as one of the more controversial exceptions to the enforcement of arbitral awards.

Per Shiranee Tilakawardane, J.

"Public policy is generally those moral social or economic considerations which are applied by courts as grounds for refusing enforcement of the arbitral award, another view would equate public policy with the policy of law, whatever leads to the obstruction of justice or violation of a statue or is against the good morals of a society can be deemed as being against public policy and therefore not susceptible to enforcement, further instances such as corruption, bribery and fraud

and similar serious cases would constitute a ground for setting aside an award."

(3) It is generally understood that the term public policy which was used in 1958 New York Convention and many other treaties covered fundamental principles of law and justice in substantive as well as procedural aspects.

The arbitral award is not in violation of the public policy of Sri Lanka.

APPEAL from a judgment of the Colombo High Court.

Cases referred to:

1. *Richardson* v *Melis* – 1824 Bing 228
2. *D.S.T.* v *Rakoil.*
3. *Deutche Schachtbau – und Triefbohrgesellscraft mbh* v *Ras Al kaimah National Oil Company* 1987 – Lloyds Rep. 246.

Aravinda Rodrigo for claimant respondent-petitioner.
Sanjay Rajaratnam DSG with *Viraj Dayaratne* SSC for respondent-petitioner-respondent.

May 23, 2007

SHIRANEE TILAKAWARDANE, J.

The notice of arbitration dated 17th August 2000 (X7) referred a dispute that had arisen between Light Weight Body Armour Ltd. the Claimant-Respondent-Petitioner and the Sri Lanka Army, the Respondent-Petitioner-Respondent relating to the payment of US$ 549,240/- being the balance sum due for the supply of body Armour by the Claimant-Respondent-Petitioner to the Sri Lanka Army.

The matters contested at the arbitration focused on the quality of the body Armour supplied by the claimant – as to whether it met the specifications set out in the tender documents and whether the requirements as to ballistic suitability had been met in terms of the Agreement.

At the hearing, parties led the evidence of several witnesses and produced several documents. The unanimous decision of the 3 Arbitrators was delivered on 7th 2004, in favour of the claimant-respondent-petitioner (P8). In terms of this Award the petitioner was awarded a sum of US$ 549,240/- together with legal interest thereon (at the rate applicable on the date of the Award) from 1.6.1999 till 19.3.2001 and from 19.3.2001 on the said sum of US$ 549,240/- till 7.7.2004 and from 7.7.2004 with further legal interest at the same rate on the aggregate amount of the Award and costs in a sum of Rs. 250,000/- payable to the claimant by the respondent.

The respondent did not comply with the Award. The respondent thereupon preferred an application in terms of section 32(1) of the Arbitration Act No. 11 of 1995 seeking to set aside the Award dated 7th July 2004. After hearing both parties, the High Court Judge Colombo, in his judgment dated 21.09.2005 set aside the aforesaid Arbitral Award (X19). The said judgment incisively considered the merits of the case and the evaluation of the facts pertaining to all the issues canvassed during the Arbitration, including matters pertaining to the burden of proof on the litigating parties and the ballistic suitability of the body Armour.

On 25.04.06 Leave to Appeal was granted against the said High Court Judgment on the questions of law set out in paragraphs 22(a) to (e) of the petition.

The only two matters urged by the petitioners and the respondents during the hearing of this case and in the written submissions were confined to-

3. Whether it was a "valid Award" in terms of section 25(2) of the Arbitration Act in as much as the determination that had been made with regard to the ballistic capability, was wrong only because it was "abrupt", meaning that such could not have been reached logically and inferring thereby that it was a perverse determination.

4. Whether the Award was against public policy?

Counsel for the respondent-petitioner-respondent has submitted that the Award is analogous to an Award that had no reasons and therefore was in contravention of the statutory form and content of an Award as set out in section25(2) of the Arbitration Act. According to the respondent-petitioner-respondent, the award was fundamentally flawed as it had not dealt adequately with the question of "ballistic capability" and did not contain "valid reasons" for the findings contained therein and it contained internal contradictions on the question of misrepresentation.

The claimant-respondent-petitioners contended that the Arbitral Award was not against public policy and that the merits or findings of the Award could not be challenged as the Award which ran into several pages had set out reasons, which logically led to the findings and

therefore the conclusions could not be challenged. The claimant-respondent-petitioner also submitted that the merits of an Arbitral Award could not be considered in an Appeal, which takes the pattern of a regular Appeal. It was contended that an Award could only be set aside in terms of the statutory provisions contained in section 32(1) of the Arbitration Act.

It was considered by all Counsel at the inception of the hearing that the only grounds on which an Award could be set aside were contained in section 32(1) of the Arbitration Act No. 11 of 1995. Indeed the application for setting aside the Award before the High Court was made only in terms of section 32(1) of the Arbitration Act. Parties also conceded that it was an immutable fact that section 26 of the Arbitration Act provides clearly that an Arbitral Award is final and binding on the parties to the Arbitration Agreement.

Section 32 of the Arbitration Act sets out the grounds upon which an application could be made to the High Court by a party to the arbitration seeking to set aside an arbitral Award section 32(1) stipulates that -

"*An Arbitral Award made in an Arbitration held in Sri Lanka may be set aside by the High Court, on application made therefore, within sixty days of the receipt of the Award –*

(a) Where the party making the application furnishes proof that –

(i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subject it or, failing any indication on that question under the law of Sri Lanka; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the Arbitral proceedings or was otherwise unable to present his case; or

(iii) the Award deals with a dispute not contemplated by or not falling within the terms of the submission to Arbitration, or contains decisions on matters beyond the scope of the submission to Arbitration.

Provided however that, if the decision on matters submitted to Arbitration can be separated from those not

so submitted, only that part of the Award which contains decisions on matters not submitted to Arbitration may be set aside; or

(iv) the composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act; or

(b) Where the High Court finds that –

(i) the subject matter of the dispute is not capable of settlement by Arbitration under the law of Sri Lanka; or

(ii) The Arbitral Award is in conflict with the public policy of Sri Lanka."

On a bare reading of section 32(1), it is clear that the opening paragraph applies to both sub-paragraphs (a) and (b) of the section. The difference between the two sub-paragraphs (a) and (b) is that the former requires an applicant to furnish proof of four situations, whereas the latter permits the High Court to find *ex mero muto* on the facts pleaded, in order to determine whether an Award should be set aside on these grounds.

Section 32(1) contemplates that a party wishing to have an arbitral Award set aside must satisfy the Court that his allegations are true. The onus of proving grounds under section 32(1)(a) rests solely on the party who makes the application to set aside the Award.

On the other hand, section 32(1)(b) permits the High Court to come to a finding as to whether the subject matter of the dispute is incapable of being settled under Sri Lankan law or whether the Award is in conflict with public policy of Sri Lanka – such consideration only confined to the pleadings placed before it by an application made to Court within the stipulated time period. Though it does not require the party to furnish proof in order to have the Award set aside, it is imperative under section 32(1)(b) that there should be sufficient material in the application for the High Court to come to a finding or determination that the Award should be set aside on the ground set out in that section.

It is important to remember that when parties choose Arbitration as a means of dispute settlement, they do so to the exclusion of all other forms of settlement. Parties who wish to take advantage of the opportunity to decide and resolve the important issues relating to the dispute by themselves are aware that the Award is final and binding between the parties as provided under section 26 of the Arbitration Act. The only exception to this rule is provided in the ground enumerated in Part VII of the Arbitration Act. Section 32 of the Act contains the grounds and the time period within which an Arbitral Award may be challenged.

Considering the respondent-petitioner-respondent's challenge that the award is fundamentally flawed and liable to be set aside based on the alleged flaws in the arbitrators approach to the question of fraud and innocent misrepresentation, and the proof thereof, I find this contention to be untenable in law,since error of law on the face of the record is not a valid ground of challenge of an arbitral award under section 32 of the arbitration Act. As section 32 contains the sole grounds upon which an Award may be challenged or set aside, courts have no jurisdiction to correct patent and glaring errors of law in an Award unless the error can be established to be a jurisdictional error or can be shown to be of such a nature as to render the Award contrary to public policy.

In India prior to enactment of the Indian Arbitration Act of 1996 an error of law apparent on the face of the record was recognized as a valid ground upon which an arbitral Award could be challenged. Earlier the position under the Act of 1940 was that an arbitral Award is susceptible to challenge if an erroneous proposition of law is stated as a basis of the Award. With the enactment of the Arbitration Act in 1996 the present Indian position is similar to that of Sri Lanka and the grounds of challenges are restricted to those specified in section 34 of the Indian Arbitration Act.

Arbitration is an alternate means of dispute resolution which has been introduced and developed in order to reduce the amount of time spent in litigation. In this light, the Arbitration Act contemplates that the arbitral Award is not susceptible and not vulnerable to any challenge except that permitted under the Act. This is on the basis that it is conclusive as a judgment between the two parties and could only be set aside the grounds explicitly set out in section 32 of the Act. The

onus of proving that if fell within the ambit of the said provision lies on the party making such an application. The legislative intend behind the Act is clearly that a degree of finality attaches to the decision of the Arbitral Tribunal, which is the Judge of both, questions of fact and law referred to it.

Thus in exercising jurisdiction under section 32 of the Act, the Court cannot sit in appeal over the conclusions of the arbitral Tribunal by re-scrutinizing and re-appraising the evidence considered by the arbitral Tribunal. A plain reading of section 32 precludes judicial demolition of an Award on the facts elicited therein. The Court cannot re-examine the mental process of the Arbitral Tribunal contemplated in its findings, nor can it revisit the "reasonableness" of the deductions given by the arbitrator, since the Arbitral Tribunal is the sole judge of the quantity and quality of the mass of evidence led before it by the parties.

Therefore in light of section 32, the contention of the respondent-petitioner-respondent that the Award should be set aside on the basis that it is fundamentally flawed on fact and law is of no merit. The only issue that needs consideration is whether the purported fundamental flaws of the award in question would amount to a violation of public policy in Sri Lanka.

In their written submissions, the respondent-petitioner-respondents focused on section 32 of the Arbitration Act, and contended that since the award was fundamentally flawed, an ordinary, reasonable and fully informed member of the public would find it offence that the Award was to be enforced by a Court of law. In support of this position, it was also suggested by the respondent-petitioner-respondent that the concept of public policy should be expanded beyond that of illegality and immorality.

The doctrine of public policy is somewhat open ended and flexible, capable of wide and expansive definition. It is this flexibility leading at times, to inconsistency and unpredictability in application, which has led to judicial censure of the doctrine and earned it the reputation as one of the more controversial exceptions to the enforcement of Arbitral awards. In *Richardson* v *Mellis*[1], the Court succinctly observed that public policy is "....a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all but when other points fail. The Court in *D.S.T.* v

Rakoil,[2] *Deutsche Schachtbau-und Tiefbohrgesellscraft mbh* v *Ras Al Kaimah National Oil Company*,[3] state that "considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution .... It has to be shown that there is some element of illegality or that the enforcement of the award, would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary responsible and fully informed members of the public on whose behalf of the powers of the state are exercised."

The concept of public policy is not immutable. Rules which rest on the foundation of public policy, not being rules of fixed customary law, are capable on proper occasion of expansion or modification depending on the circumstances. Public policy is generally those moral, social or economic considerations which are applied by Courts as grounds for refusing enforcement of an arbitral Award. The House of Lords in 1853 described the public policy as "that principle of law which holds that no subject can lawfully do that which has the tendency to be injurious to the public or against public good."

Another view would equate public policy with the "policy of law". Whatever leads to the obstruction of justice or violation of a statute or is against the good morals of a society can be deemed as being against public policy and therefore not susceptible to enforcement. (Vide, Dr. B.P. Saraf, J.&S.M. Jhunjhunuwala, J., on The Law of Arbitration and Conciliation at page 361).

It is generally understood that the term public policy which was used in 1958 New York Convention and many other treaties covered fundamental principles of law and justice in substantive as well as procedural aspects. Thus instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside. However, the facts of this case do not bear out any such incident of illegality, fraud or corruption in order to validate a challenge on the ground of public policy.

It is also important that a Court considering a challenge on the basis of public policy bear in mind the possibility of the misuse of this doctrine by a defendant in order to avoid the consequences of the arbitral award. Certainly the uncertainty and inconsistencies concerning the interpretation and application of public policy could encourage the

losing party to rely on the doctrine of public policy to resist, or at the very least delay enforcement of the arbitral award. Therefore the Court must also bear in mind the very legitimate concern that it may afford an unsuccessful defendant and/or the state a second 'bite' at frustrating enforcement.

In this case clearly the decision had been taken on the basis of the facts that were on record. Therefore the inadequacy, inadmissibility or impropriety of the evidence, particularly when both parties were represented, had the full opportunity to argue and present their respective cases and adduce any evidence they pleased, cannot be canvassed before the enforcing Court. In light of the evidence on record and the submissions of the parties, I find that the arbitral award is not in violation of the public policy of Sri Lanka.

Having considered the merits of the contentions raised by the parties in their legal context, I find that the Arbitral Award is not open to challenge on the ground that the arbitral Tribunal has reached a wrong or erroneous conclusion on the ballistic capability of the Armour, or has failed to appreciate or conclude on the findings. The parties have constituted the tribunal as the sole and final judge on the facts concerning their dispute and bind themselves as a rule to accept the Arbitral award as final and conclusive. The Arbitral Tribunal is the sole judge of the quality as well as the quantity of evidence and it is not open for the court to take upon itself the task of being a judge of the evidence before the tribunal. It is not open to the Court, in terms of the Arbitration Act to probe the mental process of the decision contained in the Award and to even speculate or query the reasoning that impelled the decision. Therefore an Award is not as a rule vulnerable to challenge except to the process and ambit contained in section 31 of the Act.

In these circumstances we see no merit in the arguments of the respondent-petitioner-respondent and find that the learned High Court Judge erred in deciding to set aside the award of the Arbitrators. The Judgment of the High Court is set aside. The appeal of the claimant-respondent-petitioner is allowed. No costs.

DISSANAYAKE, J. - I agree.

SOMAWANSA, J. - I agree.

Appeal allowed.