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[2008] 2 SRI L.R. – PARTS 3 & 4

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DIGEST

Considering the physical harm suffered by a petitioner, due to torture and/or to cruel, inhuman treatment, it would not be an easy task for the Court to decide and conclude as to what actions and conducts would constitute torture or cruel, inhuman treatment. A similar difficulty would arise when considering degrading treatment, especially when there is no physical harm encountered by the victim such as in *Kumarasena* v *Sub-Inspector Sriyantha and others*(3). Accordingly, it has to be borne in mind that, torture, cruel, inhuman and degrading treatment or punishment could take many forms, viz., psychological and/or physical and the circumstances of each case would have to be carefully considered to decide whether the act/s in question had led to a violation of Article 11 of the Constitution. Our courts have not found it easy to decide whether the force used is in violation of Article 11. In *Wijayasiriwardene* v *Kumara, Inspector of Police, Kandy and two others*,(4) considering this aspect Mark Fernando, J., referred to the statement made by Blackburn, J., in *Hobbs* v *London and South Western Railway Co.*(5), where it was stated that,

> *"It is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day;...."*

It would have been correct to describe the difficulty in drawing the distinction and deciding whether an incident in question would have amounted to torture, at the time relevant to the decision in *Wijayasiriwardene (supra).* However, this position has changed since the enactment of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, on the basis of the UN Convention on Torture. Section 12 of the said Act defines 'torture' and reads as follows:

> *"torture" with its grammatical variation and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act which is –*
>
> *(a) done for any of the following purposes that is to say –*
>
> *(i) obtaining from such other person or a third person, any information or confession; or*

(ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or

(iii) intimidating or co-ercing such other person or a third person; or

(b) done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity".

Accordingly, when the allegations are considered in the light of Section 12 of the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, along with the available medical evidence, it would not be difficult to ascertain whether the act complained of was 'qualitatively of a specially reprehensible kind'.

In the circumstances, on a consideration of the totality of the facts and circumstances in this matter and the conclusion and opinion of the Assistant Judicial Medical Officer of the Teaching Hospital, Kalubowila, it is quite clear that the petitioner's fundamental right guaranteed in terms of Article 11 of the Constitution had been infringed by executive action.

Alleged violation of Article 13(1) of the Constitution

The petitioner's complaint deals with his arrest and the learned President's Counsel for the petitioner submitted that the petitioner had been arrested without any substantial evidence incriminating the petitioner regarding the robbery at the 6th respondent's residence. Article 13(1) of the Constitution deals with freedom from arbitrary arrest, detention and punishment and reads as follows:

"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

Section 32(1)b of the Code of Criminal Procedure Act, specifies the established procedure for arrest and reads thus:

"Any peace officer may without an order from a Magistrate and without a warrant arrest any person –

(a) who in his presence commits any breach of the peace;

(b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exist of his having been so concerned."

The 1st respondent had admitted that he was deployed to investigate into the robbery of the 6th respondent's residence and was stationed at the Special Crimes Unit of the Panadura, Walana Police Station. According to the 1st respondent, the 6th respondent had made a complaint on 28.02.2003 regarding a robbery at his residence of valuables amounting to approximately Rs. 456,000/-. His position was that he had received information, in the course of his investigations about the involvement of the 5th respondent and another employee of the 6th respondent, known as one Samson Kulatunga. He had thereafter received information from his private informant that the 5th respondent had left the employment of the 6th respondent shortly after the robbery and was residing at Hatton. The 1st respondent averred that he had questioned the 5th respondent and that the 5th respondent had revealed that the petitioner had befriended him and that the petitioner had sought his assistance to burgle the 6th respondent's residence as he was familiar with the 6th resident's residence. In return for the information and assistance, the petitioner had promised to pay the 5th respondent a sum of Rs. 50,000/-.According to the 1st respondent, the 5th respondent had not taken part in the robbery, although he was aware that the 6th respondent's residence was burgled in the night of 27.02.2003 and that the petitioner was responsible for the said act. Later on 06.03.2003, the 1st respondent had taken 2nd and the 3rd respondents along with the 5th respondent to the petitioner's residence in a van driven by a civilian driver and there the 5th respondent had identified the petitioner as the person, who had broken into the residence of the 6th respondent.

Except for his averments, the 1st respondent however, had not submitted any material to substantiate the aforementioned position. The 5th respondent on the contrary had submitted that he did not know the petitioner personally and that he had never had any

dealings whatsoever with the petitioner. Moreover the 5th respondent had stated that he was subjected to torture, while he was under interrogation. Under these circumstances, would it be possible to accept the contention of the 1st respondent that he had received credible information or that there existed a reasonable suspicion against the petitioner or there had been any reasonable complaints against the petitioner? Considering all the circumstances of this matter my answers to all these questions are in the negative. It is also to be noted that, as submitted by the learned President's Counsel for the petitioner, the petitioner was discharged from the proceedings in the Magistrate Court, Panadura as there was no evidence whatsoever against him (P9-Pg.4).

Considering all the circumstances, could it be said that the 1st respondent had arrested the petitioner according to the procedure established by law? There was no material produced before this Court to show that there had been any complaint against the petitioner or that there had been credible information or a reasonable suspicion that had existed against the petitioner. In the circumstances, it is apparent that the arrest of the petitioner was unlawful and not according to the procedure established by law. For the reasons aforesaid I hold that the petitioner's fundamental rights guaranteed by Articles 11 and 13(1) of the Constitution had been violated by the 1st to 3rd respondents.

I accordingly hold that the petitioner is entitled to a sum of Rs.100,000/- as compensation and costs payable by the Sate. I direct the 1st to 3rd respondents to pay Rs. 15,000/- each, personally as compensation. In all, the petitioner will be entitled to a sum of Rs. 145,000/- as compensation and costs. This Amount must be paid within three (3) months from today.

The Registrar of the Supreme Court is directed to send a copy of this judgment to the Inspector General of Police.

RAJA FERNANDO, J. – I agree.

SOMAWANSA, J. – I agree

Preliminary objection on time bar overruled.
Application allowed.
Compensation ordered.

SAMUEL GNANAM AND OTHERS
v
ISMAIL LEBBE

SUPREME COURT
JAYASINGHE, J.
DISSANAYAKE, J. AND
MARSOOF, J.
S.C. APPEAL NO. 9/2006
S.C. SPECIAL L.A. NO. 246/2005
C.A. NO. 950/94(F)
D.C. COLOMBO NO. 95342/MR
APRIL 26TH, 2006

Prevention of Frauds Ordinance – Interpretation of Section 18 – Partnership action – Manner in which partnership actions may be instituted in Sri Lanka.

The only question that emerged for determination in the Supreme Court was whether the action filed by some, but not all the partners of a partnership business can be had and maintained for the recovery of certain sums of money alleged to be due with regard to goods supplied in terms of a Distributor Agreement to which not all of the partners were signatories, despite the failure to produce the Partnership Agreement in evidence.

The Supreme Court granted special leave to appeal on the following two questions of law -

(a) Is the judgment of the Court of Appeal in respect of issue No. 7 in that whether in view of the Section 18 of the Prevention of Frauds Ordinance, the appellants can have and maintain the present action without tendering in evidence the written Partnership Agreement?

(b) Did the Court of Appeal fail to apply properly Section18 of the Prevention of Frauds Ordinance, in the circumstances of this case?

Held:

(1) The term 'capital' as used in Section 18 of the Prevention of Frauds Ordinance should be construed to mean the initial capital and not the fluctuating capital of a partnership at any given point of time.

The *onus* of establishing the amount of the initial capital lies on the party raising a plea based on Section 18 of the Prevention of Frauds Ordinance.

Per Saleem Marsoof, J.–

> "The learned District Judge was perfectly correct when he answered Issue No. 7 with the words: "The Agreement is lawful.' It is patent that the Court of Appeal erred in assuming that the initial capital of the partnership in question exceeded one thousand rupees in the absence of any admission, or evidence to establish that fact, and failed to properly apply Section 18 of the Prevention of Frauds Ordinance in the circumstances of this case."

(2) Every partner is an agent of the firm and also for his other partners for the purpose of the business of the partnership, and the partners may sue on a contract entered into by one or more of the partners in the course of the partnership business.Though a partnership, unlike a company is not a distinct legal entity, the partners are entitled to sue third parties with whom any one or more partners had entered into a contract in the course of the partnership business.

Per Saleem Marsoof, J.–

> "..... the circumstances that this action had not been instituted by all the partners of the partnership firm does not affect the maintainability of the action, and no question of non-joinder or mis-joinder could arise – Objection of a technical nature such as non-joinder or mis-joinder of parties, are by their very nature best be taken up by way of motion prior to the commencement of the trial and should ideally not be raised as substantive issue at the trial."

Cases referred:

(1) *Pate* v *Pate*, 18 NLR 289.
(2) *Abeygunesekera* v *Mendis* 18 NLR 449.
(3) *Rajaratnam* v *Commissioner of Stamps* 39 NLR 481.
(4) *Idroos* v *Sheriff* 27 NLR 231,
(5) *Sivakumaran* v *Rajasekeram* 61 NLR 556.
(6) *Silva* v *Silva*, 5 C.W.R. 13.
(7) *Silva* v *Fernando*, 24 NLR 191.
(8) *Sinno* v *Punchihamy* 19 NLR 43
(9) *De Silva* v *De Silva* 37 NLR 276..
(10) *Aralias* v *Francis* 52 NLR 75.
(11) *Adlin Fernando and another* v. *Lionel Fernando and others* (1995) 2 SLR 25 at 27.

APPEAL from the judgment of the Court of Appeal.

Palitha Kumarasinghe, P.C. with *Nuwan Rupasinghe* for the plaintiff-respondents-appellants.

Jacob Joseph with *U.A. Mawjooth* for the defendant-appellant-respondent.

Cur.adv.vult

February 27, 2008

SALEEM MARSOOF, J.

The only question that arises for determination in this appeal is whether an action filed by some but not all, of the partners of a firm, for the recovery of certain sums of money alleged to be due with respect to goods supplied in terms of a Distributorship Agreement to which not all of them were signatories, can be had and maintained despite the failure to produce the relevant Partnership Agreement in evidence.

The plaintiff-respondents-appellants (hereinafter collectively referred to as the 'appellants') are admittedly partners carrying on business under the firm name of 'St. Anthony's Industries Group' which is a well-known manufacturer and supplier of PVC pipes, bolts & Nuts and other hardware items. The 1st, 2nd and 3rd plaintiffs-respondents-appellants, namely, Arulanandam Yosuvadian Samuel Gnanam, Arul Selvaraj Gunaseelam Gnanam and Rajaseelam Gnanam, are members of the famous 'Gnanam family' and the 4th plaintiff-respondent-appellant is the St. Anthony's Consolidated Ltd., which is a limited liability company incorporated under the now repealed Companies Act No. 17 of 1982 and having its principal place of business in Colombo. On 19th April 1983 the 1st, 2nd and 4th plaintiffs-respondents-appellants entered into a Distributorship Agreement ('P2'), a copy of which was produced with the plaint marked 'A', with the defendant-appellant-respondent, (hereinafter referred to as the 'respondent') who carried on business under the name, style and firm of 'Lanka Hardware Stores'. By the said Agreement, the said appellants agreed to supply to the respondent certain hardware items intended to be sold to dealers in terms of 'sales targets' to be fixed by the said appellants from time to time. By clause 3 of the said agreement, the respondent agreed to make regular and prompt payments for all goods accepted by him within a certain number of days, depending upon the type of item supplied.

Action was instituted in the District Court of Colombo by the Appellants for the recovery of a sum of Rs. 231,120.70 which was alleged to be the balance sum due from the respondent for goods said to have been supplied under the said Distributorship

Agreement as set out in the Statement of Accounts produced in evidence marked 'P3'. It may be observed that although in the Distributorship Agreement the names of the signatories thereof have been filled in as 'partners', in the plaint filed in the District Court, the 1st, 2nd and 4th plaintiffs-respondents-appellants are described as persons "Carrying on business under the name, style and firm of St. Anthony's Industries Group" and there is no averment clarifying whether the appellants instituted action as joint sellers or as partners. In his answer, the respondent denied that he entered into any Agreement with the appellants or that any cause of action has been disclosed in the plaint against him. He particularly averred that the 3rd plaintiff-respondent-appellant was not a party to the said Distributorship Agreement and that the appellants cannot have and maintain the action against him in view of mis-joinder of parties.

When the case was taken up for hearing in the District Court on 21st January 1993, it was admitted on behalf of the respondent that he signed the aforesaid Distributorship Agreement. Six issues were raised at the commencement of the trial, three by either party, and it appears from the issues raised on behalf of the respondent that his main defence was that the action cannot be had and maintained insofar as the 3rd plaintiff-respondent-appellant was not a party to the said Distributorship Agreement (issue 4) and the 4th plaintiff-respondent-appellant company was not duly incorporated (issue 5). The issues raised on behalf of the respondent are set out below:-

"4. පැමිණිල්ලේ කොටසක් ලෙස 'ඒ' ලෙස ලතුණු කොට ඇති ලියවිල්ලේ 3 වන පැමිණිලිකරු පාර්ශවකරුවෙකු වූයේ ද?

5. පැමිණිලි පත්‍රයේ 3 වන ඡේදයේ සඳහන් කොට ඇති ආකාරයට 4 වන පැමිණිලිකරු නිසි ලෙස සංස්ථාපනය කරන ලද සමාගමක් ද?

6. විත්තියේ ඉහත කී විසඳිය යුතු ප්‍රශ්න 4,5 විසඳිය යුතු ප්‍රශ්නවලට පිළිතුරු විත්තියේ වාසියට ලැබෙන්නේ නම් පැමිණිලිකරුට මෙම නඩුව පවරා පවත්වාගෙන යා හැකිද?"

Only one witness, namely Neelamani Deepthi Ponnamperuma, Credit Controller of St. Anthony's Industries Group, was called to give evidence on behalf of the Appellants. In her testimony she disclosed that the action has been instituted by the partners of a

firm carrying on business under the style, firm and name of "St. Anthony's Industries Group" and that at the time of the execution of the Distributorship Agreement in question the said partnership consisted of 5 partners whose names appear in the Certificate of Business Name produced by her marked 'P1'. Under cross-examination she admitted that although there were five partners at the relevant time, the said Agreement was signed only by 3 partners, and that the action has been instituted by 4 partners of whom one was not a signatory to the Distributorship Agreement. The learned Counsel for the respondent thereupon questioned the witness as to whether she was producing a copy of the relevant Partnership Agreement, and when she answered in the negative, he moved to raise the following issue which was duly accepted by Court without any objection from the learned Counsel for the appellants :-

"7. වංචා වැලැක්වීමේ පනත යටතේ හවුල්කරුවන්ගේ ගිවිස්නාව මෙම පැමිණිල්ල මගින් ඉදිරිපත් නොකොට මෙම පැමිණිල්ල පවරා පවත්වාගෙන යා හැකිද?"

The said issue has raised the question whether in view of Section 18 of the Prevention of Frauds Ordinance, Cap. 70 of the Revised Legislative Enactments of Ceylon (Official 1956 Edition), the Appellants can have and maintain this action without tendering in evidence the written Partnership Agreement.

After the appellants' case was closed, the respondent gave evidence and stated that although it is alleged in the plaint that he had entered into the Distributorship Agreement with the four appellants, he had in fact entered into the said Agreement only with three persons, namely the 1st, 2nd, and 4th plaintiffs-respondents-appellants. The essence of his case was that there was no cause of action on which the four persons named in the plaint could have sued him.

The District Court went onto deliver judgment in favour of the appellants as prayed for in the plaint answering all issues in their favour. The respondent appealed against the said judgment to the Court of Appeal, which by its judgment dated 29th September 2005 rejected the submissions made on his behalf in regard to issues 1 to 6, but held that the learned District Judge erred in answering

issue No. 7 in favour of the appellants. W.L.R. Silva,J. (with Chandra Ekanayake, J. concurring) observed as follows:-

> "In this case it is not the defendant-appellant who is seeking to establish a partnership. The plaintiffs-respondents who entered into the Agreement (P2) with the defendant-appellant *on the basis of a partnership* must prove that there was a valid partnership existing at the time the contract was entered into .... The learned District Judge has answered issue No. 7 in an awkward manner. His answer to the issue is: "The Agreement is lawful". This answer is certainly erroneous. It is not responsive to the issue raised. It is out of context and is not relevant. The lapse on the part of the plaintiff-respondents [present appellants] becomes more significant as the 3rd plaintiff-respondent [appellant] was not a party to the Agreement and not a juristic person either. The 3rd plaintiff-respondent [appellant] could have come to the case as one of the plaintiffs, only if the action was filed *on the basis of a partnership* .... For these reasons I am firmly of the view that the learned Judge should have answered issue No. 7 in the negative in favour of the appellant". (Square brackets and Italics are mine).

The 3rd plaintiff-respondent-appellant, who was not a party to the Distributorship Agreement, was Rajaseelan Gnanam, very much a natural person and a member of the Gnanam family, and W.L.R. Silva, J. in the above quoted passage was confusing the question whether the said appellant not being a signatory to the Distributorship Agreement can sue on that Agreement, with issue No. 5 raised in the original court as to whether St. Anthony's Consolidated Ltd., which was the 4th plaintiff-respondent-appellant, was duly incorporated. The latter issue had been considered by the learned District Judge to be irrelevant, and no submissions appear to have been made in that regard in the Court of Appeal. In fact, the Court of Appeal has held with the appellants on all matters raised before it except for Issue No. 7 raised on behalf of the respondent in the original court. This Court has granted special leave to appeal only on the following substantial questions of law:-

1. Is the said judgment of their Lordships of the Court of Appeal in respect of Issue No. 7 contrary to law?

2. Did the Lordships of the Court of Appeal fail to properly apply Section 18 of the Prevention of Frauds Ordinance, in the circumstances of this case?

The learned President's Counsel for the appellants submits that the decision of the Court of Appeal was based on an erroneous interpretation of Section 18 of the Prevention of Frauds Ordinance which provides as follows:-

> **"No promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorized by him or her, shall be of force or avail in law for any of the following purposes:-**
>
> **(a) for charging any person with the debt, default, or miscarriage of another;**
>
> **(b) for pledging movable property, unless the same shall have been actually delivered to the person to whom it is alleged to have been pledged;**
>
> **(c) for *establishing a partnership where the capital exceeds one thousand rupees*: Provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons or to exclude parol testimony concerning transactions by or the settlement of any account between partners."** (*Italics are mine*).

It is contended by the learned President's Counsel for the appellants, that appellants filed this action in the District Court to recover the balance amount due as price for goods supplied under a sale of goods transaction, and that the said action was not filed for "*establishing a partnership.*" He submits that the Court of Appeal failed to properly consider the fact that the case was instituted on the basis of the Distributorship Agreement marked 'P2' in terms of Section 48 of the Sale of Goods Ordinance. He submits that this was a money recovery action and not a partnership action which would have entailed the establishment of a partnership.

The learned Counsel for the respondent, however, submits that this is not a simple money recovery action because the 3rd plaintiff-

Appellant-appellant was not a signatory to the Distributorship Agreement and stressed that he could have come into the case as an appellant only if the action has been instituted on the basis of a partnership. The learned Counsel for the respondent submitted that in terms of Section 18 of the Prevention of Frauds Ordinance, the appellants have to establish the existence of a partnership to obtain relief as prayed for in the plaint. He relied on the decision of the Privy Council in *Pate* v *Pate*(1) in which,it was observed by Lord Sumner at 291 that "it could hardly be doubted that "establishing" means "establishing by proof" *coram judice*". Therefore, he submitted, that the appellants cannot succeed without producing in evidence the relevant Partnership Agreement. He relied on the decision in *Abeygunesekera* v *Mendis*(2), in which the Supreme Court held that the admission in the answer of the existence of the partnership by a defendant does not prevent him from setting up by way of defence the Prevention of Frauds Ordinance, where the agreement is not in writing and the capital exceeds one thousand rupees. He also relied on the decisions in *Rajaratnam* v *Commissioner of Stamps*(3), *Idroos* v *Sheriff*(4) and *Sivakumaran* v *Rajasekeram*(5). In the latter case, the Privy Council held that in the absence of an agreement in writing as required by Section 18(c) of the Prevention of Frauds Ordinance, the action was not maintainable.

As against the above authorities, the learned Counsel for the appellants has cited the decisions in *Silva* v *Silva*(6) and *Silva* v *Fernando*(7) to show that partnership need not be established when partnership is only incidental to the case. He also placed reliance on the following passage from Dr. C.G. Weeramantry's monumental work "*The Law of Contract*" Vol. 1 page 210:-

> "Writing is required only in cases where the plaintiff seeks to establish a partnership so far as the defendant is concerned. Where therefore evidence of the fact of partnership is purely incidental to the claim and is sought to be laid as part. of the *res gestae*, there is nothing in the Ordinance which prevents such evidence being led although the partnership is not in writing. Where for example persons carrying on business in partnership sue their servant for the recovery of a sum of money due from him, or where action is brought to enforce a

trust in respect of land purchased in the name of one partner out of moneys belonging to the partnership it is not essential to the plaintiff's claim as against the defendant that a partnership be established. Evidence of the partnership is in such an instance only a part of the history of the case and will be permitted."

I am, however, inclined to agree with the submission of the learned Counsel for the respondent that evidence of the partnership is not merely a part of the *res gestae* and is an integral part of the cause of action sued upon. Although the plaint filed in this case does not disclose whether the cause of action pleaded therein is alleged to have arisen jointly, severally or jointly and severally, and the prayers to the plaint do not shed any light in regard to this matter, the 3rd plaintiff-respondent-appellant who is not a signatory to the Distributorship Agreement,could have come into the case with the other appellants only on the basis that he is a partner in the firm, and for this purpose it is necessary to "establish" a partnership. The proviso to Section 18 of the Prevention of Frauds Ordinance which expressly lays down that the requirement of Section 18 should not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, does not extend to a situation such as that arising in this case where partners or persons acting as such are seeking to sue a third party on the basis of the existence of a partnership. I am therefore of the view that the appellants cannot succeed without proving the partnership which is alleged to bind the appellants together.

Witness Neelamani Deepthi Ponnamperuma has testified before the original court to the effect that the 1st to 4th plaintiff-respondent-appellants, along with one other person, were carrying on business under the firm name 'St. Anthony's Industries Group' at the time the relevant Distributorship Agreement was signed with the respondent in 1983. While this testimony has not been contradicted by the respondent, the only objection raised to the maintainability of the action is the non-production of the written Partnership Agreement alleged to have been entered into by the said partners. It is this objection that has got crystallized as Issue No. 7. It has

been submitted on behalf of the respondent that in view of Section 18 of the Prevention of Frauds Ordinance, *parol* evidence of the existence of the partnership cannot be led, and that it is essential to produce in evidence the written Partnership Agreement, if any.

Learned President's Counsel for the appellants has strenuously argued that a written partnership agreement is required under Section 18 of the Prevention of Frauds Ordinance only where the *initial* capital of the partnership exceeded thousand rupees, and that the onus of proving that the capital exceeded this amount is on the party relying on this provision. For these propositions, he relies on the decisions of this court in *Sinno* v *Punchihamy*[8] and *De Silva* v *De Silva*[9]. In the first of these cases it was held that the term 'capital' refers to the initial capital and not to the amount that may stand as capital, after additions or withdrawals at any time during the course of business. This decision was followed in *Aralias* v *Francis*[10] where the defendant who pleaded Section 18 in defence had failed to produce cogent evidence that the initial capital of the partnership exceeded one thousand rupees. Gunasekara, J. in the process of setting aside the judgment of the lower court upholding the plea, observed as follows at 77:-

> ".... the language of the judgment suggests an assumption that the burden lay on the plaintiff to prove that the capital of the partnership was less than Rs. 1,000. Not only does the burden on this issue lie on the defendant but that burden is, in the language of Sir Thomas de Sampayo in *Sinno* v *Punchihamy (supra),* a heavy one and in the words of the same distinguished Judge, "the defendant, having admitted the partnership, the Court will exact from him the most strict proof of any facts on which he may rely as entitling him to take refuge under the Ordinance."

There can be no doubt that the term 'capital' as used in Section 18 should be construed to mean the initial capital and not the fluctuating capital of a partnership at any given point of time, and that the *onus* of establishing the amount of the initial capital lies on the party raising a plea based on Section 18 of the Prevention of Frauds Ordinance. In the instant case, there was no admission or

issue in regard to the amount of the initial capital of the partnership, and absolutely no evidence had been led in regard to the amounts that the partners had contributed as the initial capital. In the circumstances, the learned District Judge was perfectly right when he answered Issue No. 7 with the words: "The Agreement is lawful." It is patent that the Court of Appeal erred in assuming that the initial capital of the partnership in question exceeded one thousand rupees in the absence of any admission, or evidence to establish that fact, and failed to properly apply Section 18 of the Prevention of Frauds Ordinance in the circumstances of this case.

Before parting with this judgment, it is necessary to advert to two other matters which, though not strictly arising in this appeal, were taken up in the course of the submissions of learned Counsel. The first of these relates to the manner in which partnership actions may be instituted in Sri Lanka, and the second relates to the practice of technical objections such as mis-joinder and non-joinder of parties being taken up as issues for determination at a civil trial.

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the partners may sue on a contract entered into by one or more of the partners in the course of the partnership business. While a partnership, unlike a company, is not a distinct legal entity, the partners are entitled to sue third parties with whom any one or more partners had entered into a contract in the course of the partnership business. When instituting such action, all the partners have to be named in their proper names as plaintiffs. In England, Order 81 has simplified the procedure by permitting the action to be filed in the firm name. In Sri Lanka, in the absence of such a provision, the action has to be filed in the names of all the partners as plaintiffs. However, as pointed out by Lindley and Banks on "Partnership" 17th Edition, page 444, "a failure to join one or more of them will not itself be fatal." Therefore, the circumstance that this action had not been instituted by all the partners of the partnership firm does not affect the maintainability of the action, and no question of non-joinder or mis-joinder could arise. In terms of section 11 of the Civil Procedure Code, Cap 101 of the Revised Legislative Enactment of Ceylon (Official 1956 Edition), all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist,

whether jointly, severally, or in the alternative, in respect of the same cause of action, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to without any amendment of the plaint for that purpose. The question whether the cause of action upon which the appellants instituted this action was joint, several or joint and several has not been raised in appeal, and I therefore refrain from expressing my views on this aspect of the case.

Regarding the second matter, it is necessary to stress that as observed in *Adlin Fernando and another* v *Lionel Fernando and others* (11), objections of a technical nature such as non-joinder or mis-joinder of parties, are by their very nature best taken up by way of motion prior to the commencement of the trial and should ideally not be raised as substantive issues at the trial.

For the foregoing reasons, I make order setting aside the judgment of the Court of Appeal and affirming the judgment of the learned District Judge. I make no order as to costs in all the circumstances of this case.

JAYASINGHE, J. - I agree.

DISSANAYAKE, J. - I agree.

Appeal allowed.
Judgment of the District Court upheld.

RULE AGAINST
AN ATTORNEY-AT-LAW

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, J.
AMARATUNGA, J. AND
SOMAWANSA, J.
S.C. RULE NO. 12/2004 (D)
FEBRUARY 28TH, 2008
APRIL 04TH, 2008

Judicature Act – Section 42(2) – Acts of deceit and malpractice or other conduct unworthy of an Attorney-at-Law – Supreme Court Rules of 1998 – Rule 60 – Conduct of and etiquette for Attorney-at Law – Deceit – Malpractice– Crime – Offence?

The complainant, one S alleged that one M, Attorney-at-Law had passed away on 11.02.1988 and the respondent A had been using late M's name and seal fraudulently and since he had been carrying on his practice under late M's name, he is guilty of deceitful conduct.

The Supreme Court called for observations from A and as he failed to satisfactorily explain his conduct to the Supreme Court, a Rule was issued directing A to show cause why he should not be suspended from practice or be removed from the office of Attorney-at-Law of the Supreme Court for acts of deceit and malpractice he had committed in terms of Section 42(2) of the Judicature Act.

Held:

(1) Having a partnership would not fall within the category of deceitful practice in terms of Section 42(2) of the Judicature Act.

(2) As the respondent failed to establish that there had been a partnership between the late M and the respondent, the conduct of the respondent in placing the signature and using the rubber stamp of a deceased Attorney-at-Law would constitute deceitful conduct and malpractice within the meaning of Section 42(2) of the Judicature Act.

Per Dr. Shirani Bandaranayake, J –

"In a situation, where there was no established partnership, the respondent had taken steps to file proxies, place the seal and sign

documents as M which has the effect of misleading not only the general public, but ... also the Courts."

(3) The action taken by the respondent not only amounts to professional misconduct, but also conduct which is dishonourable and unworthy of an Attorney-at-Law.

Cases referred to:

1. *Dhammika Chandratilake* v *Susantha Mahes Moonasinghe* (1992) 2 Sri LR 303.
2. *In Re Arthenayake* (1987) 1 Sri LR 314.
3. *Attorney-General* v *Ariyaratne* (1932) 34 NLR 196.
4. *In Re Brito* (1942) 43 NLR 529
5. *Emperor Rajani Kante Bose et.al* 49 Calcutta 804.
6. *Re Seneviratne* (1928) 30 NLR 299.

Rule issued in terms Section 42(2) of the Judicature Act, No. 2 of 1978 against an Attorney-at-Law.

Parinda Ranasinghe (Jr.) S.S.C. for Attorney-General.

Dr. Sunil Cooray for respondent.

Rohan Sahabandu for BASL.

Cur.adv.vult.

August 28, 2008.

DR. SHIRANI BANDARANAYAKE, J.

The complainant, Noor Mohomed Suhaibdeen, of Madawala Bazaar, Pathadumbara was a defendant in a partition action instituted in the District Court on Kandy on 19.12.1995, bearing No. P/13629. The plaint in the said action was filed by the respondent in the instant matter namely, Abdul L. Mohomed Anees, Attorney-at-Law, in which he had placed his signature and had affixed his seal under the name A.L.M. Anees (hereinafter referred to as "Abdul Anees").

The complainant alleged that on 21.05.1996 the respondent had filed an amended plaint in the District Court of Kandy under the name of S.M. Musthapha and on that the Court had issued an interim injunction. He further alleged that on page 2 of the copy of the interim injunction issued to the complainant, the respondent had signed and affixed his seal as 'S.M. Musthapha'.

The complainant alleged that S.M. Musthapha, Attorney-at-Law passed away on 11.02.1988 and Abdul Anees had been using late S.M. Musthapha's name and seal fraudulently and since had been carrying on his practice under late S.M. Musthapha's name, that he is guilty of deceitful conduct.

The observations of Abdul Anees were called and he had failed to satisfactorily explain his conduct to this Court. Therefore on 08.10.2004 a Rule was issued directing Abdul Anees to show cause, why he should not be suspended from practice or be removed from the office of Attorney-at-Law of the Supreme Court for acts of deceit and malpractice he had committed in terms of Section 42(2) of the Judicature Act.

The complainant, Noor Mohomed Suhaibdeen and the Registrar of the District Court of Kandy gave evidence and the respondent, Attorney-at-law, Abdul Anees testified under oath in his defence.

The Rule issued on the respondent stated as follows:

(1) The respondent was the registered Attorney for the plaintiff in Case No. P/13629 in the Kandy District Court while the complainant was the 3rd defendant in the same case;

(2) the respondent had placed the private seal of the then deceased S.M. Musthapha, Attorney-at-law and forged the signature of the said S.M. Musthapha as the Attorney-at-Law for the plaintiff on the enjoining order dated 13.11.1996, restraining the 2nd defendant and the said complainant.

(3) While the said S.M. Musthapha, Attorney-at-Law had expired on 11.02.1988, the respondent had fraudulently placed the private seal of the said S.M. Musthapha, Attorney-at-Law on several other documents filed in the said case P/13629 in the Kandy District Court.

The complainant, Noor Mohomed Suhaibdeen, a retired School Principal, submitted in his evidence that his residence situated at No. 133, Kandy Road, Madawala formed part of the subject matter in case No. P/13629, which was filed by the plaintiff, M.I. Laheer on 16.12.1995. It was not disputed that the respondent was the Attorney-at-Law for the plaintiff. Apparently, the said plaintiff was a relative of the respondent Attorney-at-Law. An enjoining order was

issued on 21.12.1995 preventing any further constructions or repairs of the said premises and the adjoining house purchased by the complainant, which order was prepared by the respondent (P1). He also submitted that a further interim injunction had been issued with regard to the same premises on 19.11.1996 (P2) and the said interim injunction contained a signature on page 2 of the said P2, purported to be of S.M. Musthapha for the plaintiff and also a rubber seal of the said S.M. Musthapha had been placed.

The complainant had also adduced evidence that in 2002, part of the complainant's house was demolished for road widening and a sum of Rs. 271,000/- had been paid to the complainant as compensation. Further the learned District Judge had visited these premises in question on 31.05.2004 and had allowed the complainant to fix windows only on the 1st floor of the house.

Accordingly the contention of the complainant was that due to the restraining orders, he and his family had been living in a partially built house from 1995 to date and they had to face immeasurable amount of difficulties and even the property he had purchased adjoining his house also had been neglected due to the said interim injunctions and more importantly that both these orders, according to the complainant were forgeries.

The Registrar of the District Court, Kandy, on perusal of the record of the partition action, viz., P/13629, submitted that this case had been called on 118 times and taken up for trial on 14 instances. Further, he submitted the following:

A) the proxy for the plaintiff in the partition action was filed in the name of A.L.M. Anees on 16.12.1995;

B) the said proxy contained the rubber stamp of the respondent as 'A.L.M. Anees' (P5);

C) the Counsel for the plaintiff had filed a motion on 23.01.2002, withdrawing the existing proxy and seeking permission to file a fresh proxy in the name of S.M. Musthapha.

The respondent, in his evidence admitted that he had known the late S.M. Musthapha, Attorney-at-Law and that he was working with him since 1975 until his demise on 11.02.1988. He admitted that the signature of S.M. Musthapha and the corresponding rubber

stamp appearing on the second page of the enjoining order dated 13.11.1996 (P2) was placed by him. He submitted that he had registered a business on 02.04.1988 under the business name of "S.M. Musthapha, Attorneys-at-Law" (P4) and that he had been using the letter heads, which depicted the words, 'Musthapha and Anees' well after the demise of 'S.M. Musthapha.'

Having admitted the above, the respondent contended that he had known late S.M. Musthapha, Attorney-at-Law for a very long period and that he was a close relative. Further it was contended that the complainant had been aware of the fact that S.M. Musthapha had died in 1988 and therefore the charge of deceit cannot be maintained against him on the evidence before this Court.

On the charge of malpractice against the respondent, his position was that there was nothing improper in an Attorney-at-Law or even several Attorney's-at-Law practice under a business name. In support of this contention, learned Counsel for the respondent in his written submissions had referred to 'De Silva & Mendis', 'D.N. Thurairajah & Co.', 'Julius & Creasy' or D.L.& F. de Seram' all of which are business names under which Attorneys-at-Law have been and are practicing their profession for long periods of time. Accordingly the contention of the respondent was that due to his long association with S.M. Musthapha, Attorney-at Law during his lifetime and his being a close relative, it was not a malpractice to use the impugned business name of "S.M. Musthapha, Attorneys-at-Law."

It was also submitted on behalf of the respondent that it is not a malpractice for an Attorney-at-Law to practice his profession under a firm name, which included the name of a deceased Attorney-at-Law with whom he had been in practice. Learned Counsel for the respondent referred to Dr. A.R.B. Amerasinghe (Professional Ethics and Responsibilities of Lawyers,P. 79), where it has been stated that,

> "An attorney shall not practice under a firm name which includes any name other than his own name, that of a partner, or any past member of the firm or of a firm which conducted the same practice..."

> The name of a firm does not necessarily identify the individual members of the firm and hence the continued use of a firm name after the death of one or more partners is not a deception and is permissible."

Accordingly it was contended that the respondent cannot be found guilty of malpractice.

The suspension and removal of Attorneys-at-Law is referred to in Section 42 of the Judicature Act and Section 42(2) of the said Act, which deals with such suspension or removal, reads as follows:

> *"Every person admitted and enrolled as an attorney-at-law who shall be guilty of any deceit, malpractice, crime or offence may be suspended from practice or removed from office by any three Judges of the Supreme Court sitting together."*

As stated earlier, the Rule issued on 08.10.2004, against the respondent referred to acts of deceit and malpractice the respondent had committed in terms of Section 42(2) of the Judicature Act.

Considering the evidence before Court, it was not disputed that the respondent had registered a business in the name of 'S.M. Musthapha, Attorneys-at-Law' soon after the demise of S.M. Musthapha. It was also not disputed that he was using letter headings, which read as 'Musthapha and Anees'.

With regard to the registration of a business under the name 'S.M. Musthapha, Attorneys-at-Law', the contention of the respondent was that it was to 'perpetuate the good name of the said S.M. Musthapha and out of the respect he had for him'. However, after making reference to various other legal partnerships referred to earlier, it was contended on behalf of the respondent that, the respondent and the deceased S.M. Musthapha had a partnership from 1975.

Having a partnership, undoubtedly would not fall within the category of deceitful practice in terms of Section 42(2) of the Judicature Act. If there was such a legally recognised partnership between the respondent and the deceased, then as stated by

Dr. A.R.B. Amerasinghe *(supra),* the respondent was legally entitled to place the signature in question, which was placed on the enjoining order and served on the complainant. However, for the placing of the signature in question to be valid in this instance, it should be evident that a partnership had been established. Accordingly the question in issue is, was there a partnership between S.M. Musthapha and the respondent, Abdul Anees?

The respondent, as pointed out by the learned Senior State Counsel, took great pains in stressing the fact that he and the deceased had a partnership from the very outset in 1975. However, it is not disputed that the respondent, except for his own contention that there was a partnership between the deceased and himself, did not place any evidence before this Court to support his version. Moreover, on his own evidence, a question arose as to whether the respondent had been a partner of the deceased S.M. Musthapha or whether he had worked with the deceased only as an assistant. In his evidence in chief on 28.02.2008, the respondent took up the position that he had functioned with the deceased only as an assistant.

"ප්‍ර: - නමා 1975 දෙසැම්බර් මස සිට මුස්තාපා සමග නීතිඥවරයෙක් වශයෙන් කටයුතු කළේ මොන පදනමක් උඩද ?....

උ: - සහායකයෙක් විදියට කාර්යාලය පාවිච්චි කළා පමනක් නෙවෙයි, සහායකයෙක් වශයෙන් කටයුතු කළා."

Further in his observations sent to this Court in reply to the complaint made against him on 07.02.2002, the respondent had not referred to a partnership between the deceased and himself, and had merely stated that the deceased S.M. Musthapha was his senior in profession.

> "Answering to paragraph 2, I state on the demise of late Mr. S.M. Musthapha who was *my senior in profession* I registered in his name a firm called and known as 'S.M. Musthapha, Attorney-at-Law'. Hence I signed as S.M. Musthapha, Attorney-at-Law ....
>
> I admit that Mr. S.M. Musthapha *who was my mentor and senior in my professional matters* died on 11th February 1988" (emphasis added).

In cross-examination, the respondent submitted that, he had discussed the possibility of registering a partnership between the deceased S.M. Musthapha and himself with S.M. Musthapha's son, Faiz Musthapha, President's Counsel and whether he had any objection to such registration.

"ප්‍ර: - මහත්මයාගේ ස්ථාවරය වන්නේ එස්. එම්. මුස්තාපා මියගිය දිනයේම, එස්. එම්. මුස්තාපාගේ පුතා වන ජනාධිපති නීතීඥ ෆයිස් මුස්තාපා සමග කතා කිරීමෙන් මේ කරුණු ගැන මහත්මයා අනතුරුව තීරණයකට එළඹුනා එස් එම් මුස්තාපා යන නමින් මේ ව්‍යාපාර නාමය ලියා පදිංචි කරන්න?

උ: - ඇත්ත වශයෙන්ම එස්. එම්. මුස්තාපා ව්‍යාපාර නාමයක් වශයෙන් ලියා පදිංචි කිරීමට ඔහුගේ විරුද්ධත්වයක් තිබෙනවාද කියලා ඇහැව්වා. ඔහු එයට විරුද්ධත්වයක් නැහැ කිව්වා."

In support of this contention, the respondent relied on the document marked 'R1' dated 18.02.2006. The said document was issued by Faiz Musthapha, President's Counsel, on the said date and reads as follows:

"Mr. A.L.M. Anees, Attorney-at-law, was practicing in Kandy under my father, the late S.M. Musthapha, *as his assistant*. My father passed away on the 11th of February 1988. Upon his death, Mr. Anees succeeded to my father's practice and took over same at the same premises. I became aware that he continued the practice under the name, style and firm of 'S.M. Musthapha, Attorneys-at-Law.'

I had no objection to his doing so" (emphasis added).

All this material the respondent had relied upon, clearly indicate that the respondent had been functioning as an assistant of late S.M. Musthapha. Even the letter issued by Faiz Musthapha, President's Counsel, which was referred to earlier, introduces the respondent as S.M. Musthapha's, assistant and not as his partner.

On a careful examination of the contention of the respondent and the supporting evidence of his position, it is quite clear that he has not tendered any material to support his version that he had been functioning as a partner of the late S.M.Musthapha.

As pointed out earlier when observations were called on the complaint made against the respondent, he did not take up the position that he had indicated to the deceased S.M. Musthapha, about the registration of a business as a partnership under the name, style and firm of S.M. Musthapha, Attorneys-at-Law. At that stage his position was that he had functioned as an assistant to the deceased S.M. Musthapha. Later at the inquiry, he changed his position from being an assistant of the late S.M. Musthapha to that of his partner. The only piece of evidence he tendered in support of his version was the letter given to him by Faiz Musthapha, President's Counsel, which I had reproduced earlier. That letter, however does not indicate any discussion the respondent, as claimed by him in his evidence, had with the said Faiz Musthapha, President's Counsel at the time of his father, S.M. Musthapha's demise, of registering a partnership. For that matter, the contents of the letter does not indicate any kind of discussion the respondent had with the deceased S.M. Musthapha's son. The letter clearly states that he 'became aware' that the respondent had continued the practice under the name, style and firm of S.M. Musthapha, Attorneys-at-Law and that he had no objection for such action.

The aforesaid letter, it is to be noted, has been obtained by the respondent well after the Rule was issued. The said Rule was issued on 08.10.2004 whereas the letter 'ඔ1' was written on 18.02.2006. The said letter, is only in support of the position that Faiz Musthapha, President's Counsel had no objection to the respondent carrying on the practice in the name, style and firm of his late father. Furthermore although the respondent contended that he and the deceased had a partnership from the very beginning in 1975, the document 'ඔ1', refers to the respondent as his father's assistant until his demise in 1988. It would not be necessary to spell out in detail the difference between a partner and an assistant in a law firm and their respective legal implications.

Accordingly, the document ඔ1, does not support the contention of the respondent that there was a discussion with Faiz Musthapha, President's Counsel, in regard to the registration of a partnership at the time of the death of S.M.Musthapha. It is not disputed that, except for the document marked ' ඔ1', respondent had not placed

any other material before this Court, in support of his contention. Although he had referred to the intention of entering into partnership, there is not even an *iota* of evidence to support this position. Also, if there was an intention from the time he joined the deceased S.M. Musthapha, in 1975 could it be believed that for 13 years, until S.M. Musthapha's demise in 1988, that this could not get materialised? During a time span of 13 years, weren't the other assistants, whom the respondent had referred to, as had worked with the deceased and the respondent, aware of such an intention? If so, wouldn't the respondent have called them to establish the existence of the partnership or for that matter, even the intention of establishing such a partnership? If, as the respondent claims, there was such an idea of a partnership for over a period of 13 years, couldn't there be an indication, documentary or oral of such an intention?

The respondent relied on the fact that the business had been registered under the business name 'S.M. Musthapha' and the general nature of the business being "Legal practice – Attorneys-at-Law and Notaries Public' (P4). He also referred to the letter issued in February 2006 by Faiz Musthapha, President's Counsel, in support of his contention that there had been an agreement with the late S.M. Musthapha to enter into a partnership with the respondent. However, as has been examined, it is abundantly clear that the respondent had not been able to satisfy this Court by submitting oral or documentary evidence to indicate that it had been the intention of the late S.M. Musthapha and the respondent to enter into a partnership.

In the circumstances I answer the question, which was raised as to whether there had been a partnership between the late S.M. Musthapha and the respondent, in the negative.

The question thus arises as to the conduct of the respondent in placing the signature and using the rubber stamp of a deceased Attorney-at-Law in the absence of a partnership.

The conduct of the respondent becomes questionable when one considers the two documents marked P3 and P12, which were produced before this Court at the proceedings. In both these documents, attention of the Court was drawn not to the contents of

the letter but only to the contents of the letter heads. The first document marked P3 is dated 28.10.1995 and the letter head reads thus:

"Musthapha & Anees
Attorneys-at-Law & NP

A.L.M. Anees LL.B. (Cey.)	ඒ. එල්. එම්. අනීස්
.....	එල් එල්. බී (ලංකා)
	....."

The document marked P12, which bears letters of a different font, contains the names as 'Musthapha and Anees', but gives a different address and telephone number and the letter is dated 15.03.2004.

A careful examination of both these letter heads clearly indicates that the 1st document marked P3 was written seven (7) years after the business name was registered and the second letter marked P12 had been written in 2004, which is sixteen(16) years after the said registration. It is to be noted that the said business name was registered not as Musthapha and Anees, but as S.M. Musthapha – Attorneys-at-Law.

On being questioned of these letter heads, the respondent contended that there were excess of letter heads that were printed prior to 1988 and therefore he continued to use them even after the demise of S.M. Musthapha. It is to be noted that, when observations were called from the respondent by the Registrar of the Supreme Court, the respondent had used one of the aforementioned letter heads, which contained the names "Musthapha and Anees' (P13).

The respondent also admitted that he had been using a rubber stamp, which contained a signature similar to that of late S.M. Musthapha.

"ප්‍ර: - දැන් මහත්මයා මේ ව්‍යාපාරය රෙජිස්ටර් කළාට පස්සේ එස්.එම්. මුස්තපා අත්සන එක්තරා විදියකට යොදන්න පටන් ගත්තා?

උ: - එහෙමයි"

As stated earlier, the Rule against the respondent refers to the conduct of the respondent and stated that he had committed 'deceit and malpractice' within the ambit of Section 42(2) of the Judicature Act.

Referring to deceitful conduct Dr. A.R.B. Amerasinghe *(supra*, pg. 157) clarifies as to what kind of action would constitute deceitful conduct and stated that,

> "Deceit may amount to misconduct even though the act was not done in the performance of his professional duties. The Canadian Code makes 'committing, whether professionally or in the lawyer's personal capacity, any act of fraud or dishonesty, e.g. by knowingly making a false tax return or falsifying a document, even without fraudulent intent and whether or not prosecuted therefore' a violation of the rule requiring integrity. *Therefore, being dishonourable or questionable conduct, disciplinary action would be warranted*" (emphasis added).

Section 42(2) of the Judicature Act, refers to deceit, malpractice, crime or offence and although this section was similar to Section 35 of the Administration of Justice Law, the words 'or other conduct unworthy of an Attorney-at-law' which were in Section 35 of the Administration of Justice Law were not incorporated into Section 42(2) of the Judicature Act. Considering the scope of Section 42(2) in the light of the above, Amerasinghe, J., in *Dhammika Chandratilake* v *Susantha Mahes Moonesinghe*(1) clearly stated that the word 'offence' in Section 42(2) of the Judicature Act contained a wide meaning, which would include all forms of unprofessional conduct in the sense of the 'misconduct' of an Attorney-at-Law in the process of his professional work. Thus, according to Amerasinghe,J.,

> "In *Re Arthenayake*(2) Seneviratne, J. at 349 said that in the interest of the Bar and that of the public, Section 42(2) of the Judicature Act should be amended by the addition of the words 'or other conduct unworthy of an attorney-at-law'. Although the phrase certainly did usefully put the matter beyond any doubt, and might have been retained out of an

abundance of caution, which, with great respect, is what I think Seneviratne, J., meant, I do not think the removal of the words 'or other conduct unworthy of an attorney-at-law' has diminished the powers of the court, I am inclined to think that the word 'offence' in Section 42(2) of the Judicature Act has a wider meaning than that given to it in the Penal Code and Code of Criminal Procedure. I think it means *disciplinary offence* and includes, conviction for an offence by a competent court, conduct that is criminal in character, malpractice – whether the professional misconduct involves moral turpitude or not –, deceit and all other forms of unprofessional conduct in the sense of misconduct the court ought to have taken into account at the time of the admission of any attorney-at-law in deciding whether he was a person of good repute."

Considering the matter in question, it is obvious that the respondent was only an Assistant of the late S.M. Musthapha, who had been a well-known legal luminary. Although the respondent claimed of a partnership he had had with the late S.M. Musthapha, as stated earlier, the respondent did not produce any material to establish his contention.

In a situation, where there was no established partnership, the respondent had taken steps to file proxies, place the seal and sign documents as S.M. Musthapha which has the effect of misleading not only the general public, but as correctly pointed out by the learned Senior State Counsel, also the Courts.

As pointed out by Amerasinghe, J. in *Dhammika Chandratilake* v *Susantha Mahes Moonesinghe (supra)*, 'we do not have a *right* to practice, but only a privilege conferred by the State, provided certain conditions are fulfilled'. Thus the right to practice, according to Macdonell, C.J. in *Attorney-General* v *Ariyaratne*[3] is a revocable franchise. Howard C.J. in *Re Brito* [4], following with approval the decision by Mukerjee, J. in *Emperor Rajani Kante Bose et al*[5] took a similar view and stated that,

"The practice of the law is not a business open to all who wish to engage in it, it is a personal right or privilege limited to selected persons of good character with special qualifications

duly ascertained and certified; it is in the nature of a franchise from the State conferred only for merit and may be revoked whenever misconduct renders the person holding the licence unfit to be entrusted with the powers and duties of his office. *Generally speaking the test to be applied is whether the misconduct is of such a description as shows him to be an unfit and unsafe person to enjoy the privilege and manage the business of others as (an attorney-at-law), in other words, unfit to discharge the duties of his office and unsafe because unworthy of confidence"* (emphasis added).

Rule 60 of the Supreme Court (Conduct of an Etiquette for Attorneys-at-Law) Rules of 1988 clearly states that an Attorney-at-Law must not conduct himself in any manner, which would be reasonably regarded as dishonourable and Rule 61 states that an Attorney-at-Law shall not conduct himself in any manner unworthy of an Attorney-at-Law.

On a consideration of all the circumstances of this matter, the action taken by the respondent not only amounts to professional misconduct, but also a conduct, which is dishonourable and unworthy of an Attorney-at-Law.

For the reasons aforesaid, I find the respondent guilty of deceit and malpractice within the ambit of Section 42 of the Judicature Act.

Considering the circumstances of this matter, I am of the view that it is appropriate to refer to the words of Schneider, A.C.J. in *Re Seneviratne*[6], which were followed by Amerasinghe, J. in *Dhammika Chandratilake* v *Susantha Mahes Moonesinghe (supra)* that I can only hope that this decision will have the salutary effect of awakening in Anees 'a higher sense of honour and duty'.

The Rule is, therefore, made absolute. I order that the respondent, A.L.M. Anees, Attorney-at-Law be suspended from practice for a period of two (2) years commencing from today.

AMARATUNGA, J. – I agree.

SOMAWANSA, J. – I agree.

Rule made absolute.

Attorney-at-Law suspended for 2 years.

KARUNARATNE AND ANOTHER
v
LINGAM AND OTHERS

COURT OF APPEAL
ABDUL SALAM, J.
CA 830/2003 (F)
DC WELIMADA 115/L
FEBRUARY 10, 2004

Civil Procedure Code - Case laid by – Subsequently case restored to the trial roll – Appeal? Is it a final order? Restoring to Trial roll – Duties on Court?

Held:

(1) The impugned order cannot be identified with a single characteristic of a final order.

(2) In the event of a case being laid by ,the duty of restoring it to the trial roll is cast on the District Judge and not on the parties.

APPEAL from an order of the District Court of Welimada.

Cases referred to:

(1) *Samsudeen* v *Eagle Insurance Co. Ltd.* 64 NLR 372.

(2) *Siriwardena* v *Air Ceylon Ltd.* 1984 1SLR 286

Sanath Jayatilleke for defendant-appellants.
Hemasiri Withanachchi for plaintiff-respondent.

November 12, 2007

ABDUL SALAM, J.

The plaintiff-respondents instituted action in the District Court of Welimada against the 1st and 2nd defendant-appellants praying *inter alia* for a declaration of ownership to the subject matter and for the ejectment of the defendant-appellants.

When the case was taken up for hearing on 29.1.1987 learned Counsel for the plaintiffs-respondents moved to have the case

laid by as the 1st and 2nd plaintiff-respondents were away in Jaffna and the 2nd defendant-appellants was unable to travel from Jaffna due to ill health. Accordingly, the learned District Judge made order to lay-by the case.

The plaintiff-respondents on 3-1-2003 applied to Court to have the case restored to the trial roll and to have the same fixed for further trial. The defendant-appellant appeared upon notice and opposed the application on the ground that litigation has come to an end after the order made to lay-by the case. The defendants-appellants further took up the position that in any event they have acquired a prescriptive title to the subject matter in question during the period in which the case had been laid-by. The learned District Judge by his order dated 28.8.2003 allowed the application of the plaintiffs-respondents and restored the case to the trial roll. The present appeal has been preferred against the said order dated 28.8.2003.

In arriving at this conclusion the learned District Judge had followed the guideline laid down in *Samsudeen* v *Eagle Star Insurance Co. Ltd.*(1). In that case it was laid down that in the events of a case being laid-by, the duty of restoring it to the trial roll is cast on the District Judge and not on the parties.

The question that arises for consideration is whether the impugned order satisfies the requirements of a final order to render it appealable. In the case of *Siriwardena* v *Air Ceylon Ltd.*(2) the principles laid down to ascertain the nature of an order as to its finality have been correctly applied by the learned District Judge.

Upon a careful consideration of the impugned order it is quite obvious that it cannot be identified with a single characteristic of a final order as has been explained in a series of judgments.

For the above reasons even if it is to be assumed that the order concerned is appealable, yet there is no reason to conclude that the order of the learned District Judge to restore the case to the trial roll is illegal or contrary to law.

In any event, since the order dated 28.8.2003 is necessarily an interim order, in my opinion the defendents-appellants have

no right of appeal. For the above reasons I affirm the order of the learned District Judge dated 28.8.2003 and dismiss the appeal with costs.

Appeal dismissed.

PANDA TOYS EXPORTS (PVT) LTD.
v
COMMISSIONER-GENERAL OF LABOUR AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 2412/2004
APRIL 26, 2006
MAY 18, 2006

Termination of Employment of Workmen (Sp. Prov.) Act No. 45 of 1971 – Sections 6, 11 and 12 – Factory closed – Toy factory converted to Garment Factory – Factory premises leased out. New Company to absorb all workmen – No compensation awarded – Commissioner acting on recommendation of a subordinate – violation of principle 'he who hears must decide'.

The petitioner was engaged in the business of manufacturing / exporting soft toys. As there was a drop in orders the petitioner had decided to convert the factory into a garment factory and leased out the premises to V Company. The V Company was to absorb all workmen – with continuity of service.

The workmen complained to the Commissioner-General of Labour that the petitioner was planning to close the factory without giving compensation. An inquiry was held by the 2nd respondent, and an order was made based on the recommendation of a Deputy Commissioner of Labour, who did not conduct the inquiry. The 1st respondent Commissioner-General of Labour awarded compensation to the workmen.

The petitioner company urged that, the 1st respondent had made an order on a recommendation which was made by a person who has not held the inquiry.

Held:

(1) The 1st respondent had made the impugned order on a recommendation which was made by a person, who did not hold the inquiry – the decision of the 1st respondent based on that recommendation is illegal.

(2) The procedure is in violation of the principle that 'he who hears must decide and as such the order is *ultra vires*.

APPLICATION for a Writ of *Certiorari*.

Cases referred to:-

1. *Kundanmal Industries Ltd.*, v *Wimalasena, Commissioner of Labour and others* 2001-3 Sri LR 229.
2. *Nagalingam* v *Lakshman de Mel, Commissioner of Labour* 78 NLR 231.

Murshid Maharoof with *S.M. Markhen* for petitioner.

Uresha de Silva SC for respondents.

July 4, 2006

SRISKANDARAJAH, J.

The petitioner is a private limited liability company incorporated under the Company Laws of Sri Lanka has sought a writ of *Certiorari* to quash the order of the 1st respondent contained in the letter dated 22..3.2004 marked P17. By the said Order the 1st respondent has awarded compensation to the 4th to 14th respondent the workers of the petitioner company, under the powers vested in terms of section 6 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971.

The petitioner submitted that the petitioner company was engaged in the business of manufacturing and exporting soft toys from 1996. From 1998 the petitioner company experienced a drop in the orders and was facing financial crises and it has become impossible to run the business as a profitable business due to non availability of export orders. Due to this reason in early 2001 the petitioner decided to convert the soft toys factory into a garment factory and decided to lease out the factory premises to a company called Viking Fashions Limited at the said premises. The petitioner made special arrangements in April 2001 with the said company to absorb and employ all the workmen at the same place, with the same salary and positions with the continuity of service. Accordingly the said Company was to start its operation from 18.06.2006.

On 4.6.2001 some of the workers of the petitioner's company complained to the 1st respondent the Commissioner General of Labour stating that the petitioner was planning to close the factory

from 15.06.2001 without giving compensation to the workmen (P2). On 16.06.2001 the 4th to 14th respondents had made an application to the 1st respondent stating that their rights were denied with effect from 15.06.2001 (P3).

Consequent to the receipt of the aforesaid complaints of the employees, the petitioner was informed of this complaint and both parties were intimated to be present for an inquiry on 19.7.2002 (1R2) by the 1st respondent. The inquiry was held by the 2nd respondent with the participation of both parties and both parties were given an opportunity to file written submissions. The order marked P17 dated 22.3.2004 was made based on the recommendations (1R4) that were forwarded consequent to the aforementioned inquiry. This recommendation was made by one M.N.S. Fernando, Deputy Commissioner of Labour (Termination Unit). The petitioner contend that Mr. M.N.S. Fernando did not conduct the said inquiry and the petitioner never took part in an inquiry before M.N.S. Fernando but the recommendation marked 1R4 was given by a person who did not conduct the inquiry therefore the decision of the 1st respondent based on that recommendation is illegal and should be quashed.

The Counsel for the 1st respondent conceded that the recommendation 1R4 was made by M.N.S. Fernando, Deputy Commissioner of Labour (Termination Unit) and he made this recommendation after studying the proceeding that took place before the 2nd respondent. The 1st respondent has not given any explanation why the recommendation was not submitted by the inquiring officer and why it was submitted by another officer who has not held the inquiry.

In *Kundanmals Industries Ltd.* v *Wimalasena Commissioner of Labour and others*[1] J.A.N.De Silva P/CA (as he then was) held:

> "I see no serious objection to the Head of the Department taking a final decision having considered the evidence recorded and documents available to him on the question that has to be decided. In the circumstances I state that there is no merit in this submission. There is no material available to establish that the 1st respondent mechanically adopted the recommendations without giving his mind to the evidence and documents. The power to delegate

hearing under the Termination of Employment of Workmen Act No. 45 of 1971 was considered and accepted in the case of *Nagalingam* v *Lakshman de Mel*[2]."

In *Nagalingam* v *Lakshman de Mel, Commissioner of Labour (supra).* Sharvananda J. with Tennekoon, C.J. and Gunasekera J. agreeing held:

"Mr. Jayawardena, appearing for the petitioner, urged two grounds in support of his application.

One ground was that the inquiry in to the 3rd respondent's application under Section 2 of the Act was conducted by the 2nd respondent and that in the premises the 1st respondent had no jurisdiction to make the order complained of. Section 12 of the Act provides that the commissioner shall have power to hold such inquiries as he may consider necessary for the purposes of the Act. Section 11(2) authorises the commissioner to delegate to any officer of the Labour Department any power, function or duty conferred or imposed on him under the Act. Hence, it was lawful for the Commissioner to have delegated to his assistant, the 2nd respondent the function of holding the inquiry into the 3rd respondent's application. The ultimate order dated 28th March, 1974, (P12), though it has gone under the hand of the 1st respondent, was in fact, as a perusal of the original record disclosed, made on the recommendation of the 2nd respondent. In the circumstances, there is no substance in this objection. In fact, the Counsel for the petitioner, when it was pointed out to him that the order only embodied the decision of the 2nd respondent, did not press the matter further."

The instant case is distinct from the above two cases, in this case the 1st respondent delegated the power to the 2nd respondent to hold an inquiry and the 2nd respondent had held the inquiry but he had not submitted a recommendation to the 1st respondent who made the said impugned order. The recommendation on which the 1st respondent relied was submitted by one M.N.S. Fernando, Deputy Commissioner of Labour (Termination Unit) but he did not inquire the said case at any stage. It appears that he had submitted the recommendation after perusing the said inquiry proceedings and documents.

Alternatively, there is nothing to show that the 1st respondent addressed his mind to the evidence, the documents produced at the inquiry and the issues involved. In other words the 1st respondent had made an order on a recommendation which was made by a person who has not held the inquiry. It is in violation of the principle that "he who hears must decide" and as such the order is *ultra vires.*

For this reason I set aside the order of the 1st respondent dated 22.3.2004 marked P17. The application of the petitioner for *writ of certiorari* is allowed without costs.

This order will not preclude the respondent to make an order on the recommendation of the inquiring officer of the said inquiry or to hold a fresh inquiry.

Application allowed.

CHOOLANIE
v
PEOPLE'S BANK AND OTHERS

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, J,
DISSANAYAKE, J. AND
RAJA FERNANDO, J.
S.C. (FR) APPLICATION NO. 530/2002
MAY 31ST 2006
JUNE 21ST, 2006

Fundamental Rights – Article 12(1) of the Constitution – Equality before law and equal protection of the law – Need to give reasons – Concept of legitimate expectation – Discretion and/or unequal treatment.

The petitioner alleged that the decision of the 1st respondent-Bank to retire him from service with effect from 15.03.2002 was illegal, unlawful, arbitrary, irrational and inconsistent with the provisions of the Circulars No. 323/2001 dated 12.10.2001 and No. 323/2001 dated 19.11.2001 and thereby violated his fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

Held:

(1) When there is no evidence to indicate that there is deliberate concealment of material facts from Court, an application cannot be rejected on account of the failure to comply with the requirement of *uberrima fides.*

(2) Although the 1st respondent Bank had not given reasons for their decision to the petitioner, the Bank should have revealed all such reasons to Court and denial of tendering reasons for their decision to the Supreme Court would undoubtedly draw an inference that there were no valid reasons for the refusal of the extension of service to the petitioner.

(3) Satisfactory reasons should be given for administrative decisions. A decision not supported by adequate reasons is liable to be quashed by Court.

Per Dr. Shirani Bandaranayake, J.

> "..... giving reasons to an administrative decision is an important feature in today's context, which cannot be lightly disregarded. Furthermore, in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily in coming to their conclusion."

Held further

(4) In general terms legitimate expectation was based on the principle of procedural fairness and was closely related to hearings in conjunction with the rules of natural justice. A promise or a regular procedure could give rise to a legitimate expectation. The doctrine of legitimate expectation has been developed both in the context of reasonableness and in the context of natural justice.

(5) An employee of the 1st respondent Bank would, while knowing that he could retire at the age of 55 years, have a legitimate expectation to service upto the age of 60 years on extensions of his service and therefore it could not be correct to state that the legitimate expectation of an employee would be to retire at the age of 55 years.

Held further

(6) The equal protection to all persons guaranteed by means of constitutional provisions, ensures that there would not be any discrimination between any two persons, who are similarly situated. However, there could be classifications among a group of people where such classification is reasonable and is not based on an arbitrary decision.

(7) What is necessary for a justifiable decision is that equals should not be treated unequally and the unequals should not be treated equally and the only differentiation that could be justified is, what could be classified on an intelligible basis and with a close nexus to the objective of the classification. Those who are similarly circumstanced, should be treated similarly.

(8) Although the Extensions of Service Committee was granted the authority to consider the extensions of service of the employees of the Bank, they

had to exercise their discretion according to law and undoubtedly having in mind the basic concepts stipulated in terms of Article 12(1) of the Constitution.

Per Dr. Shirani Bandaranayake,J.

"Article 12(1) of the Constitution ... deals with the right to equality and therefore the bank, being a State Institution should act within the four corners of the aforesaid constitutional provision. The guarantee of equality before the law ensures that among equals the law should be equal and should be equally administered."

(9) The refusal of the extension of service was taken arbitrarily and unreasonably and therefore the said refusal of the Bank to grant an extension of service to the petitioner is in violation of the petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution.

Cases referred to:

1) *Gas Conversions (Pvt) Ltd. et al* v *Ceylon Petroleum Corporation et al* – SC (Application) No. 91/2002.
2) *Pure Spring Co. Ltd.* v *Minister of National Revenue* (1947) 1 DLR 501.
3) *Minister of National Revenue* v *Wrights' Canadian Ropes Ltd.* (1947) AC 109.
4) *R.V. Gaming Board for Great Britain, ex parte Benaim and Khaida* (1970) 2 Q.B. 417.
5) *R.V. Civil Service Appeal Board, ex parte Cunningham* (1991) 4 AER 310.
6) *Padfield* v *Minister of Agriculture, Fisheries and Food* (1968) A.C. 997.
7) *Doody* v *Security of State for the Home Department* (1993) 3 A.E.R. 92.
8) *Lloyd* v *McMohan* (1987) 1 AER 1118.
9) *Lal Wimalasena* v *Asoka Silva and Others* SC (Application) No. 473/2003, SC Minutes of 04.08.2005.
10) *Wijepala* v *Jayawardene* SC (Application) No. 89/95, SC Minutes of 30.06.1995.
11) *Manage* v *Kotakadeniya* (1997) 3 Sri L.R. 264.
12) *Suranganie Marapana* v *The Bank of Ceylon and Others* (1997) 3 Sri LR 156.
13) *Karunadasa* v *Unique Gem Stones* (1997) 1 Sri LR 256.
14) *W.P.A. Pathirana* v *The People's Bank and Others* SC (FR) 297/2004, SC Minutes of 12.12.2005.
15) *Schmidt* v *Secretary of State for Home Affairs* (1969) 2 Ch. 149.
16) *McInnes* v *Onslow-Fane* (1978) 1 WLR 1520.
17) *Breen* v *Amalgamated Engineering Union* (1971) 2 QB 175.
18) *Cinnamond* v *British Airports Authority* (1980) 1 WLR 582.
19) *R* v *Barnsley Metropolitan Borough Council, ex parte Hook* (1976) 1 WLR 1052.

20) *Attorney-General for New South Wales* v *Quin* (1990) 170 CLR 1.
21) *Attorney-General of Hong Kong* v *Ng Tuen Shiu* (1983) 2 AER 346.
22) *Council of Civil Service Unions* v *Minister for the Civil Service* (1984) 3 AER 935.
23) *Re Westminster City Council* (1986) AC 668.
24) *Ram Krishna Dalmia* v *Tendolkar* AIR 1958 SC 538.

APPLICATION complaining of infringement of Fundamental Rights.

J.C. Weliamuna for petitioner.
Ben Eliyathamby, PC with *Ronald* for respondents.

Cur.adv.vult.

June 20, 2007

DR. SHIRANI BANDARANAYAKE, J.

The petitioner alleged that by the decision of the 1st respondent Bank (hereinafter referred to as 'the Bank') to retire him from the service of the said Bank with effect from 15.03.2002 (P11) had violated his fundamental rights guaranteed in terms of Article 12(1) of the Constitution for which this Court had granted leave to proceed.

The facts of the petitioner's case, as submitted by him, are briefly as follows:

The petitioner, a Graduate had joined the Bank as an Officer – Grade IV in 1972. Later he was promoted to Grade III (II) in 1985, and Grade III (I), which is a managerial Grade, in 1996. When he had reached the age of 55 years on 23.08.1998 the bank had granted the petitioner his first extension of service upto 23.10.1999 (P4) and later he was granted his second extension from 23.10.1999 to 23.10.2000 (P5). He was granted his third extension from 23.10.2000 to 23.10.2001 (P6).

Since the petitioner was of the view that he had the capacity and the ability to serve the Bank upto the age of 60 years, in March 2001 he had applied for his fourth extension of service, which fell due on 23.10.2001 (P6).

By letter dated 10.08.2001, the Bank had informed him that his services were extended from 23.10.2001 to 28.02.2002 (P8).

In October 2001, the Bank had introduced the Circular No. 323/2001 dated 12.10.2001, that contained a new policy and scheme for extensions of service for the employees, which cancelled all previous circulars relating to extensions of service. The employees of

the Bank, who had made applications under the previous circulars were instructed to make fresh applications in terms with the aforementioned new circular on which the petitioner also had made a further application for extension of his service.

By letter dated 25.02.2002, the petitioner was informed that the Bank had decided to extend his services until 15.03.2002 (P11).

The petitioner was surprised by the said decision of the Bank to deny his extension of service as the following persons were granted extensions of services under the new scheme:

i. Mrs. P. Perera - 4th extension
ii. Mrs. Samitha Abeywickrama - 3rd extension
iii. Ms. J. Peiris - 2nd extension
iv. Mrs. C.K. Adhikaramage - 4th extension

The petitioner had appealed against the decision of not granting him a full year's extension of service to the General Manager of the Bank. The petitioner did not receive any response in relation to the said application. The petitioner therefore had stated that the decision of the bank to retire him from service with effect from 15.03.2002 is illegal, unlawful, arbitrary, irrational and inconsistent with the provisions of the Circulars No. 323/2001 (P9) dated 12.10.2001 and No. 323/2001 (1) (P10) dated 19.11.2001 and thereby had violated his fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

The respondent took up a preliminary objection that the petitioner had misrepresented the material facts in his application and in accordance with the decision in *Gas Conversions (Pvt.) Ltd. et al* v *Ceylon Petroleum Corporation et al*[1], the petitioner's application should be rejected on account of the failure to comply with the requirement of *uberrima fides.*

The contention of the learned President's Counsel for the 1st and 2nd respondents was that the petitioner in his application to the Human Rights Commission on 18.03.2002, a copy of which was annexed to his petition (P12), had stated that he 'has been prematurely retired' by the Bank.

The Bank accordingly had taken the position that the age of retirement in terms of the People's Bank Staff Circular is 55 years and as the petitioner was over 55 years of age at the time he had retired, that it was a false claim and therefore lacks *uberrima fides.*

In *Gas Conversions (Pvt.) Ltd. et al (supra),* which considered several decisions on suppression of material and/or misrepresentation, clearly held as to what amounts to such suppression and/or misrepresentation. Accordingly it was stated that,

> "... a petitioner invoking the fundamental rights jurisdiction must make a complete disclosure of all material facts and refrain from deliberately concealing material facts from the Court. If a petitioner has not made the fullest possible disclosure, such a person cannot obtain any relief in terms of Article 126 of the Constitution."

Thus it is clear that, what is necessary is to see whether there has been any attempt to 'deliberately conceal material facts from Court'. If there is no such deliberate concealment, then there cannot be any suppression and/or misrepresentation of material facts.

In this application, the respondents' contention was the position taken up by the petitioner in his application to the Human Rights Commission. A careful perusal of his statement clearly indicates that, it was the view expressed by the petitioner, considering the fact that extensions were granted to some of the employees upto the age of 60 years and in that context his retirement is premature. His application to the Human Rights Commission contains the details he had included in his petition to this Court and in my view the petitioner has not made any attempt to suppress or misrepresent the relevant material.

Accordingly, when there is no evidence to indicate that there is deliberate concealment of material facts from this Court, an application cannot be rejected on account of the failure to comply with the requirement of *uberrima fides.*

For the reasons aforementioned, I overrule the preliminary objection raised by the learned President's Counsel for the 1st and 2nd respondents and would turn to consider the petitioner's application on its merits.

The contention of the learned President's Counsel for the 1st and 2nd respondents was three fold.

Firstly, it was submitted that the granting of extensions of service is at the discretion of the management of the Bank and that there is no requirement to give reasons for such decisions taken by the Bank.

Secondly, it was contended that the previous Staff Circular No. 286/97 (P7) as well as the current Staff Circular No. 323/2001, (P9) clearly had designated and had laid down that 'the age of retirement of the Bank employees shall be 55 years' and therefore the legitimate expectation of all the petitioners would have been to retire at 55 years.

Thirdly, considering the extensions granted, which were cited by the petitioner as persons who were similarly circumstanced where the Special Extension Committee (R3), which had stated that the petitioner could be easily replaced and that said conclusions are not 'unreasonable, irrational or arbitrary'.

Having stated the contention of the 1st and 2nd respondents, let me now turn to consider the aforementioned submissions separately.

I. The need to give reasons

It is common ground that the extension of service of the employees of the Bank are governed by the terms specified in Staff Circular No. 323/2001 dated 12.10.2001. This Circular deals with several aspects pertaining to granting of extension of service and whilst several clauses make provisions regarding the basic requirements and the procedure for the extension of service implementation, clause 12 and clause 14(iii) refer to the specific need to give reasons in the event of non-recommendation of an application. Clause 12 has to be read with other clauses and therefore clause 11, clause 12 and clause 14 (iii), are reproduced below and are in the following terms:

"Clause 11 - All application forms duly filled as stated above should be sent to the Chief Manager H.R. Department to be received by the Chief Manager on or before 20th January 2002 without exception if they are recommended. Staff Department should process all applications received by them, and submit their applications to the Service Extension Committee by February 10, 2002. The Service Extension Committee should sit from 10th February through 20th February 2002 and forward papers to General Manager, who will finally decide on the individual applications by February 25th 2002.

Clause 12 - In the event the applications is/are not recommended, a **separate report stating the reasons** why it was not recommended should be sent directly to DGM (Est, HR, I and I) (emphasis added).

Clause 14(III) -When any member of the line management is not recommending an application for an extension, **a separate report has to be submitted by such manager, giving reasons for the same** to DGM (E, HR I and I) extension is received by such manager (emphasis added)."

A careful examination of clauses 12 and 14(iii) of the aforementioned circular clearly specifies that, if an application is not recommended by the line management, a separate report has to be submitted by such manager, with reasons as to his decision for the non-recommendation. This aspect clearly indicates that the Extensions of Service Committee needed all the relevant information including reasons for refusal, if any, for deciding on each applicant on their extensions of service and therefore the said Extensions of Service Committee should have maintained records in relation to all applicants, who had applied for extensions of service.

Learned Counsel for the petitioner contended that, except for the comments made by the Extensions of Service Committee, no detailed reasoning has been given in terms of clauses 11, 12 and 14(iii) of the Circular No. 323/2001 in relation to the petitioner's extension of service.

The petitioner, as referred to earlier, had submitted the application for his extension of service on 20.12.2001 (R2) to his immediate Superior Officer, who had recommended his application.

Thereafter the application was forwarded to the DGM, who had recommended his application on 27.12.2001.

According to the affidavit of the 1st and 2nd respondents, the Committee, which considered the Extension of Service had rejected the petitioner's application for extension as the petitioner could be replaced since his service did not warrant any specific skills.

The Extensions of Service Committee however had not given any reasons based on the aforementioned submissions and had only stated that it is possible to appoint a successor to the petitioner's position and the petitioner should be sent on retirement in terms of clause 10 of 323/2001. If this is to be regarded as the reasons given by the Extensions of Service Committee, I would find it difficult to agree with the respondents as there has not been any justifiable reason given with regard to the rejection of the petitioner's application for an extension. This position becomes much stronger, when one compares the recommendation received by some of the other officers, who had received extensions of service for a period of one year. For instance one Mrs. P. Perera had been granted an extension of service from February 2002 to January 2003 with the mere word 'recommended' (R4) entered by the AGM. However, no reasons were given for the aforesaid extension of service or differentiating the petitioner's application from that of the others, who were given a year's extension of service with recommendations similar to what was given to the petitioner.

Thus it is apparent that, although there may not be a requirement for the Extension of Service Committee to give reasons for their decision to the petitioner, the 1st respondent Bank owed a duty to this Court to reveal the reasons for their decisions. It would not be incorrect to presume that in order to arrive at a decision, the committee must consider several aspects in terms with the relevant clauses of Circular No. 323/2001 and more importantly that they should have revealed the reasons for their decisions. As stated earlier, although the reasons were not communicated to the petitioner, the Bank should have revealed all such reasons to this Court and denial of tendering reasons for their decisions to this Court would undoubtedly draw an inference that there were no valid reasons for the refusal of the extension of service to the petitioner.

In general terms, considering the general rule, the position taken by Court is that there is no duty to state reasons for judicial or administrative decisions *Pure Spring Co. Ltd.*, v *Minister of National Revenue*[2] at 501, (Statements of Reasons for Judicial and Administrative Decisions, Michael Akehurst, MLR Vol. 33, 1970, pg.154). Accordingly as Michael Akehurst has clearly pointed out, 'a statement of reasons is not required by the rules of natural justice, and

therefore there is no duty to state reasons for the decisions of Courts, juries, licensing justices, administrative bodies and tribunals or domestic tribunals' (*supra*).

Although the common law had failed to develop any general duty to provide a reasoned decision *Minister of National Revenue* v *Wrights' Canadian Ropes Ltd.*(3) at 109, *R* v *Gaming Board for Great Britain*, ex. p. *Benaim* and *Khaida*(4) at 417, *R* v *Civil Service Appeal Board*, ex. *P. Cunningham*(5) at 310, there are several exceptions to this general principle.

One clear method was through statutory intervention, which came into being by the recommendation of the Franks Committee (Cmnd. 218 (1957)). The Franks Committee recommended the giving of reasons ((*supra*) paras 98, 351), that came into being through the Tribunals and Inquiries Act, 1958, which was replaced by the Tribunals and Inquiries Act, 1992.

The Franks Report of 1957, ((*supra*), at para 98), in fact highlighted the issue as to why reasons should be given, referring to ministerial decisions taken, after the holding of an inquiry.

> *"It is a fundamental requirement of fair play that the parties concerned in one of these procedures should know at the end of the day why the particular decision has been taken. Where no reasons are given the individual may be forgiven for concluding that he has been the victim of arbitrary decision. The giving of full reasons is also important to enable those concerned to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the minister's decision in the courts or elsewhere. Moreover as we have already said in relation to tribunal decisions a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more truly to have been properly thought out".*

Another method, and one which was extremely important from the practical point of view, indirectly imposed a requirement that reasons be stated and if not had decided that the result reached in the absence of reasoning is arbitrary. Thus in the well known decision in *Padfield* v *Minister of Agriculture*(6) at 997 the House of Lords decisively rejected the notion that the absence of a duty to state reasons precluded the

Court from reviewing the reasons for the decision. It was therefore stated in *Padfield (supra)* that,

> "If all the *prima facie* reasons seem to point in favour of his (the Minister's) taking a certain course to carryout the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions."

Similarly in *Minister of National Revenue* v *Wrights' Canadian Ropes Ltd., (supra)*, which considered an appeal from an income tax assessment, the Privy Council stated that,

> *"Their lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action.... But this does not mean that the Minister by keeping silent can defeat the taxpayer's appeal.... The court is always entitled to examine the facts which are sworn by evidence to have been before the Minister when he made his determination. If those facts are ..... insufficient in law to support it, the determination cannot stand....."*

Accordingly an analysis of the attitude of the Courts since the beginning of the 20th century, clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness. Reasons for an administrative decision are essential to correct any errors and thereby to ensure that a person, who had suffered due to an unfair decision is treated according to the standard of fairness. In such a situation without a statement from the officer, who gave the impugned decision or the order, the decision process would be flawed and the decision would create doubts in the minds of the aggrieved person as well of the others, who would try to assess the validity of the decision. Considering the present process in procedural fairness *vis-a-vis*, rights of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement. Referring to reasons, fair treatment and procedural fairness, Galigan (Due Process and Fair Procedure, Clarandon Press, Oxford, pg. 437) stated that,

"If the new approach succeeds, so that generally a statement of reasons for an administrative decision will be regarded as an element of procedural fairness, then various devices invented in the past in order to allow the consequences of a refusal of reasons to be taken into account will gradually lose their significance".

The necessity to give reasons was quite succinctly expressed in *Lloyd* v *McMahon*(7) at 1118), where Lord Donaldson, M. R. had concluded that the giving of reason was necessary, where McCowan, L.J., stated that the Court was not required to tolerate the unfairness of reasons not being given and Legalt L.J. had stated that the duty to act fairly extended to the duty to give reasons. The need for reasons in administrative decisions was described in very practical terms by Lord Mustill in *Doody* v *Security of State for the Home Department* (8) at 92, where he had stated that,

"a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon, 'transparency', in the making of administrative decisions."

The necessity to give reasons was considered by this Court, as referred to in Bandaranayake, J's judgment in *Lal Wimalasena* v *Asoka Silva and Others*(9) in *Wijepala* v *Jayawardene*(10), *Manage* v *Kotakadeniya*(11) at 264, *Suranganie Marapana* v *The Bank of Ceylon and Others*(12) at 156 and in *Karunadasa* v *Unique Gemstones*(13) at 256. In *Wijepala* v *Jayawardene* (*supra*), considering the necessity to give reasons, at least to this Court, Fernando, J., was of the view that,

"The petitioner insisted, throughout, that established practice unquestionably entitled him at least to his first extension and that there was no relevant reason for the refusal of an extension...

Although openness in administration makes it desirable that reasons be given for decisions of this kind, in the case I do not have to decide whether the failure to do so vitiated the decision. **However, when this Court is requested to review such a decision, if the petitioner succeeds in making out a *prima facie* case, then the failure to give reasons becomes crucial. If reasons are not disclosed, the inference may have to be drawn that this is because in fact there were no reasons – and so also, if reasons are suggested, they were in fact not the**

reasons, which actually influenced the decision in the first place" (emphasis added).

In *Manage* v *Kotakadeniya and others* (*supra*), where an application of a Post Master for his extension of service, upon reaching the age of 55 years was refused, Amerasinghe, J., was of the view that,

"the refusal to extend the service of the petitioner was not based on adequate grounds."

The order of retirement was thus quashed on the basis that the petitioner in that case was treated unequally and that there had been discriminatory conduct against the petitioner.

In *Suranganie Marapana* v *The Bank of Ceylon and Others* (*supra*), it was held that the Board failed to show the Court that valid reasons did exist for the refusal to grant the extension, which was recommended by the corporate management and therefore it was held that the refusal to grant the extension of service sought was arbitrary, capricious, unreasonable and unfair.

It is noteworthy to refer to the views expressed by Mark Fernando, J., in *Karunadasa* v *Unique Gemstones* (*supra*) with reference to the need to give reasons to a decision, where it was stated that,

".... whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision "may be condemned as arbitrary and unreasonable"; certainly the Court cannot be asked to presume that they were valid reasons for that would be to surrender its discretion."

On a consideration of our case law in the light of the attitude taken by Courts in other countries, it is quite clear that giving reasons to an administrative decision is an important feature in today's context, which cannot be lightly disregarded. Furthermore, in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily in coming to their conclusion. These aspects have been stated quite succinctly in the following passage, where Prof. Wade had taken the view that, (Administrative Law, 9th edition, pg. 522),

"Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of law. ***A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over other.*** (emphasis added)"

And more importantly,

"The only significance of withholding reasons is that if the facts point overwhelmingly to one conclusion, the decision maker cannot complain if he has held to have had no rational reason for deciding differently, and that in the absence of reasons he is in danger of being held to have acted arbitrarily."

In the light of the aforementioned, it becomes important to refer to the decision in *Suranganie Marapana* v *The Bank of Ceylon and Others* (*supra*), which was discussed in detail in *W. P. A. Pathirana* v *The People's Bank and Others*[14].

In that case, the petitioner was the Chief Legal Officer of the respondent Bank. As she was to reach the age of 55 years on 27.11.1996 she applied to the Bank on 25.05.1996 for an extension of service for an initial period of one year. Her application was recommended by the Personnel Department in its draft Board minute, under exceptional circumstances. The Board of Directors took four months to decide on the application and after a lapse of a further month, the petitioner was informed on 22.10.1996 that her application had been rejected and she would be retired from 27.11.1996. Officers, who were of a comparable grade had been granted extensions. But she was refused for no reason. The Board failed to submit to Court its decision. The Chairman of the Bank stated in his affidavit that the refusal to extend her services was done *bona fide* and unanimously after a careful evaluation of her application and the need of the Bank to increase the efficiency of its Legal Department. This Court held that the Board failed to show the Court that valid reasons did exist for the refusal to grant the extension, which was recommended by the corporate management. Considering the question in issue the Court stated that,

".... the Personnel Department recommended that the petitioner's service be extended for a period of one year with effect from 27.11.1996 under exceptional circumstances. If, therefore, the Board of Directors thought otherwise, it should have done so only for valid reasons and on reasonable grounds. Even though Public Administration Circular No. 27/96 dated 30.08.1996 (P8), which was an amendment to Chapter 5 of the Establishments Code, does not have any direct application to the matter before us, it clearly sets out the attitude of the State in regard to the question of extension of service of public sector employees, when it states that where extensions of service of State Employees are refused ***"there should be sufficient reasons to support such decisions beyond doubt."*** *Even if the bank failed to give the petitioner the reasons for the refusal of her application for an extension of service, it undoubtedly became obliged in law to provide such reasons to this Court where the decision of the Board was challenged by the petitioner.* (emphasis added)"

The decision in *Suranganie Marapana* (*supra*) in my view is strongly supportive of the view taken by several decisions that satisfactory reasons should be given for the decisions taken by a Committee. In fact Prof. Wade (Administrative Law, supra at p. 226-229) has clearly stated that,

"The whole tenor of the case law is that the duty to give reasons is a duty of decisive importance which cannot lawfully be disregarded."

Having considered the necessity to adduce reasons for administrative decisions, let me now turn to examine the question of legitimate expectation.

II. Legitimate expectation

Learned President's Counsel for the Bank contended that the petitioner cannot be heard to say that her fundamental rights guaranteed in terms of Article 12(1) of the Constitution was violated since she had a legitimate expectation to work for the Bank beyond the age of 55 years, as if there was any such legitimate expectation with regard to serving at the Bank, such legitimate expectation would have been to serve only upto the age of 55 years.

This contention raises the basic issue as to how a legitimate expectation could arise in a situation such as extensions of service.

In general terms legitimate expectation was based on the principle of procedural fairness and was closely related to hearings in conjunction with the rules of natural justice. As has been pointed out by D. J. Galigan (Due Process and Fair Procedures, A study of Administrative Procedure, 1996, pg. 320),

> *"In one sense legitimate expectation is an extension of the idea of an interest. The duty of procedural fairness is owed, it has been said, when a person's rights, interests, or legitimate expectations are in issue."*

Discussing the concept of legitimate expectation, David Foulkes (Administrative Law, 8th Edition, Butterworths, 1995, pg. 290) has expressed the view that a promise or an undertaking could give rise to a legitimate expectation. In his words:

> *"The right to a hearing, or to be consulted, or generally to put one's case, may also arise out of the action of the authority itself. This action may take one of two, or both forms; a promise (or a statement or undertaking) or a regular procedure.* ***Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that is, an expectation of the kind which the courts will enforce"*** (emphasis added).

An examination of the decisions pertaining to rights and privileges in the field of Administrative Law, clearly indicates that since the decision of Lord Denning M.R., in *Schmidt* v *Secretary of State for Home Affairs*[15] at 149, the concept of legitimate expectation had come into being to play an important role in the development of fairness. A long line of cases, since the decision in *Schmidt* (*supra*), had considered the concept of legitimate expectation *R* v *Gaming Board for Great Britain, ex. P. Benaim and Khaida* (*supra*), *McInnes* v *Onslow–Fane*[16] at 1520, *Breen* v *Amalgamated Engineering Union*[17] at 175, *Cinnamond* v *British Airports Authority*[18] at 582, *R* v *Barnsley Metropolitan Borough Council, ex. P. Hook*[19] at 1052.

Examining the decision in *Schmidt* (*supra*) and the Australian decision in *Attorney General for New South Wales* v *Quin*[20] at 1, P.P.

Craig (Legitimate Expectations, A Conceptual Analysis, L. Q.R. (1992) 108, pg. 79) had observed the applicability of the concept of legitimate expectation in administrative decisions. In his words,

> *"The foundation of the applicant's procedural rights is not simply that he has some legitimate expectation of natural justice or fairness.* ***The basis of the applicant's claim to protection is that he has a legitimate expectation of an ultimate benefit which is in all the circumstances felt to warrant the protection of that procedure,*** *in this instance his continued presence in the country"* (emphasis added).

Thus it is apparent that, as stated by *David Foulkes*, (*supra*) a promise or a regular procedure could give rise to a legitimate expectation that could be enforced by Court. This position is clearly illustrated by the decisions in *Attorney-General of Hong Kong* v *Ng Tuen Shiu*[21] at 346 and *Council of Civil Service Unions* v *Minister for the Civil Service*[22] at 935.

In *Ng Tuen Shiu*, (*supra*), Ng was an illegal immigrant. The government had announced a policy of repatriating illegal immigrants. According to the said policy each immigrant would be interviewed and each case was treated 'on its merits'. Ng was interviewed and his removal was ordered.

Ng complained that at the interview he was not allowed to explain the humanitarian grounds on which he would have been allowed to stay, but was allowed only to answer the questions put to him. It was stated that although Ng was given a hearing, it was not the hearing in effect, which was promised as what was promised was to give a hearing at which 'mercy' could be argued. The Judicial Committee agreed that, on that narrow point, the government's promise had not been implemented and that *Ng's case* had not been considered on its merits, and therefore the removal order was quashed. Accordingly Ng succeeded on the basis that he had a legitimate expectation that he would be allowed to present his case arising out of the government's promise that everyone affected would be allowed to do so.

In *Council of Civil Service Unions* (*supra*), the question of legitimate expectation arose, not due to a promise as in *Ng's* case *(supra),* but

out of a regular practice, which could reasonably be expected to continue. In this matter, the then British Prime Minister Mrs. Margaret Thatcher, issued an instruction that civil servants engaged on certain work would no longer be permitted to be members of trade unions. The House of Lords held that those civil servants had a legitimate expectation that they would be consulted before such action was taken, as it was an established practice for government to consult civil servants before making significant changes to their terms and conditions of service.

Having stated the applicability of legitimate expectation on the grounds of a promise and a procedure, let me now turn to examine the petitioner's case in the light of the aforementioned position.

It is not disputed that the 1st respondent Bank had been granting extension of services to its employees beyond the age of 55 years. It is also not disputed that the previous circulars, which dealt with the extensions of service did not refer to the age of retirement, but simply called for applications for extensions of service. For instance, clause 1 of Staff Circular No. 286/97(2) (P8), which refers to 'applications for extension of service' states that,

> *"As per instructions given in the above circulars, all employees who wish to remain in service on the basis of extension of service beyond 55 years of age should submit their applications for extension to the relevant line authorities of the subject employee, six months prior to the date of retirement."*

However, by Staff Circular No. 323/2001, (P10) of October 2001, amendments had been made to the existing policy for extension of service, which stated that the age of retirement of the Bank employees shall be 55 years. However, although the age of retirement was fixed at the age of 55 years, the Circular No. 323/2001 had made provision for the grant of extensions. In fact it is pertinent to note that the said circular clearly refers to the decision of the Board of Director of the 1st respondent Bank at their September 2001 meeting was to '*implement the policy and scheme for the extension of services*' of the employees of the Bank. The relevant paragraph of the aforesaid circular reads as follows:

"The Board of Directors at their meeting on September 28th 2001 decided to implement the policy and scheme for the extension of services detailed as stated below:

The age of retirement of the Bank employees shall be 55 years. However the General Manager/CEO and Management nominated by the CEO will grant extensions of the period of employment of a staff member for a specific period beyond 55 years of age and upto the age of 60 years at their discretion taking into consideration the following factors."

Accordingly, it is obvious that prior to the introduction of the new policy regarding extensions of service, extensions were considered and granted upto the age of 60 years and even under the new policy formulation, provision was made for extensions of service to be granted beyond the age at 55 years. This position was incorporated in Clause 9 of Circular No. 323/2001, where it was stated that,

"The new policy will be fully implemented with effect from 1st March 2002. In the meantime extensions will be considered in the normal way...."

It is not disputed that the petitioner had joined the Bank well before Circular No. 323/2001 came into effect. Moreover, he had been given extensions of service more than on one occasion, in terms of the previous circulars.

Learned Counsel for the petitioner strenuously contended that, although the age of retirement in the Bank was 55 years as was the case in most of the public sector establishments, this condition was subject to annual extensions being granted upto the age of 60 years.

If one has to consider the petitioner's position *vis-a-vis* the concept of legitimate expectation, it is apparent that he comes within both the categories explained by *David Foulkes (supra)*, which contains a promise and a regular procedure, which in other words could be categorized as substantive and procedural legitimate expectation.

It is to be noted that the doctrine of legitimate expectation has been developed both in the context of reasonableness and in the context of natural justice. (Administrative Law, Prof. Wade, 9th Edition, pg, 500).

In *Re Westminster City Council*[23], considering the question of legitimate expectation it was stated that,

> *"The courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation."*

Considering the major aspects of legitimate expectation, *Prof. Wade* (*supra*, at pg. 372) has clearly indicated that,

> *"inconsistency of policy may amount to an abuse of discretion, particularly when undertakings or statements of intent are disregarded unfairly or contrary to the citizen's legitimate expectation."*

Accordingly legitimate expectation must be given a broad interpretation as it could be used in more than one way utilizing the concept as the foundation for procedural fairness. Considering the concept of legitimate expectation being linked to the concept of procedural fairness, P. P. Craig (Administrative Law, 3rd Edition, 1994, pg 294-296) stated that this could depend on three different ways. *Firstly*, it could be on the basis of procedural rights for the purpose of protecting the applicant's future interests. *Secondly*, the concept is based on the foundation of procedural rights. *Thirdly*, the legitimate expectation could arise, where an applicant had relied on a particular *criteria*, whereas the defendants had applied a different one.

Considering the aforementioned it is clearly evident that the Bank had had a practice of granting extensions upto the age of 60 years. As referred to earlier, the circulars, which were introduced prior to Circular No. 323/2001, had clear provisions regarding such extensions, where the employees of the Bank had continued upto the age of 60 years on extensions. Moreover, it is not disputed that even under the present Circular, provision has been made for extensions beyond the age of 55 years. Although guide lines and/or *criteria* have been laid down for such extensions beyond the age of 55 years, the fact clearly remains that, in principle the Bank had accepted the position that extensions would be considered beyond the age of 55 years at least for a limited number of employees.