THE

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Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2008] 2 SRI L.R. – PARTS 7 & 8

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SATHASIVAM
v
MERCANTILE CREDIT LTD. AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 192/95(F)
DC COLOMBO 4129/MHP
MARCH 28, 2007

Hire Purchase – Consumer Credit Act No. 29 of 1982 – Finance Act – Management and administration of company vested in the Monetary Board – Company institutes action – legality? – Renouncing of benefits and privileges by guarantor – validity? Debtor's right to proceed against a guarantor?

The defendant-appellant was a guarantor in the Hire Purchase action instituted by the respondent company against one A. The District Court held with the plaintiff-respondent. In appeal it was contended that, the respondent company has no *locus standi* to institute action, as under the provisions of the Finance Act, the Monetary Board has taken over all the functions. It was also contended that, all privileges and benefits of a guarantor has been retained in terms of the Consumer Credit Act and the clauses in the Guarantee Bond – renouncing benefits and privileges – is contrary to law. It was further contended that the agreement was not read over and explained to him.

Held:

(1) The plaintiff company does not cease to exist and only the management and administration of the company is vested in the Monetary Board, as such there is no legal bar for the company to defend or institute proceedings in a court of law.

(2) Section 29 of the Consumer Credit Act contemplates of making Hire Purchase agreements void in certain circumstances, but there is nothing in Section 29 which would prevent a guarantor renouncing his rights under the Common Law and entering into a contract of guarantee.

(3) The signature of the 2nd defendant-appellant in the agreement is admitted, if that be so the defendant-appellant cannot deny the contents of the said document.

per Anil Gooneratne, J.

"A creditor would have a right to proceed against a guarantor as long as the principal debtor's right to pay remains and the principal debtor fails to satisfy the creditor or is in default according to the terms of the contract".

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *CA 209/93* DC Colombo 9118 CAM 3.6.93.
2. *GMOA* v *Senanayake* 2001 3Sri LR 377 at 389.

S. Mandaleswaran with *Ms. Aluthge Tharanga* for 2nd defendant-appellant.

Padma Bandara for respondent.

June 12, 2007

ANIL GOONERATNE, J.

This appeal arises from the judgment of the District Court of Colombo dated 29.3.95 on a hire purchase case. The appellant is the 2nd defendant in the District Court case who was a guarantor to the hire purchase agreement marked 'B' annexed to the plaint. In the District Court trial preliminary issues were raised by the 2nd defendant appellant and the learned District Judge rejected and ruled against those issues by his order of 19.11.1993. In this appeal matters raised by way of preliminary issues were also urged with emphasis on same namely that in view of the Gazette Notification marked 'A' annexed to the plaint, the Monetary Board has in terms of the Provisions of the Finance Act taken over the administration and management of Mercantile Credit Limited (plaintiff) and that the plaint and the action is not properly constituted since only the Monetary Board could file plaint or that this action should be preferred by the Monetary Board or that the plaint does not indicate that authority has been given by the Monetary Board to the plaintiff to proceed with the action.

The other important matter raised by the 2nd defendant appellant is that clauses 21, 22 and 23 of the above agreement marked 'b' is contrary to the provisions of the Consumer Credit Act, No. 29 of 1982 and the law relating to sureties.Issue Nos. 9 and 9A were not pursued.

At the hearing of this appeal the Counsel for 2nd defendant appellant also contended that the agreement marked 'B' was not read over and explained to the 2nd defendant-appellant.

I would like to comment on the above objections referred to above initially since it was the case submitted to this Court by the 2nd defendant-appellant though the written submissions of the appellant refer to other matters. It is apparent that plaintiff instituted action on or about 6.11.1992 and by that time Gazette Notification marked 'A' was in operation. The appellant contends that in terms of Section 20(2)(a) of Act No. 79 of 1988, all powers, duties and functions of the Board of Directors of the Company are vested with the Monetary Board and in view of Section 20(3) of the said Act every Director, Manager and Secretary of the Company will cease to function unless authorized by the Board and on account of this the Company itself cannot function.

Section 20 reads thus:

20(1) If the Board after review of the facts and circumstances upon the receipt of a report by the Director under Section 18 is of opinion that a finance company may by made a solvent and viable by action as hereinafter provided, it may by a notice published in the Gazette take over the administration and management of a finance company for such period as may be specified in such notice. The Board may by a subsequent Notice published in the Gazette extend the period specified in the original notice. The Board shall cause copy of every such notice to be sent to the Registrar of Companies who shall make a minute thereof in the books relating to the company.

(2) Where the Board takes over the administration and management of a finance company the Board may –

(a) exercise, perform and discharge with respect to such finance company all the powers, duties and functions conferred or imposed on, or assigned to, the Board of Directors of such company by or under any written law or by the articles of association of such company.

(b) enter into any agreement with any person or body of persons for the management of the finance company

subject to such conditions as may be agreed upon between the Board and such person or body of persons having regard to the interests of the depositors and creditors of the company and in the public interest.

(c) make such arrangements as it considers necessary for the amalgamation of the finance company with another finance company or any other institution with the consent of such other finance company or institutions.

(d) re-organise such finance company by increasing its capital, arranging for new shareholders, and by reconstituting its Board of Directors.

(e) reconstruct the finance company in any such manner as it considers to be in the interest of depositors; or

(f) direct any shareholder of any finance company to divest or transfer the ownership of any shares owned by him to a person nominated by the Board on payment by such person of compensation determined as follows-

(i) where such shares are quoted, at the market value thereof; or

(ii) where such shares are not so quoted, at a price to be determined by a valuer nominated by the Board.

(3) During the period for which the administration and management of a finance company is taken over by the Board, every director, manager and secretary of such finance company shall, unless expressly authorized to do so by the Board, cease to exercise, perform and discharge any powers, duties and functions with respect to such company.

(4) Where the administration and management of a finance company is taken over by the Board under subsection (1), the Board may where it considers it in the public interest to do so –

(a) arrange for or grant, such financial accommodation as it may consider necessary to the finance company by way of loans or other accommodation, other than by way of grants; and

(b) meet all costs, charges and expenses incurred in the administration and management of the company;

Provided however that the Board may at any time after the take over of the administration and management of a finance company under subsection (1) suspend the business of the company temporarily, if it is of opinion, that it is in the interest of the public or of the depositors to do so, or direct the Director to apply to a competent court to wind up the company, if on a report made by the Director or any person authorized by the Board, it appears to the Board that the company cannot be made viable and solvent within a reasonable period of time. In the event of the Board directing the Director to wind up the finance company, the provisions of section 18 relating to winding up shall apply.

On a perusal of the above Section one cannot contend in the same way as the appellant does and it is apparent that the company does not cease to exist and only the management and administration of the company is vested with the Monetary Board. As such there is no legal bar for the company to defend or institute proceedings, in a court of law. (there being no winding up or liquidation proceedings or assignment of it's rights at that point of time) Similar views were expressed in *C.A. 209/93*[1] by Wijeratne, J. the proxy in this case has been forwarded by the Monetary Board. As such there is no reason to interfere with the District Court order of 19.11.93.

On the other matter referred to above, the appellant contends that all privileges and benefits of a guarantor has been retained in terms of the Consumer Credit Act No. 29 of 1982, and clause 21, 22 and 23 of document 'B' would take away or be contrary to the said law which would renounce the benefits and privileges available under the common law, Section 29 of the said Act does not prohibit renouncing of privileges under common law by a guarantor.

Section 29 reads thus:

The following provisions in a hire-purchase agreement shall be void, that is to say, any provision –

(a) whereby an owner or a person acting on his behalf is authorized to enter upon the premises where the hirer

resides for the purpose of taking possession of goods which have been let under a hire-purchase agreement or is relieved from liability for any such entry; or

(b) whereby the right conferred on a hirer by this Act to determine the hire-purchase agreement is excluded or restricted, or any liability in addition to the liability imposed by this Act is imposed on a hirer by reason of the termination of the hire-purchase agreement by him under this Act; or

(c) where by a hirer, after the determination of the hire-purchase agreement in any manner whatsoever, is subject to a liability which exceeds the liability to which he would have been subject if the agreement had been determined by him under this Act; or

(d) whereby any person acting on behalf of an owner or seller in connection with the formation or conclusion of a hire-purchase agreement is treated as, or deemed to be, the agent of the hirer or buyer; or

(e) whereby an owner or seller is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire-purchase agreement; or

(f) whereby the hirer or buyer is required to avail himself of the services, as insurer or a repairer or in other capacity whatsoever, of a person other than a person selected by mutual agreement between the owner and the hirer or buyer.

The admission recorded in this case also needs to be considered in the light of the objection of the 2nd defendant-appellant. The signature of the 2nd defendant in agreement 'B' is admitted. If that be so can the 2nd defendant appellant deny the contents of the said document. In a way one could argue that it is not safe to draw inferences from that admission. But having regard to ordinary business of this nature and the usual human behaviour one cannot plead ignorance of the transaction. In any event provisions of the statute needs to be examined. Section 31

(interpretation) reads thus: .....

"contract of guarantee", in relation to any hire-purchase agreement means a contract whereby a person (in this Act referred to as "guarantor") guarantees the performance of all or any of the hirer's obligations under the hire-purchase agreement;

"court" means the court having jurisdiction to entertain the suit or action;

"guarantor" means a person who has guaranteed the performance by the hirer of all or any of his obligations under a hire-purchase agreement;

Accordingly the 2nd defendant has guaranteed and agreed to pay in case of default of the principal debtor or the hirer. The learned Trial Judge in his order refer to Section 29 of the Consumer Credit Act and observes that the said section contemplates of making the hire-purchase agreement void in certain circumstances but there is nothing in that section which would prevent a guarantor renouncing his rights under Common Law and entering into a contract of guarantee. The Trial Court Judge's views on same cannot be disputed.

Defendants who choose to renounce or waive as per the well-known principle expressed in the maxim "*quilibet potest renunciare juri pro Se introducto*" which means – anyone may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour – Brooms legal Maxims 10th Edition – pg.477.

This legal maxim is recognised by our courts as per Upali De Z Gunawardena, J. in *GMOA* v *Senanayake* (2) at 384.

The evidence led by the respondent Company of one Michel Vandott the Finance Manager was that the agreement in question was read over as explained and signed by the 2nd defendant in his presence and another employee of the company. One Duleeth Fernando had in the presence of the said witness read the agreement and explained same to the appellant and if a translation was necessary into the Tamil language there was also one Sulochana Jayasinghe an employee of the company also present.

This evidence has been submitted to the trial court by the said witness and there had been no successful attempt to demolish the

version of the said witness of the Company. The Trial Court Judge has accepted the evidence of the said witness and this court sees no reason to interfere with those findings. It was the position of the 2nd defendant appellant that he signed the agreement in question as a witness and not as a guarantor. The learned District Judge has rejected this position of the 2nd defendant. The Trial Court Judge clearly explains that on the evidence led before the District Court it was said that the 2nd defendant-respondent had submitted his bank statements, tax receipts, Auditors reports of his business etc. and there is no reason to submit these documents to the company if his position was that he was only a witness to the transaction. The Trial Court Judge's views on same is correct and rejection by the District Judge of the 2nd defendant-appellant's version of being a witness cannot be faulted.

A creditor would have a right to proceed against a guarantor as long as the principal debtor's right to pay remains and the principal debtor fails to satisfy the creditor or is in default according to the terms of the contract. The several objections raised in this appeal by the appellant does not have any merit which were also put in issue in the original court, unsuccessfully. The learned District Judge's judgment cannot be faulted as he has given cogent reasons for rejecting the appellant's version. In the circumstances, I dismiss this appeal with costs fixed at Rs. 15,000/- and affirm the judgment of the District Court.

CHANDRA EKANAYAKE, – I agree.

Appeal dismissed.

MALLIKA AND OTHERS
v
RUHUNU DEVELOPMENT BANK

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 218/2004
SEPTEMBER 27, 2006

Writ of Certiorari -Promotion challenged – Regional Development Bank Act No. 6 of 1997 Section 42 – Acting contrary to Circular – Statutory underpinning? – Office of a public character – Provision in the Act conferring statutory powers?

The petitioners, employees of the 1st respondent – Ruhunu Development Bank sought a writ of certiorari to quash the decision of the respondents to appoint 9th – 19th respondents to the post of Assistant Manager. The petitioners contended that, their non-selection is illegal contrary to the procedure laid down in the Bank Circular.

The respondents contended that, the Circular is an employees Circular, and it can no manner be construed as having any statutory flavour of underpinning. The circular is one confined to the realm of the employer-employee relationship and is purely of contractual in nature.

Held:

(1) The rule making power under Section 42 in relation to the promotion of the officers of the Bank is vested with the Board of Directors. The circular is not a rule made by the Board but is a communication between the administration of the Bank and its staff. There is no provision of the Act under which the circular has been promulgated or issued, the circular does not take the form of a rule for promotion.

(2) There is no provision under the Act which confers any statutory status on the office of the petitioners or that of Asst. Managers, neither as to the office or position under consideration nor the scheme of promotion has any statutory flavour or underpinning.

APPLICATION for a Writ of Certiorari/Mandamus.

Cases referred to:-

1. *K.S. de Silva* v *National Water Supply and Drainage Board and another* – 1989 – 2 Sri LR 3,
2. *Rodrigo* v *Municipal Council – Galle and another.*
3. *Wijesinghe* v *Mayor of Colombo and another* 50 NLR 87.
4. *Perera* v *Municipal Council Colombo* – 48 NLR 66
5. *Piyasiri* v *People's Bank* 1989 2 Sri LR 47 at 53.
6. *R.M. Jayasena and others* v *Uva Development Bank and others* CA 2042/2003 – CAM 16.12.2003.
7. *R.M. Jayasena and others* v *Uva Development Bank and another* SC Spl. LA 33/2004 SCM 29.4.2004.

Mohan Peiris PC with *Indunil Bandara* for petitioner.
Geof Alagaratnam with Mohamed Adamaly for 1-8 respondents.

March 20, 2007

SRISKANDARAJAH, J.

The petitioners are employees of the 1st respondent Bank. They have sought in this application a writ of certiorari to quash the decision of the 1st to 8th respondents to appoint the 9th respondent to the post of Assistant Manager Grade 3 – III of the 1st respondent Bank. The petitioners have also sought a *mandamus* directing the 1st to 8th respondents to make appointments according to law.

The petitioners submitted that the 1st respondent issued circular No 69/2003 marked P2 calling for applications and setting out the criteria and selection process for promotion to Assistant Manager Grade III of the Bank. The said Circular, setout, *inter alia*:

(a) the Persons eligible to apply,

(b) the number of vacancies as 15,

(c) that the selection process is two tiered, being by a written examination and an interview.

(d) That the Persons being placed 1st, 2nd and 3rd at the examination to be promoted irrespective of marks obtained at the interview if they satisfy the threshold criteria,

(e) Marks to be allowed under the different criteria set out in the circular.

The petitioners further submitted that the 1st and 2nd petitioners were placed 2nd and 3rd at the examination stipulated by the said

circular. All the petitioners were called for an interview before the interview panel consisted of the 2nd 3rd and 8th respondents. The results of the interview were published on 24th December and the petitioners were not successful at the interview and the 9th to 19th respondents were promoted.

The petitioners contended that their non selection is illegal, contrary to the procedure set out in the circular, irrational, unfair and unreasonable for the reason that the 1st and 2nd petitioners should have been mandatorily promoted as they have been placed 2nd and 3rd at the written examination as per section 4.2.1 of the circular and by their non-selection of the 2nd to the 8th respondents have breached the mandatory provisions of the circular. Most of the respondent selected had got less marks at the examination and for other qualifications compared to the petitioners and therefore to promote the 9th to 19th respondents in preference to the petitioners evidences a patent error in the selection process.

The respondents contended that the circular 69/2003(P2) dated 26.03.2003 is an employees circular for the promotions to Assistant Manager Grade III. The system prevalent in the Banks to send out general and formal communications is in the form of circular and hence the term circular only indicates the formality. However it can in no manner be construed as having any statutory flavour or underpinning. The circular is one confined to the realm of the Employer-Employee relationship between the Bank and its employees and is purely contractual in nature.

The petitioner contended that the 1st respondent bank is a creature of the Regional Development Bank Act No.6 of 1997. The Powers of the bank established in terms of the provisions of the said Act is set out in Section 5. It provides:

5. The Bank may, subject to the provisions of this Act, and without prejudice to any powers conferred on it by or under any law, exercise all or any of the following powers:-

(a) .....

(b) .....

.....

(x) to appoint such officers and servants as may be necessary

for carrying out the activities of the Bank, to fix the wages, salaries or other remuneration of such officers and servants and determine the terms and conditions of service of such officers and servants;

(y) to provide welfare and recreational facilities, and accommodation facilities, to officers and servants employed by the Bank;

(z) to enter into and perform all such contracts, whether in or outside Sri Lanka, as may be necessary for the exercise of the powers and the performance of the duties of the Bank.

(aa) to make rules in relation to its officers and servants including their appointment, promotion, remuneration, disciplinary control and the grant of leave to them;

(bb) to make rules in respect of the administration of the affairs of the Bank; and

(cc) to do all such other things which in the opinion of the Board of Directors of the Bank may be necessary to facilitate the proper carrying on of the business of the Bank.

The petitioner contended that the 1st respondent bank is vested with powers which should be exercised for the public benefit and as such when the 1st respondent bank exercises the said powers it displays a public character.

The question that has to be determined is whether the 1st respondent has exercised its Rule making power under Section 42 of the said Act to make rules in relation to its officers and servants including their appointment , promotion, remuneration, disciplinary control and the grant of leave to them. Section 42 of the said Act provides:

"42. The Board may make rules in respect of all or any matters for which rules are required or authorized to be made under this Act or any other matter necessary to enable the Bank to effectively carry out and performs its powers and duties under this Act."

From the above provision the rule making power in relation to the promotion of the officers of the said Bank is vested with the Board of Directors. The circular marked P2 is not a rule made by

the Board of Directors, but it is a communication between the administration of the bank and its staff. There is no provision of the Act under which P2 has been promulgated or issued. P2 does not take the form of a rule for promotion.

In *K.S.De.Silva* v *National Water Supply and Drainage Board and another*[1] at 3 G.P.S.De.Silva, J. with H.A.G.De Silva, J. and Jameel, J. agreeing held:

> "The case of *Rodrigo* v *The Municipal Council, Galle and another,*[2] appears to me to have a direct bearing on the matters that have arisen for decision on this appeal. That was a case where the petitioner who was Revenue Inspector in the Moratuwa Urban Council applied for a writ of *Mandamus*. He was transferred to the Galle Municipal Council (1st respondent) by the Local Government Service Commission. When the petitioner reported for work at the Galle Municipal Council, he was refused work and he was not paid his salary. The petitioner sought a writ of *Mandamus* to order the respondents (the Municipal Council and the L.G.S.C.) "to give the petitioner work and to pay his salary." In refusing the application for the writ, Windham, J. stated that one of the matters upon which the court must be satisfied is that "the petitioner is being prevented from exercising a right to perform certain duties and functions legally conferred upon him by virtue of his holding an office carrying with it such a right .... In the present case the petitioner has no powers or duties statutorily vested in him. It may well be that he is a public servant and in the employ of a public body (i.e. the 1st respondent)...But that is not the test. The question is whether he has public duties and powers vested in him by statute, so that he can be said to be statutorily entitled to exercise them." In short, Windham,J. held that the petitioner was not the holder of an office "to which specified duties and powers had been statutorily attached."
>
> Another decision which throws some light on this question is *Wijesinghe* v *Mayor of Colombo and another*[3] The petitioner was appointed to the post of Charity Commissioner by the Local Government Service Commission. The Municipal Council, Colombo, declined to recognize his appointment. The petitioner moved for a writ of *Mandamus* to order the

respondents (the Mayor and the Secretary of the Colombo Municipal Council) "to permit him to perform his duties in the exercise of his lawful functions as Charity Commissioner.....". In allowing the application, Gratiaen,J. stated: "I do not agree that the petitioner's right to the office of Charity Commissioner was only of a private nature which could adequately be enforced in a civil suit. The petitioner is an executive officer of the Council by virtue of Section 176 of the Municipal Councils Ordinance of 1947 ..... many, if not all, of the powers and functions contemplated are clearly powers and functions of a public nature" (at pages 90 and 91). See also the case of *Perera* v *Municipal Council of Colombo*(4).

In support of his submission that the petitioner in the application before us is seeking admission to an office which is of a public character, Mr. Perera referred us to sections 68 and 69 of the National Water Supply and Drainage Board Law No.2 of 1974. But these two sections refer only to the powers and duties of the General Manager of the Board and the powers of the Board to appoint "to its staff such officers and servants as the Board may deem necessary and determine their terms of remuneration and other conditions of employment." We were not referred to any rules made under the said Law No.2 of 1974 which speak of the powers or duties attached to the post of Accountant. In my opinion, the office to which the petitioner is seeking admission is not a "public office" of the kind which attracts the remedy by way of *Mandamus*. It is an office essentially of a contractual or private character. Accordingly, as a matter of law, the writ of *Mandamus* does not lie and the application must fail.

In *Piyasiri* v *People's Bank*(5) at 53 Wijeratne J held:

"Having regard to the constitution and functions of the respondent Bank, I hold that there is no public duty or statutory duty in this case to call the petitioner for this interview. As is well known this Writ will not be issued for private purposes.

Staff Circular 186/82 (which adopts the Nihal Wiratunga Report on the Minister's directions) is only a circular and not a regulation having statutory force. The said circular lays down

the policy and does not purport to provide for every step. The implementation of this circular is a private and internal matter of the respondent Bank. To call for recommendations from superior officers before a promotion is effected is a common practice based on prudence prevalent everywhere in the world and is nothing unusual. I am of the view that in the implementation of the circular the respondent Bank has a modicum of discretion as to whether recommendations should be sought from superior officers before effecting promotions."

The respondents also brought to the notice of this Court a similar application challenging the non-selection for the appointment to Grade 3-III of the Bankers' Service under a circular calling for applications for promotion to the said post was refused by the Court of Appeal in *R.M. Jayasena and 8 others* v *Uva Development and 48 others*(6) based on *K.S.De Silva* v *National Water Supply and Drainage Board (supra).* The Leave to Appeal against this Order was also refused by the Supreme Court(7).

There is no provision under the Act which confers any statutory status on the office of the petitioners or that of the Assistant Managers Grade 3-III. Therefore neither as to the office or position under consideration nor the scheme of promotion marked P2 has any statutory flavour or underpinning. Therefore the petitioners are not entitled to the relief claimed and this application is dismissed without costs.

Application dismissed.

VILMA DISSANAYAKE AND OTHERS

v

LESLIE DHARMARATNE

SUPREME COURT.
S.N. SILVA, C.J.
JAYASINGHE, J.
RAJA FERNANDO, J.
SC 3/2007
SC SPL. LA 114/2006
CALA 304/2004
DC COLOMBO 16858/L
JANUARY 24, 2007

Judicature Act No. 2 of 1978 – amended by Act No. 27 of 1999 – Section 48 – Continuing proceedings before succeeding Judge – Necessity? Discretion of Court?

Held:

(1) It is necessary for a succeeding Judge to continue proceedings since there are change of Judges holding office in a particular Court due to transfers, promotions and the like.
It is in these circumstances that Section 48 was amended giving discretion to a Judge to continue with the proceedings.

(2) The exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witnesses recorded by the Judge who previously heard the case.

APPEAL from the judgment of the Court of Appeal.

Gamini Marapana PC with *Kushan de Alwis* and *Navin Marapana* for petitioner.

Bimal Rajapakse with *Ravindra Anawaratne* for 2nd defendant-respondent.

January 24. 2007

S.N. SILVA, C.J.

This is an application for leave to appeal from the judgment of the Court of Appeal dated 17.3.2006. By that judgment the Court of Appeal set aside the order of the Additional District Judge whereby the Additional District Judge decided to continue with the proceedings and to enter judgment on the basis of evidence already recorded. The Additional District Judge acted on the basis of Section 48 of the Judicature Act No. 2 of 1978 as amended by Act No. 27 of 1999. The Court of Appeal held that since the Judge has not observed the demeanour of the witnesses there is an unreasonable exercise of the discretion vested in the Judge in terms of Section 48 as amended. Both Counsel agreed that special leave to appeal could be granted. We accordingly grant special leave to appeal, since the evidence had been recorded by a Judge who is yet in the judicial service as a Judge of the High Court and there is a possibility of the judgment being written by that Judge. Both parties agreed that no further evidence need be adduced. With consent of Counsel took up the matter for hearing.

It is necessary for a succeeding Judge to continue proceedings since there are changes of Judges holding office in a particular Court due to transfers, promotions and the like. It is in these circumstances that Section 48 was amended giving a discretion to a Judge to continue with the proceedings. Hence the exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witness recorded by the Judge who previously heard the case. It is common ground that there are no such issues as to demeanour when evidence was adduced by the 1st defendant.

Both Counsel, on the basis of the instructions received agreed that the judgment could be written by Mrs. Malini Gunaratne, presently a Judge of the High Court being the judge who heard the matter and before whom all the evidence was recorded.

Accordingly we allow this appeal and set aside the judgment dated 17.03.2006 of the Court of Appeal.

Registrar is directed to send this judgment to the Court of Appeal for the Court Appeal to forward the original record together with this judgment to the District Court of Colombo.

The Registrar, District Court of Colombo will seek an order from the

Judicial Service Commission for the appointment of Mrs. Malini Gunaratne presently High Court Judge to conclude case No. D.C. Colombo 16858/L, on the basis of the evidence that has been recorded. Early action to be taken by the Registrar, Supreme Court, Registrar, Court of Appeal and the Registrar, District Court considering the long delay in concluding this matter. The appeal is allowed. No costs.

JAYASINGHE, J. - I agree.

RAJA FERNANDO - I agree.

Appeal allowed.

LANKA RAJYA SANSTHA HA PODU SEVAKA SAMITHIYA AND OTHERS - SC FR 171/04
MENDIS - SC FR 193/2004
IRANGANI DE SILVA - SC FR 387/2007

v

BUILDING MATERIALS CORPORATION LTD.

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
AMARATUNGA, J.
MARSOOF, J.
SC FR 171/2004
SC FR 193/2004
SC FR 387/2004
MAY 22, 2006
JULY 6, 2006
SEPTEMBER 20, 2006
NOVEMBER 9, 2006
FEBRUARY 15. 2007
MARCH 20,2007
MAY 9, 2007
OCTOBER 29, 2007

Fundamental Rights – Article 12(1) – Age of retirement – 55 or 60 – Conversion of a Corporation to a limited liability company – Applicability of the Public Administration (PA) Circular 5/2002 – Legitimate expectation – Voluntary Retirement Scheme (VRS) – Reasonable classification – Legitimate expectation – Computation of the period to grant compensation –

Establishment Code – Cap 5 Section 5.

The petitioners filed three applications complaining of a decision taken by the 1st respondent – Building Materials Corporation Ltd., (BMC) that they had consented to the accepting the V.R.S. offered by the 4th respondent – Secretary to the Treasury. The petitioners contended that, their letters of appointment did not specify their age of retirement and the P.A.S. Circular 5/2002 dated 23.8.2002 had amended Section 5 of Cap. V of the Establishment Code extending the age of retirement from 55 years to 57 years, and contended that they could have served until the age of 57 years and thereafter could have continued up to 60 years, it was their contention that they had a legitimate expectation of receiving compensation on the VRS taking into account 60 years as the age of retirement.

Held:

(1) It is not disputed that the letters of appointment issued to the petitioners had not specified the age of retirement. The BMC had decided to adopt the rules and regulations of the E Code but since the conversion of the corporation to a limited liability company in 1992 (BMC), BMC has not taken steps to adopt the E Code in situations, where there are no rules and regulations.

(2) The 1st respondent authority had changed its status to a limited liability company which is not a statutory authority – but only a commercial entity, that falls under the Companies Act, accordingly Government Circulars and the provisions of the E Code had no automatic application to the 1st respondent.BMC.

(3) At the time the corporation was converted into a limited liability company, the age of retirement stipulated in the E Code was 55. The corporation had taken a conscious decision regarding the age of retirement in July 2000 – would be 55 years, although the age of retirement in the E Code was increased from 55 to 57. the corporation had not taken a decision to change their employees age of retirement from 55 to 57.

(4) It is apparent that there had been a differentiation between the employees of the 1st respondent and the employees of some of the corporations and statutory bodies, the reasons for the 1st respondent's decision regarding the age of retirement of its employees is not contrary and rests on real and substantial criteria – the classification is based on intelligible differentiation with reasonable relation to the objects that it sought to achieve.

The petitioner cannot complaint that their age of retirement has not been considered as 57 as they are not similarly circumstanced as the others, where age of retirement has been increased to 57 years.

(5) On a consideration of all the facts and and circumstances it is evident that

neither the Government nor the 1st respondent or its predecessor had made any express representation to the petitioners that the age of retirement would be changed from 55 to 57 years. there had not been any change in the policy of the 1st respondent in respect of the age of retirement of its employees. As there had not been a change of the age of retirement, there could not have been any possibility for the petitioners, to claim that they had a legitimate expectation for the age of retirement to be considered as 60 for the purpose of computing compensation on VRS.

APPLICATION under Article 126 of the Constitution.

Cases referred to:

1. *E.P. Royappa* v *State of Tamil Nadu* AIR 1974 SC 555.
2. *Ram Krishna Dalmia* v *Justice Tendolkar* AIR 1958 SC 538.
3. *Dayaratne* v *Minister of Health* 1999 1Sri LR 393.
4. *Sirimal* v *Board of Directors of the CWLS* 2003 2 Sri LR 23.
5. *Lorna Gunasekera* v *People's Bank* SC FR No. 524/2002 SCM 20.6.2007.
6. *Attorney-General of Hong Kong* v *Ng Tuen Shiu* 1983 2 All ER 346.
7. *Council of Civil Services Union* v *Minister for the Civil Service* 1986 3 All ER 935.

Peter Jayasekera with *Kosala Senadheera* for petitioners.
Bimba Jayasinghe Tilakaratne DSG for respondents.

December 12, 2007

DR. SHIRANI BANDARANAYAKE, J.

Thirty (30) petitioners filed three (3) applications complaining of the decision taken by the 1st respondent. Since all applications relate to a single decision taken by the 1st respondent, all Counsel agreed that there applications could be heard together and a single judgment would be applicable to all applications.

Petitioners of all these applications, employees of the 1st respondent Corporation Ltd., had consented to accept a Voluntary Retirement Scheme (hereafter referred to as VRS), which was offered by the 4th respondent. The petitioners' position was that the said VRS was offered to all employees, who were attached to Government Corporations and Companies, which were to be closing or winding up due to various reasons. According to petitioners, for the purpose of payment of compensation in terms of the VRS, the employees were classified into (3) categories, which included,

(1) employees having ten (10) or more years of service;

(2) employees who had ten (10) years of service; and

(3) casual and contract employees.

In terms of the amendment to paragraph 4 of the Circular No. P.E.D. 10 dated 28.05.2003 (P23(b)) provision was made for the payment of compensation taking into consideration the age of retirement. According to the said Circular,

> "for the purpose of payment of compensation the relevant age (as per service agreement) shall be 55 years or 60 years as stated in the letter of appointment."

Learned Counsel for the petitioners contended that their letters of appointment did not specify their age of retirement and the Public Administration Circular No.5/2002 dated 23.08.2002 had amended section 5 of Chapter V of the Establishments Code extending the age of retirement from 55 years to 57 years of age. Accordingly, the petitioners submitted that in terms of the said Circular, the petitioners could have served until the age of 57 years and thereafter could have obtained extensions upto the age of 60 years.

Accordingly, the petitioners stated that they had a legitimate expectation of receiving compensation based on the VRS taking into account 60 years as the age of retirement. The petitioners therefore complained that the compensation given to them on the basis of VRS considering the age of retirement as 55 years as arbitrary and unreasonable and in violation of their fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

It is common ground that all the petitioners were paid and had accepted the compensation package offered to them in terms of the VRS, on the basis of 55 years of age, irrespective of their actual ages, which was considered as the age of retirement. The only question that has to be resolved therefore is whether the age of retirement of the petitioners was 55 years as stated by the respondents or whether it was changed on the basis of the Public Administration Circular No. 5/2002 dated 23.08.2002 as contended

by the learned Counsel for the petitioners in these three applications, to 60 years of age.

Learned Counsel for the petitioners contended that although there was a conversion from the Building Materials Corporation into the Building Materials Corporation Ltd., such conversion had no effect with regard to the terms and conditions of service of its employees. It was also contended that the amendment to Chapter V of the Establishments Code by Public Administration Circular No. 5/2002 dated 23.08.2002 had enabled an employee to remain in employment upto the age of 57 years without any annual extensions of service. In support of his contention learned Counsel for the petitioners referred to the letter dated 20.10.2004 by the Secretary to the Ministry of Housing and Construction Industry, Eastern Province Education and Irrigation Development, where the Corporation and statutory Boards, which came under that Ministry were permitted to adopt the government policy on retirement at the age of 57 years in place of 55 years of age with provision to obtain extension of service upto 60 years of age. Learned Counsel for the petitioners also submitted that that National Housing Development Authority had consequent to the directive of the aforementioned Secretary to the Ministry of Housing and Construction Industry, Eastern Province Education and Irrigation Development Ltd. had adopted 57 years as the age of retirement. Learned Counsel for the petitioners therefore contended that they were similarly circumstanced as other government servants and/or employees of Statutory Boards or Corporations that has adopted 57 years as the age of retirement.

Learned Counsel for the petitioners also contended that the VRS was calculated on a formula based on the number of years between the age of the employee and the age of retirement stipulated by the respondent authority. Learned Counsel for the petitioners contended that since the letters of appointment had not stated the age of retirement, that should be considered on the basis of the government policy and considering the amendment to the Establishments Code by Public Administration Circular No. 5/2002, the petitioners had a legitimate expectation of serving until the age of 57 years and obtaining extensions of service thereafter. Accordingly, he contended that, for the purpose of paying

compensation on VRS, the age of retirement should be taken as 60 years of age and not 55 as has been considered by the respondents.

Accordingly, the complaint of the petitioners was that the 1st respondent had wrongfully and unreasonably fixed the age of retirement of the petitioners as 55 years of age for the purpose of paying compensation on the VRS without considering the amendment to the Establishment Code and the Public Administration Circular No. 5/2002.

At the hearing it was conceded that the actions of the 1st respondent Corporation were executive or administrative within the meaning of Article 126(1) of the Constitution.

The main contention of the learned Counsel for the petitioners was that the Building Materials Corporation as well as the 1st respondent Corporation Ltd. were governed in terms of the Establishments Code and were subjected to the government policy of retirement, which was extended from 55 years to 57 years of age.

It was not disputed that the letters of appointments issued to the petitioners had not specified the age of retirement. It was also not disputed that the Building Materials Corporation in 1992 had decided to adopt the rules and regulations of the Establishments Code 'when no rules or regulations in respect of a matter' were available. The relevant Minute of the Board Meeting held on 29.04.1992 ..... which refers to this position, was as follows:

> *"..... where there are no rules and regulations adopted by the board for the Corporation, the rules and regulations laid down in Volumes I and II of the Establishments Code of the Democratic Socialist Republic of Sri Lanka will apply to the Building Materials Corporation."*

However, the Chairman/Managing Director of the 1st respondent Corporation has dearly averred in his affidavit that since the conversion of the Building Materials Corporation to a limited liability Company on 16.10.1992, the Company has not taken any steps to adopt the Establishments Code, in situations where there are no rules and regulations.

It is not disputed that with the conversion which took place on 16.10.1992, the 1st respondent authority changed its status to a limited liability Company, which is not a statutory authority, but only a commercial entity, that falls under the Companies Act. Accordingly the Government circulars and the provisions of the Establishments Code had no automatic application to the 1st respondent, although the 1st respondent had the authority for them to be adopted, modified or varied at the discretion of the Board of Directors acting in terms of the Companies Act. The petitioners however had not submitted any materials to show that the 1st respondent had passed a resolution to this effect.

It is also important to note that at the time the 1st respondent adopted the provisions of the Establishments Code, it was only for the purpose of making provision, where no regulations had been made by the Building Materials Corporation (R3).

Learned State Counsel correctly contended that such decision to adopt the Establishments Code did not fetter the 1st respondent Corporation from making any other rules contrary to the Establishments Code. Thus, the 1st respondent Corporation could have made necessary rules without adopting an amendment that was brought to the Establishments Code.

The decision of the Board of Directors to adopt the provisions of the Establishments Code was taken as referred to earlier, on 29.04.1992. Within a matter of six months in October 1992, the Building materials Corporation was converted into a limited liability Company. At that time the age of retirement stipulated in the Establishments Code was 55 years of age.

Even if we were to take into account that the 1st respondent had taken a decision to adopt the Establishments Code and since there were no further adoption of the said Code by the newly established Corporation Limited that the earlier decision should continue to apply to the latter, it is clearly evident that, the 1st respondent had taken a considered decision regarding the age of retirement of its employees.

As has been stated earlier, the decision of the Board of Directors in April 1992 has to adopt the rules and regulations of the Establishments Code, when there were no applicable rules and

regulations made by the 1st respondent Corporation. Then there was only a limited applicability of the Establishments Code and the discretion was in the hands of the Building Materials Corporation to decide whether to adopt the provisions of the Establishments Code or to make their own rules and regulations.

In fact it is clearly evident, that the Building Materials Corporation Ltd. had taken a conscious decision regarding the age of retirement of their employees in July 2000. The decision of the Board of Directors on 03.07.2000 clearly states that the age of retirement of their employees would be 55 years. The said Board decision (R4) reads as follows:

> "Extension of service of the Employees beyond the age of 55 years – Board Papers 92/03 and 92/04.
>
> The Board having perused Board Papers 92/03 and 92/04 made a policy decision that as a matter of principle not to extend the services of employees of BMC beyond the age of 55 years ... with effect from 31.07.2000.
>
> The Board also decided that as recommended by the Board Paper 92/04 those whose services have already been extended will serve upto the approved date of extension."

Although the age of retirement in the Establishments Code was increased from 55 years to 57 years by Public Administration Circular No. 5/2002 dated 23.08.2002, the Building Materials Corporation Ltd., quite evidently had not taken a decision to change their employees age of retirement from 55 years to 57 years. On the contrary, the 1st respondent just prior to the issuance of the Public Administration Circular No. 5/2002 and soon afterwards, had once again reiterated and had reconfirmed their decision that the employees should retire at the age of 55 years. Thus on 03.10.2002 the Board of Directors had referred to the age of retirement as 55 years (R5). The decision stated as follows:

> "The chairman said that since the Board decision is not to extend the services of employees who reach the retirement age of 55 years BMC was not in a position to retain an employee even if his services were required as it would be contrary to the decision of the Board."

Similar decisions were taken at the meetings held on 07.11.2002 (R6) and 24.11.2003 (R7), which were as follows:

"Revision of Section 5 of Chapter V

The Board resolved to abide by the decision of retiring employees at the optional age of 55 years as proposed by the chairman."

"Age of Retirement

The Managing Director stated that there had been a request to change the provisional age of retirement to 57 years. The Board after discussion regretfully decided to abide by the existing policy of 55 years."

It is thus evident that the Building Materials Corporation and the Building Materials Corporation Ltd., which were under no obligation to follow the Establishment Code had taken a policy decision irrespective of the amendments made by the Public Administration Circular No. 5/2002, to maintain the age of retirement of their employees at 55 years of age.

Having said so, the question that arises at this point is whether there had been any violation of the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution, by the decision of the 1st respondent Corporation to consider the petitioners' age of retirement as 55 years for the computation of the payments on VRS when there have been instances, where some of the Corporations and Statutory Boards had adopted 57 years of age as the age of retirement.

Article 12(1) of the Constitution, which deals with equality before the law reads as follows:

"All persons are equal before the law and are entitled to the equal protection of the law."

Equality requires the application of a law equally among similarly circumstanced people without any discrimination. However, it does not mean that the same law should apply identically to all persons and every differentiation is not treated as discrimination. It is thus evident that in these circumstances, classifications could be sustained. A classification to be treated as

valid it should be reasonable and not arbitrary. Equality, as pointed out by Bhagwati, J. (as he then was) in *E.P. Royappa* v *State of Tamil Nadu*[1], is antithetic to arbitrariness and equality and arbitrariness are sworn enemies. This however does not mean that every classification would become invalid on the basis of arbitrariness. A classification could be valid if it could satisfy the following conditions:

(a) the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and

(b) that the differentia must bear a reasonable or a rational relationship to the objects and effects sought to be achieved (*Ram Krishna Dalmia* v *Justice Tendolkar*[2].

Accordingly, there cannot be any discrimination between two persons, who are similarly circumstanced, which emphasizes the notion that equals cannot be treated unequally and unequals cannot be treated equally.

The many descriptions and explanations given in interpreting the concept of equality refer to classifications, which are not arbitrary or irrational, but are reasonably related to a legitimate objective.

Accordingly, the question that has to be answered in instances such as the one that is under consideration would be whether the classification has been based on reasonable grounds.

Admittedly, the petitioners' allegation is that they have been treated differently as the 1st respondent had taken a decision that their age of retirement is at 55 years for the purpose of computing the payment of compensation on the VRS, whereas some of the other Corporations and Statutory Board had allowed their employees to function until the age of 57 years.

Considering the Circumstances of this case, it is apparent that there had been a differentiation between the employees of the 1st respondent and the employees of some of the Corporations and Statutory Boards. In such a situation the question that has to be answered would be whether this classification is reasonable and could be founded on intelligible differentia that distinguishes the

employees of the 1st respondent from that of the others. Such classification, as has been stated earlier, cannot be arbitrary and should rest on real and substantial criteria. Accordingly it would be necessary to consider the reasons for the 1st respondent's decision regarding the age of retirement of its employees.

The Chairman of the 1st respondent in his affidavit had averred that the 1st respondent had in recent years incurred heavy losses had become a commercially non-viable Company and had ceased to be an on going concern in view of its accumulated losses.

Considering the aforementioned it was absolutely clear that the 1st respondent was not profit making and necessarily needed a restructuring programme to reduce the employees and thereby to reduce the expenditure of the Company. For this purpose the 1st respondent had introduced a Voluntary Retirement Scheme and 625 employees had accepted the said Scheme. The Circular pertaining to the said VRS had clearly stated that the age of retirement is considered as 55 years for the purpose of payment of compensation and the petitioners had accepted the compensation in terms of the said Circular and had retired from service.

When these circumstances are taken into consideration it is quite evident that the 1st respondent Corporation is totally different to other Organizations. The other establishments referred to by the petitioners where the age of retirement was extended from 55 years to 57 years of age had no such financial difficulties as had been encountered by the 1st respondent. Accordingly it is evident that the 1st respondent belongs to a different category. Thus the classification is founded on intelligible differentia with a reasonable relationship to the objects and effects that it sought to achieve. The concept of equality means that persons who are similarly placed could be treated equally and on a consideration of all the circumstances in these applications it is apparent that the petitioners do not belong to the category of employees of other Corporations, where the age of retirement was fixed at 57 years of age. The petitioners therefore cannot complain that their age of retirement has not been considered as 57 years as they are not similarly circumstanced as the others, whose age of retirement has been increased upto the age of 57 years.

Learned Counsel for the petitioners submitted that they had a legitimate expectation for the retirement age to be considered as 60 years as a matter of government policy for the purpose of computing the compensation on the VRS not referred to the decisions in *Dayaratne* v *Minister of Health*[3] and *Sirimal* v *Board of Directors of the CWE*[4].

Legitimate expectation, as has been stated in *Lorna Gunasekera* v *People's Bank*[5], was based on the principles of procedural fairness and was closely related to hearings in conjunction with the rules of natural justice. As expressed by David Foulkes (Administrative Law, 8th Edition, Butterworths, 1995, pg. 290), it is necessary for the presence of a promise or an undertaking to give rise to a legitimate expectation. Referring to this concept, David Foulkes *(supra)* had stated that:

> "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).

This position was clearly illustrated by the decision in *Attorney-General of Hong Kong* v *Ng Tuen Shiu*[6] and *Council of Civil Service Unions* v *Minister for the Civil Service*[7].

As the petitioners have contended that they had a legitimate expectation that the compensation on VRS would be computed considering the age of retirement as 60 years, it could be necessary to examine whether there had been a promise and/or procedure that could have given rise to such an expectation.

On a consideration of all the facts and circumstances of these applications it is evident that neither the Government not the 1st respondent Corporation or its predecessor had made any express representation to the petitioners that the age of retirement would be changed from 55 years to 57 years of age. Moreover, if one considers the age of retirement that had been applicable to the employees of the 1st respondent including the petitioners, it could

be observed that throughout the years the 1st respondent had maintained that to be 55 years of age. There had not been any change in the policy of the 1st respondent Corporation in respect of the age of retirement of its employees. It is therefore clearly seen that the petitioners' applications are totally different to that of *Dayaratne* v *Minister of Health (supra)* and *Sirimal* v *Board of Directors of the C.W.E. (supra)*, where it was accepted that the aggrieved parties had a substantial legitimate expectation.

In *Dayaratne's* case *(supra)* that question that arose was whether a change in *criteria* for the scheme of training had violated the express representation made and thereby whether that had affected the legitimate expectation of the petitioners. In that case the petitioners in response to a Gazette Notification had sat for the competitive examination and on its results were qualified to follow the training at which stage a decision had been taken effecting a change of policy. In *Sirimal (supra)*, C.W.E. had issued several Circulars stating that extensions would be granted upto the age of 60 years and later had changed their policy and had decided to retire their employees at the age of 55 years without any extensions of service.

A careful consideration of the present case clearly indicates that, as stated earlier, there had been no change of the age of retirement of the employees of the 1st respondent. Accordingly there could not have been any possibility for the petitioners to claim that they had a legitimate expectation for the age of retirement to be considered as 60 years of age for the purpose of computing compensation on VRS.

On a consideration of all the aforementioned facts and circumstances and for the reasons given in my judgment I hold that the petitioners have not been successful in establishing that their fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the respondents.

These applications are accordingly dismissed, but without costs.

AMARATUNGA, J. - I agree.

MARSOOF, J. - I agree.

Application dismissed.

EAGLE BREWERIES LTD.
v
PEOPLE'S BANK

COURT OF APPEAL
ANDREW SOMAWANSA, J. (P/CA)
WIMALACHANDRA, J.
CA 586/2004
DC CHILAW 709/MDR
FEBRUARY 24, 2006

Debt Recovery (Sp. Pro.) Act No.2 of 1990 Section 4(1), 4(2), 4(5) – Action based on cheques – Full sum to be deposited – Notice of appeal filed – Rejection of same by the District Court – Validity – Civil Procedure Code. Section 754(4), 754(3), 755 – a writing or document stipulated under Section 4 of the Debt Recovery Act? Revision – Exceptional circumstances.

The plaintiff-respondent instituted action in terms of the Debt Recovery (Sp. Prov.) Act (DR Act) – action being based on 20 cheques. After inquiry on 3.12.2003 Court ordered the defendant to deposit the full sum claimed in the plaint to be entitled to file answer.

The petitioner lodged a notice of appeal which was rejected by the District Judge on 26.1.2004. The District Court also rejected the position of the defendant that, there was no agreement. The petitioner moved in revision and contended that the District Judge has no jurisdiction to reject the notice of appeal but could only record his observations as to whether or not there is a right of appeal against the judgment appealed against.

It was also contended that as there was no writing or documents on which the respondent can sue or on which the loan is said to have been granted, – the action cannot be maintained.

Held:

(1) In terms of the provisions contained in the Civil Procedure Code, with regard to tendering of notice of appeal, the relevant provisions do not permit or give authority to the District Judge to reject the notice of appeal on the basis that the petitioner is not entitled to a final appeal, it was the function of the Court of Appeal to look into this aspect of the matter.

(2) Section 754(1) states that "if such conditions are not fulfilled the Court shall refuse to receive it – it refers to the requirements specified under Section 754(3) and 754(4) only and no other. It does not give jurisdiction to the District Judge to refuse the notice of appeal as he is of opinion that the order in question does not give rise to a final appeal.

Held further:

(3) While it is conceded that statement of accounts and the cheques do not come within the meaning of instrument or agreement, the restricted interpretation sought to be given to an instrument or an agreement as being a document which contains a contract entered into between two or more parties is unacceptable. For a cheque or a statement of account from a Bank too could be considered to constitute a document that would contain a contract entered into between two parties.

Cheque drawn from a Bank and a statement of accounts from a Bank would come within the ambit of a document in terms of Section 4(1).

Held further:

(4) Exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting intervention and revision is a discretionary remedy – No explanation has been given as to why he did not resort to his statutory right to seek relief from the 2nd order dated 3.12.2003.

APPLICATION in revision from an order of the District Court of Chilaw.

Case referred to:

(1) *Dharmaratne and another* v *Palm Paradise Company Ltd. and others* 2003 3 Sri LR 24.

Sunil Cooray for petitioner.

Ronald Perera for respondent.

February 24, 2006

ANDREW SOMAWANSA, J. (P/CA)

In this revisionary application the defendant-petitioner is seeking to revise and set aside the orders of the learned District Judge of Chilaw dated 03.12.2003 holding that unless the defendant-petitioner deposits in Court the sum claimed in the plaint the defendant-petitioner is not entitled to file answer and to contest this action and the order dated 26.01.2004 rejecting the defendant-petitioner's notice of appeal. Defendant-petitioner further prayed for the dismissal of the plaintiff-respondent's action or in the alternative

an order granting unconditional leave to the defendant-petitioner to file answer and contest the action. The defendant-petitioner also supported and obtained a stay order staying proceedings in the District Court which have been extended from time to time.

After the pleadings were completed and when this application was taken up for argument both Counsel agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are: the plaintiff-respondent (hereinafter called the respondent) instituted the instant action in terms of provisions of the Debt Recovery (special provision) Act No. 2 of 1990 as amended seeking to recover Rs. 928,980/50 and interest at the rate of 32% per annum. The action is based on 20 cheques drawn by the defendant-petitioner (hereinafter called the petitioner) on his current account maintained at the respondent's Bank branch at Madampe and all of which had been honoured by the respondent Bank. The District Court issued *decree nisi* on the petitioner and the petitioner filed his objections supported by affidavit and moved that he be allowed leave to appear and defend unconditionally by filing answer to contest this action and that the *decree nisi* be dissolved. At the conclusion of the inquiry into this application made by the petitioner the learned District Judge by his order dated 03.12.2003 held that unless the petitioner deposits in Court the sum claimed in the plaint the petitioner will not be entitled to file answer or to contest this action. Being aggrieved by this order, the petitioner duly filed a notice of appeal in terms of Section 755(1) of the Civil Procedure Code. The respondent objected to the said notice of appeal being accepted and moved that the same be rejected. At the conclusion of the inquiry into the aforesaid objection the learned District Judge by his order dated 26.01.2004 rejected the petitioner's notice of appeal. It is the aforesaid two orders that the petitioner is seeking to revise and set aside.

As for the order rejecting the notice of appeal the same cannot stand for the learned District Judge has no jurisdiction to reject either a notice of appeal or a petition of appeal but could only record his observations as to whether or not there is a right of appeal against the judgment or decree appealed against.

At this stage it is useful to consider the relevant provisions in the Civil Procedure Code,

Section 754(3) "Every appeal to the Court of Appeal from any judgment or decree of any original Court, shall be lodged by giving notice of appeal to the original Court within such time and in the form and manner hereinafter provided".

(4) "The notice of appeal shall be presented to the Court of first instance for this purpose by the party appellant or his registered attorney within a period of fourteen days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of public holidays, and the Court to which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the Court shall refuse to receive it".

It is to be noted that the last sentence in 754(4) of the Civil Procedure Code which reads

'If such conditions are not fulfilled the Court shall refuse to receive it' refers to the requirement spelt out in Sections 754(3) and (4) only and no other. It does not give jurisdiction to the District Judge to refuse notice as he is of opinion that the order in question does not give rise to a final appeal as in the instant action.

Thereafter Section 755(4) and (5) comes into operations which reads as follows:

755(4) "Upon the petition of appeal being filed, the court shall forward the petition of appeal together with all the papers and proceedings of the case relevant to the judgment or decree appealed against, as speedily as possible to the Court of Appeal retaining however an office copy of the judgment or decree appealed against, for the purposes of execution if necessary. Such proceedings shall be accompanied by a certificate from the Registrar of the Court of Appeal stating the dates of the institution of the decision of the case, in whose favour it was decided and the dates on which the notice and the petition of appeal were filed, and the opinion of the Judge as to whether or not there is a right of appeal against the

judgment or decree appealed against".

(5) "On receipt of the petition of appeal, the Registrar of the Court of Appeal shall forthwith number the petition and shall enter such number in the Register of Appeals and notify the parties concerned by registered post.

Provided that when the judge of the original court has expressed an opinion that there is no right of appeal against the judgment or decree appealed against, the Registrar shall submit the petition of appeal to the President of the Court of Appeal or any other Judge nominated by the President of the Court of Appeal who shall require the petition to be supported in open court by the petitioner or an attorney on his behalf on a day to be fixed by such Judge, and the court having heard the petitioner or his attorney, may, reject such petition or fix a date for the hearing of the petition and order notice thereafter to be issued on the respondent or respondents;

Provided further, that, when a petition is rejected under this section the Court shall record the reasons for such rejection".

In terms of the provisions contained in the Civil Procedure Code with regard to the tendering of notice of appeal the relevant provisions do not permit or give authority to the learned District Judge to reject the notice of appeal on the basis that the petitioner is not entitled to a final appeal. On this point of law, I would say the learned District Judge has misdirected himself as having authority to do so when in fact he did not have such authority and it was the function of the Court of Appeal to look into this aspect of the matter.

In the circumstances, I would hold that the order dated 26.01.2004 is palpably wrong and could be considered as exceptional circumstances warranting the interference and exercise of the extraordinary powers of this Court to set aside the said impugned order. In this respect, I would also consider the fact that when the notice of appeal was rejected on 26.01.2004 the only means by which he could obtain relief was by way of revision for there was no other alternative means of relief that he could resort to.

In respect of the other order dated 03.12.2003 Counsel for the petitioner contends that the question of law raised by him at the inquiry in the original Court is that this action cannot be maintained in terms of Debt Recovery (Special Provisions) Act No. 2 of 1990 as there was no writing or documents on which the respondent can sue in this action. He submits that there was no written agreement or document on which the loan is said to have been given and is now sought to be recovered. For the above submission the defendant relies on the express provisions of Section 4(1), Section 4(2) and Section 4(5) of the Debt Recovery (Special Provisions) Act No. 2 of 1990, which reads as follows:

"4(1) The institution suing shall on presenting the plaint .... produce to the court the instrument, agreement or document sued upon or relied on by the institution".

"4(2) If any instrument, agreement or document is produced to the court and the same appears to the court to be properly stamped (where such instrument, agreement or document is required by law to be stamped) and not be open to suspicion by reason of any alteration or erasure or other matter on the face of it, and not to be barred by prescription, the court .... shall enter a decree nisi in the form set out in the First Schedule.....".

"4(5) The institution shall tender with the plaint – (a) the ... instrument, agreement or document referred to in subsection (1) of this section ..."

Counsel submits that an action under the said Act No. 2 of 1990 cannot be instituted by an institution unless it has, and it produces in court, an instrument, agreement or document sued upon or relied on by the institution and the petitioner had shown, in applying for unconditional leave to appear and defend this action, that there is an issue or a question in dispute which ought to be tried within the meaning of Section 6(2)(c) of the said Act, No. 2 of 1990. Therefore the Court was obliged under Section 6(2) of the said Act to "give leave to appear and show cause".

He further submits that the contention of the plaintiff bank is that the several cheques which it has produced with the plaint, and/or the statement of accounts which it has produced with the plaint, amounts to an instrument, agreement or document sued upon or

relied on by the plaintiff bank. This contention of the plaintiff bank is wholly incorrect and untenable and the statement of accounts and the cheques produced do not come within the meaning of "instrument" or "agreement". An "instrument or agreement" is clearly a document which contains a contract entered into between two or more parties. The word "document' in Section 4(1) must be given a meaning *ejusdem generis* and must mean some document by which the loan was granted by the plaintiff to the defendant. This is clearly seen by the words "sued upon or relied on" in Section 4(1).

For the above reasons Counsel submitted that the plaintiff is not entitled to institute this action under the provisions of the said Act No. 2 of 1990, and that the defendant has shown that he has an arguable defence in this action, the Court was bound to have granted unconditional leave to appear and defend under Section 6(2)(c) of the Act No. 2 of 1990.

I am not impressed with the aforesaid submissions for the relevant provisions state that on presenting the plaint ... produced to the Court the instrument, agreement or document sued upon or relied upon by the institution. While it is conceded that statement of accounts and the cheques produced do not come within the meaning of instrument or agreement. However, the restricted interpretation sought to be given by Counsel to an instrument or an agreement as being a document which contains a contract entered into between two or more parties is unacceptable. For a cheque or a statement of accounts from a Bank too could be considered to constitute a document that would contain a contract entered into between two parties. My considered view is that a cheque drawn from a Bank and a statement of accounts from a Bank would come within the ambit of a document in terms of Section 4(1) of Act No. 2 of 1990. In any event the objection taken by the petitioner was rejected and journal entry dated 03.12.2003 reads as follows:

නීතීඥ ආර්. එ-/ජ් රත්දෙනිය මහතා පැමිණිල්ලට සිටී.
නීතීඥ අර්විත් ප්‍රනාන්දු මහතා විත්තියට සිටී.
නියෝගය.

විත්තිකරුගේ අධ්‍යක්ෂ පද්මසිරි මහතා පෙනී සිටී.
විත්තිකරු වලංගු විත්ති වාචකයක් ඉදිරිපත් කර නැත.

එබැවින් විත්තිකරු විසින් පැමිණිල්ලේ සඳහන් මුදල මෙම අධිකරණයේ නඩුවේ
බැරට තැන්පත් කරනු නොලබන්නේ නම් විත්තියට උත්තර ගොනු කිරීමට අවස්ථාවක්
හිමි නොවන බවට නියෝග කරමි. (සටහන බලන්න)
මුදල් තැන්පත් කිරීම සඳහා කැඳවන්න.
10.03.2004

The petitioner was given time till 10.03.2004 to deposit the money. It appears that he did not take any steps to have this order dated 03.12.2003 vacated or set aside or stay the proceedings when he had a statutory right of appeal with the leave of the Court of Appeal first had and obtained. However it appears that without resorting to his statutory right or depositing the money he had proceeded to tender a notice of appeal on 19.12.2003. Ultimately after an inquiry as per journal entry dated 26.01.2004 petitioner's notice of appeal was rejected and the instant revision application has been tendered on 04.03.2004.

It is to be noted that no explanation at all has been given as to why he did not resort to his statutory right to seek relief from the order dated 03.12.2003. No explanation given as to the delay in coming to this Court by way of revision.

It is well settled law that the exercise of the revisionary powers of the Appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention and that the revision is a discretionary remedy and will not be available unless the application discloses circumstances which shock the conscience of the Court and is certainly not available to a party who for reasons best known to him sleeps over his rights without asserting them.

In Dharmaratne and Another v Palm Paradise Cabanas Ltd. and Others[1] Gamini Amaratunga, J. having considered 19 judgments held as follows:

Per Gamini Amaratunga, J.

> Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method or rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in

the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal."

'The practice of Court is to insist in the exercise of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed.

The petitioner has not pleaded or established exceptional circumstances warranting the exercise of revisionary powers."

For the foregoing reasons, whilst I would revise and set aside the order dated 26.01.2004, I would refuse the application to revise and set aside the order dated 03.12.2003. In all the circumstances I make no order as to costs.

WIMALACHANDRA, J. - I agree.

Application dismissed.
Order rejecting notice of appeal held to be void.

PIYADHARSHANA AND TWO OTHERS
v
SRI LANKA PORTS AUTHORITY

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
RAJA FERNANDO, J.
BALAPATABENDI, J.
SC 75/2006
HCALT 838/04
SPL. LA NO. 250/2006
LT 1/180/06, 1/81/00, 1/408/98, 1/472/98

Termination of employment – Tendering forged documents in order to gain employment – Dismissal of employee – Justified? – Labour Tribunal just and equitable order – Granting of compensation after holding that dismissal lawful and justifiable – On Probation – Lawful?

The three petitioners were dismissed from their employment as they were found guilty after an inquiry – for submitting fraudulent/forged documents with the intention of misleading the respondents in order to gain employment. Their applications filed in the Labour Tribunal were dismissed, however compensation was awarded except to petitioner P.

The High Court dismissed the applications but awarded compensation to P, on the basis that the order of the Labour Tribunal would not be just and equitable if compensation was not awarded to one applicant out of four.

The 3 petitioners-appellants sought to set aside the two orders and claiming reliefs prayed in their applications.

Held:

(1) The impugned termination of services was justified.

All the petitioners were on probations at the time of their termination of their employment. No malice or *mala fides* on the part of the respondent for termination of employment had been alleged or averred at any stage.

(2) The essence of a probationary appointment is that the employer retains the right not to confirm the appointment after a specific period particularly on the ground of capability. A probationer has no right to be confirmed in the post and the employer is not bound to show good cause where he terminates the services of a probationer.

(3) The termination of the services of the probationers been lawful and justifiable, the employees are not entitled to an additional order of compensation. The awarding of compensation of 6 months salary to the petitioners who were on probation is without any basis. The petitioners have gained employment dishonestly and fraudulently, hence illegally – the petitioners are not entitled to get any compensation for their dismissal from their employment.

APPEAL from the judgment of the High Court.

Cases referred to:

1. *G.H. Lily Perera* v *Chandani Perera and others* BASL News 5.5.1992 CA 223/77(F).
2. *Esquire Garments Industries Ltd.* v *Bank of India* BASL News 1.12.1999 CA 663/89(F).
3. *University of Sri Lanka* v *Ginige* 1993 1 Sri LR 362.
4. *State Distilleries Corporation* v *Rupasinghe* 1994 2 Sri LR 395.
5. *Ceylon Cement Corporation* v *Fernando* 1990 1 Sri LR 361.
6. *Piliyandala Polgasowita MPCS Union Ltd.* v *Liyanage* 74 NLR 138.
7. *Brown & Co. Ltd.* v *Samarasekera* 1996 1 Sri LR 334.
8. *Jayasuriya* v *Sri Lanka State Plantation Corporation* 1995 2 Sri LR 379.
9. *Pfizer* v *Rasanayagam* 1991 1 Sri LR 290.

Uditha Egalahewa for appellant-appellant-petitioners.
Suharshi Herath SC for respondent-respondent-respondent.

August 24, 2007

JAGATH BALAPATABENDI, J.

The three applicant-appellant-petitioners (hereinafter referred to as petitioners) were employed by the respondent-respondent-respondent Sri Lanka Port Authority (hereinafter referred to as 'Respondent').

The facts in brief are as follows:

The three petitioners with two others were dismissed from their employment, by the respondent, as they were found guilty after an inquiry for the following charges:-

a) For submitting fraudulent – documents or forged documents with the intention of misleading the respondent in order to gain employment;

b) In securing the employment each of them acted fraudulently to mislead the respondent;

The three petitioners (with the other two employees) filed applications in the Labour Tribunal against the dismissal from their employment. The learned President of the Labour Tribunal found:

(a) The petitioners guilty for the alleged charges,

(b) the dismissal of the petitioners from the employment were lawful and justifiable, but awarded compensation for others except for the petitioner Piyadharshana.

In the appeal to the High Court, the learned High Court Judge held that the Order of the learned President of the Labour Tribunal was lawful and correct, but awarded compensation for the petitioner Piyadharshana also, as the Order of the Labour Tribunal would not be a just and equitable, if compensation was not awarded to one applicant, out of four.

In this Court the petition had been filed only by three petitioners namely Piyadharshana, Nimalasiri and Weerananda and in the Prayer to the petition they prayed:

a) to set aside the Judgment of the learned High Court Judge,

b) to set aside the Order of the learned President of the Labour Tribunal;

c) to grant reliefs prayed for in the Prayers of the applications of the petitioners filed in the Labour Tribunal marked as P1A, P1B and P1C on the facts stated therein.

Now I will deal with the evidence (facts) available against each of the petitioners separately:

It is pertinent to note that all three petitioners were on **PROBATION** at the time of dismissal from their employment. It was an admitted fact that clause (12) of the letter of Appointment issued to the petitioners states that the Applicant is liable to be terminated from his services in the event of any document forwarded to gain the employment reveals that it is false or forged. Also it was admitted that the procedure which prevailed at that time for recruitment of un-skilled employees was on the list of names of the candidates given by the Hon. Minister in charge of the respondent Sri Lanka Ports Authority. Hon. Minister prepares the list of candidates to be selected on the quota given to the Members of the Parliament. Once the Applications are received from the candidates with the Hon. Minister's endorsement, they are called for an interview and selected. Later the names of the employees selected, are checked with the 'List' sent by the Hon. Minister.

The Petitioner - Piyadharshana - The contention of this Applicant was that, having heard from a friend already employed with the respondent that there are vacancies, he submitted an application to the respondent with a letter of recommendation from Mr. Atula Nimalasiri, the Member of Parliament for Mahara. Later he was selected as a Driver after an interview. He joined the respondent on 30th April 1997 till his employment was terminated on 2nd September 1997. (About 04 months in service).

The evidence led at the Labour Tribunal revealed that the Application form of the petitioner does not indicate the category of the Job he applied for and whether he has got a driving licence.

The respondent alleged that even though there was an endorsement placed on the application of the petitioner deemed to

be by the Hon. Minister, the Applicant petitioner's name did not appear in the list sent by the Hon. Minister. Thus, the said endorsement was a forgery.

The petitioner had admitted the fact that he told a lie at the Domestic Inquiry about the letter given by the Member of Parliament for Mahara. Further he had stated, that he was surprised when he got the letter of appointment to wit – (මට රැකියාව ලැබුනු විදිය ගැන පුදුම හිතෙනවා. මේ රැකියාව ලැබුණු ක්‍රමය කියන්න අකමැතියි.)

The finding of the learned President of the Labour Tribunal was that on the facts elicited at the inquiry, the petitioner was guilty to the charges, and hence the dismissal was justified.

The Petitioner - Daya Nimalasiri - The alleged charges were the same against this petitioner and his contention was that he submitted an application to the respondent with a letter attached to it issued by the Hon. Minister Atula Nimalasiri Jayasinghe. Later he was selected as an Assistant Manager after an interview. He has joined the respondent on 23rd April 1997 and his services were terminated on 11th July 1997 (about 2 1/2 months in service).

The finding of the learned President of the Labour Tribunal was that, the petitioner had given contradictory evidence on the letter issued by Hon. Minister Atula Nimalasiri Jayasinghe and his name was not in the 'List'. Thus, the Hon. Minister in charge of the respondent (Ports Authority) Mr. Ashroff could not have put any endorsement on the Application form. Hence, the endorsement which appear on the Application form is a forgery. (at page 276 of the brief, and at page 11 of the Order) Therefore he had justified the dismissal of the petitioner. But awarded compensation of 6 months salary.

The Petitioner - Weerananda - The alleged charges were the same against this petitioner also. His contention was that he submitted an application to the respondent with a letter attached to it, issued by Hon.Minister Atula Nimalasiri Jayasinghe. He was selected as a Security Guard after an interview, and joined the respondent on 2nd May 1997. his services were terminated after 4 months of service on 2nd September 1997.

The learned President of the Labour Tribunal had found that even though the petitioner stated that he attached a letter to the Application form issued by the Hon. Minister and handed it over to one Kumara, an employee of the respondent, the said letter was not found with the Application form and his name did not appear in the list sent by the Hon. Minister. Hence Hon. Minister Mr. Ashroff could not have put any endorsement on the application form. It was elicited at the domestic inquiry that his application was dated 20th January 1997, he joined the respondent on 2nd May 1997, whereas the date of the endorsement deemed to have put by the Hon. Minister was on 20th July 1997, after he gained the employment with the respondent. Thus, it is clear the endorsement of the Hon Minister was a forgery (document R10). Hence the termination of the employment of the petitioner was justified. But awarded compensation of 6 months salary by the President Labour Tribunal.

The witness Musakil had given evidence on behalf of the respondent and had stated that he worked more than ten years closely with the late Hon. Minister Ashroff as he is a relative and he is very familiar with the signature and handwriting of the late Hon. Minister. At the time he gave evidence he was the Personal Assistant to the Vice Chairman of the respondent. He testified with certainty that the endorsement and the signature that was on each Application form forwarded by the three petitioners was not the signature and handwriting of the late Hon. Minister Mr. Ashroff.

The learned President of Labour Tribunal after careful analysis of the evidence led arrived at a finding that the signature of the late Hon. Minister appears on the Application forms was forged. Therefore, in no uncertain terms has found that the dismissal of the petitioners from the employment were justifiable.

The learned High Court Judge on analysis and evaluation of the evidence led at the Labour Tribunal against the three petitioners and also on the findings of the President of the Labour Tribunal on the question of law, had come to a conclusion that the termination of the employment of the three petitioners were lawful and justifiable, but awarded compensation of 6 months salary to the petitioner Piyadharshana also.

Special Leave to Appeal was granted by this Court to the three petitioners on the following questions of Law:

(i) The learned High Court Judge of the Province has not considered the fact that the Order of the learned President of the Labour Tribunal is against the weight of the evidence adduced.

(ii) The learned High Court Judge of the Province has not taken into consideration the fact that since the Order of the Labour Tribunal has ordered compensation in lieu of employment the decision arrived at by the learned President of the Labour Tribunal that the termination is justifiable is wrong;

(iii) The learned High Court Judge of the Province has not observed that in the absence of any probable evidence to prove the misconduct and/or the allegations leveled against the petitioners, the Labour Tribunal President's conclusion to that effect is vague.

(iv) The learned High Court Judge of the Province has misdirected himself in respect of the oral and documentary evidence adduced.

The Counsel for the three petitioners contended that the petitioners forwarded duly filled Application forms to the respondent and thereafter they were selected for employment with the respondent after an interview. They were unaware of any endorsement put on their Application forms as alleged by the respondent. This position appears to be made up as the recruitment procedure adopted by the respondent (also known to the applicants) was only on recommendation of the late Hon. Minister, Mr. Ashroff by placing an endorsement with his signature on the Application Forms.

Further he contended that the alleged Application Forms were sent to the EQD by the President Labour Tribunal for examination, and the EQD in his report has stated that he is not in a position to express any opinion on the signature and the handwriting of the late Honourable Minister, thus the President of the Labour Tribunal has not evaluated the evidence against the

petitioners and he has based his findings on the evidence of the witness Musakil.

Section 47 of the Evidence Ordinance deals with: When it is sought to prove the handwriting of a person other than by expert evidence the Court should follow:

(a) opinions of persons acquainted with the handwriting of the person concerned.

A person is said to be acquainted with the handwriting of another:

i) when he has seen a person write the document in question or of other documents;

ii) when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person;

iii) when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. ("Habitually" means usually, generally or according to practice);

In the case of *G.H. Lily Perera* v *Chandani Perera and others*(1) it was held that *'the onus probande'* in a case where a Last Will is alleged to be a forgery is upon the party propounding a Will – he must satisfy the conscience of the Court. A Court need not accept the evidence of a handwriting expert in a case where such expert cannot express a definite opinion.

In the case of *Esquire Garments Industries Ltd. v Bank of India*(2) held that "Section 47 of the Evidence Ordinance describes opinion by non-experts as to handwriting could be elicited for the purpose of a Court coming to a conclusion as to the person by whom any document was written or signed. Thus, the opinion of any person acquainted with the handwriting of such person would be relevant".

The Law of Evidence, (Volume I), by E.R.S.R. Coomaraswamy, at page 648, it is stated, that testimony as to handwriting under Section 47 is for various reasons better than expert testimony. This is because there is no question of bias or suspicion of partiality since the knowledge was acquired incidentally and unintentionally and not for the purpose of litigation.

Murphy on Evidence at page 596 states as follows:

"There is an obvious relevance in evidence which proves the authenticity of the handwriting of the person purporting to be the signer or executer of the document. Handwriting may be proved in any of the following ways:

"..... Non-expert witnesses who are familiar with the signature of the purported signer, or who have on other occasions received documents bearing the purported signature or made in the purported handwriting of the purported signer, may state their opinion that the document is signed by the person by whom it purports to be signed. The weight of such evidence may, of vary very considerably according to the circumstances of the case including the degree of the witness's familiarity with the handwriting".

Hence, I take the view that the findings of the President of the Labour Tribunal was correct in Law.

In this appeal, it was admitted that –

(a) All the petitioners were **ON PROBATION** at the time of termination of their employment (few months of service in the said relevant posts).

(b) Clause (12) of the Letter of Appointment of each of the petitioners states "that their services could be terminated in the event of, if they have made any misrepresentation or forwarded any fraudulent documents to gain the employment with the respondent."

(c) Scheme of recruitment was only on the recommendation of the Hon. Minister, sent to the respondent by way of a 'List' containing the names of candidates to be recruited;

No malice or *mala fide* on the parts of the respondent for termination of their employments had been alleged or averred by the petitioners at any stage. If the respondent (Employer) had acted *mala fide* the employee Probationer has a right to relief.

The essence of a **PROBATIONARY APPOINTMENT** is that the employer retains the right not to confirm the appointment after a specific period particularly on the grounds of capability. A probationary employee must know that he is on trial and must

therefore establish his suitability for the post. The employer must show that he acted reasonably in dismissing a probationer. If an employee is told that his appointment is subject to a probationary period of a certain length of time, this does not give the employee a legal right to be employed for that length of time, and the employer may lawfully dismiss him before that period has expired. Further, it is for the employee to prove that he was dismissed, it is for the employer to show the reason for dismissal. It will then be for the Industrial Tribunal to find out on the basis of evidence presented whether or not the employer had acted reasonably in treating that reason as a sufficient ground for dismissal. A decision on whether the employer acted reasonably is a question of fact for the Industrial Tribunal to decide, which can only be challenged if the decision was perverse or based on incorrect perception of the Law.

In the case of *University of Sri Lanka* v *Ginige*(3). It was held that "during the period of probation, the employer has the right to terminate the services of the employee if he is not satisfied with the employee's work and conduct. Where the employee is guilty of misrepresentation of facts, use of unbecoming language and misconduct, the termination is justified and *bona fide*, if the employer has acted *mala fide* the probationer has the right to relief".

In the case of *State Distilleries Corporation* v *Rupasinghe*(4). It was held that "the acceptance of the principle that Labour Tribunal has jurisdiction to examine whether a termination is *mala fide*, necessarily involves the corollary that the employer must disclose to the Tribunal his reasons for termination and that means that he should have some reason for termination". Further, it was held that "if the termination took place during the probation period the burden is on the employee to establish unjustifiable termination and the employee must establish at least a *prima facie* case of *mala fide*, before the employer is called upon to adduce evidence as to reasons for dismissal".

In the case of *Ceylon Cement Corporation* v *Fernando*(5). It was observed that "the employer is the sole Judge to decide whether the **service of a Probationer** are satisfactory or not. A Probationer has no right to be confirmed in the post and the employer is not bound to show good cause where he terminates the **services of a**

Probationer at the end of the term of probation or even before the expiry of that period. The Tribunal cannot sit in judgment over the decision of the employer. It can examine the grounds for termination only for the purpose of finding out whether the employer had acted *mala fide* or with ulterior motives or was actuated by motives of victimization".

In the instant case the respondent had conducted a disciplinary inquiry against the petitioners and found them guilty of forwarding application forms with the signature of the Hon. Minister forged. Thereafter, the President of the Labour Tribunal having considered the evidence led before him had come to a conclusion that the petitioners have forged the signature of the Hon. Minister in their Application forms forwarded to the respondent, therefore the termination of the employment of the Probationer were justified. The learned High Court Judge had affirmed the decision of the President of the Labour Tribunal.

For the reasons aforesaid it is my view that the Employer-respondent had given satisfactorily good reasons for the termination of the services of the petitioner-employees who were on probation. Hence the termination of the employment of the petitioners were lawful and justifiable.

In the case of *Piliyandala Polgasowita Multi-Purpose Co-operative Societies Union Ltd.* v *Liyanage*(6). Here the applicant-respondent was appointed on 15th February 1968 to a post on condition that if during a probationary period of one year, the employer was not satisfied with him, his services were liable to be discontinued. About five months afterwards his services were terminated because the Employer-Appellant discovered that the respondent had been charged in 1946 in the Magistrate's Court for offences involving **DISHONESTY** and dealt with under Section 325 of the Criminal Procedure Code. It was held that "the termination of the applicant-respondent's services was justified. **In such a case the employee is not entitled to an alternative order of compensation**".

In the case of *Brown & Co. Ltd.* v *Samarasekera*(7). It was observed that "at the time of the impugned termination of services, the respondent was a probationer. His services were terminated after giving him two extensions of his period of probation. The fact that such

an opportunity was given would negative the existence of *mala fides*. In the circumstances, the impugned termination of services was justified and the **respondent is not entitled to compensation**".

In the case of *Jayasuriya* v *Sri Lanka State Plantation Corporation*(8). It was observed that "the Tribunal must make an order in good equity and conscience, acting judicially based on a legal evidence rather than on beliefs that are fanciful or irrationally imagined notions or whims". Further, it was observed that "for just and equitable verdict the reasons must be set out in order to enable the parties to appreciate how just and equitable the verdict is. Where **no basis for compensation** award is given the order is liable to be set aside. The essential question is the actual financial loss caused by the unfair dismissal because compensation is an indemnity for the loss".

In the case of *Pfyzer Ltd.* v *Rasanayagam*(9). It was held that "in assessing compensation the essential question is this. What is the actual financial loss caused by the **unfair dismissal**?"

In the instant case I am of the view that the learned President of the Labour Tribunal and the learned High Court Judge have awarded compensation of 6 months salary to the petitioners who were on probation without any basis.

It is obvious that the petitioners have gained employment dishonestly and fraudulently, hence illegally with the respondent as probationers and worked only for about 4 months, therefore I am of the opinion that the petitioners are not entitled to get any compensation for their dismissal from their employment.

For the reasons aforesaid, I affirm the decisions of the learned President of the Labour Tribunal and the learned High Court Judge on the termination of the employment of the petitioners. And set aside the decisions of both the Labour Tribunal and the High Court of awarding compensation of 6 months salary to the petitioners. Appeal is dismissed. No costs.

DR. SHIRANI BANDARANAYAKE, J. - I agree

RAJA FERNANDO, J. - I agree.

Appeal dismissed.
The decisions by the Labour Tribunal and the High Court to award compensation set aside.

BAMUNUARACHCHIGE

v

UNIVERSITY OF PERADENIYA AND OTHERS

COURT OF APPEAL
SRIPAVAN, J. (P/CA)
ROHINI PERERA
CA 1722/05
APRIL 3, 2007
AUGUST 23, 2007

Writ of Certiorari – Decision of University Services Appeals Board – Is it final and conclusive – University Act – Section 87 – Making of a valid decision – Could the Court allow the issue of invalidity – to be raised in any proceedings where it is relevant? – Void acts – Voidable Acts – Challenge to same?

The petitioner Senior Lecturer (Temp) in the Department of Agricultural Biology applied for the post of Senior Lecturer Grade II, the selection committee recommended the appointment. There were protests that the petitioner did not possess the necessary educational qualifications. The 2nd respondent Vice Chancellor sought a clarification from the Vice Chancellor of the Open University from where the petitioner obtained his first degree. He was informed that, the petitioner's degree program was a 3 years general degree and that the standard of the petitioner's degree was that of the "2nd" class lower division". The 1st respondent decided not to approve the recommendation made by the Selection Committee. The petitioner appealed to the University Service Appeal Board (USAB). The USAB directed the 1st respondent to appoint the petitioner. The petitioner complained that he was not appointed.

Held:

(1) It is apparent that, the petitioner does not satisfy the qualifications necessary for the appointment of 'Senior Lecturer Grade II'. He has only reached the standard requirement for a 2nd class lower division.

Per Sripavan, J.

"It is open in these proceedings to impugn the decision of the Appeals Board as being unlawful or a void decision. The Court cannot issue a *writ of mandamus* compelling the 1st respondent to comply with an unlawful decision."

(2) As a general rule, the Court will allow the issue of invalidity to be raised in any proceedings where it is relevant. Void acts and decisions are indeed usually destitute of legal effect, they can be ignored with impunity, the validity can be attacked if necessary in collateral proceedings, they confer no legal rights on anybody. No legally recognized rights found on the assumption of its validity should accrue to any person even before the act is declared to be invalid or set aside in a Court of law.

AN APPLICATION for a *writ of mandamus.*

Case referred to:

(1) *Rajakulendran* v *Wijesundera* 1 Srikantha Law Reports 164.

K.G. Jinasena for petitioner.
Ms. M.N.B. Fernando DSG with *Deepthi Tilakawardane* SC for 1st and 2nd respondents.
J.C. Boange for 21st, 22nd and 23rd respondents.

September 27, 2007
SRIPAVAN, J. (P/CA)

The 1st respondent University by a notice marked P7 invited applications, *inter alia*, for the post of "Lecturer (Probationary)/Senior Lecturer (Grade II/Grade I)" in the Department of Agricultural Biology of the Faculty of Agriculture. The petitioner, pursuant to the said notice forwarded his application for the post of "Senior Lecturer". After an interview, the Selection Committee recommended the appointment of the petitioner for the post of "Senior Lecturer-Grade II". It was not in dispute that there were protests by a group of former students of the 1st respondent University not to appoint the petitioner on the basis that the petitioner did not possess the necessary educational qualifications for the appointment of "Senior Lecturer-Grade II". In fact, the 2nd respondent along with his objections furnished a copy of the letter marked 2R6 sent to him by the Alumni Association of the Faculty of Agriculture of the University of Peradeniya, seriously objecting to the petitioner's appointment. The 2nd respondent thereafter sought a clarification from the Vice Chancellor of the Open University of Sri Lanka from where the petitioner obtained his first degree. The reply received from the Vice Chancellor, Open University of Sri Lanka explains that the petitioner's Degree Programme was a three years general degree and that the standard of the petitioner's degree was that of a "2nd Class Lower Division". The verification of

the petitioner's results was brought to the notice of the University Council of the 1st respondent which decided not to approve the recommendation made by the "Selection Committee" but to re-advertise the said post. The petitioner thereafter preferred an appeal to the University Services Appeals Board against the decision taken by the University Council. The Appeals Board by its order dated 29.03.2005 directed the 1st respondent University to appoint the petitioner to the Post of "Senior Lecturer-Grade II". The complaint of the petitioner is that the 1st respondent University has failed to implement the order made by the Appeals Board, todate. The petitioner therefore seeks a *writ of certiorari* to quash the decision taken by the University Council not to appoint the petitioner to the post of "Senior Lecturer - Grade II" and a *writ of mandamus* directing the 1st respondent University to implement the decision of the Appeals Board dated 29.03.2005.

It is common ground that the petitioner was appointed as an "Assistant Lecturer (Temporary)" in the Department of Agricultural Biology with effect from 07.01.2004; the said appointment was upgraded to the post of "Senior Lecturer (Temporary)" with effect from 01.04.2004 and the petitioner continued in the same capacity until 31.10.2005. The Scheme of Recruitment applicable to the post of "Senior Lecturer - Grade II" is as follows:

a) the academic qualifications required for Lecturer (Probationary) [Non-Medical/Dental]; and

b) A Masters Degree in the relevant field obtained after a full time course of study of at least 2 academic years (or an equivalent part time course of study) with a research component by way of thesis/dissertation or a Doctoral Degree.

Therefore, it becomes necessary to consider whether the petitioner possesses the academic qualifications required for the post of "Lecturer (Probationary)". It was not in dispute that one of the academic qualifications required for the post of "Lecturer (Probationary)" and heavily relied on by both Counsel for the purpose of this application is as follows:

a) A Degree with specialization in the relevant subject without Honors or any other Degree with at least 2nd Class Honours; and

b) A Postgraduate Degree of at least 2 academic years duration in the relevant subject with a research component by way of thesis/dissertation. (Emphasis added).

Learned Deputy Solicitor-General argued that since the vacancies were in the Department of Agricultural Biology, the petitioner must possess either a Degree with specialization in the relevant subject, namely, "Agricultural Biology" or any other Degree with at least a 2nd Class Honors. Both Counsel agreed that the petitioner did not specialise in "Agricultural Biology" but possess a general Degree of three years duration. The Counsel for the petitioner however failed to establish that the petitioner's Degree was at least with a 2nd Class Honors. The document marked 2R1 sent by the Vice Chancellor of the Open University of Sri Lanka shows that the petitioner has only reached the standard required for a 2nd Class Lower Division. A careful consideration of the petitioner's application marked 2R3 indicates that the petitioner obtained his Postgraduate qualifications in "Micro Biology" and not in the relevant subject, namely, "Agricultural Biology". In view of the foregoing, I cannot hold that the petitioner satisfies the qualifications necessary for the appointment of "Senior Lecturer-Grade II".

Learned Counsel for the petitioner strenuously contended that the decision made by the University Services Appeals Board was final and binding on the respondents. Learned Deputy Solicitor-General on the other hand relied on the case of *Rajakulendran* v *Wijesundera*[1] and submitted that the University Services Appeals Board has failed to make a valid decision within the meaning of Section 87 of the University's Act and that the purported decision of the Appeals Board was void in law. As a general rule, the Court will allow the issue of invalidity to be raised in any proceedings where it is relevant. Void Acts and decisions are indeed usually destitute of legal effect; they can be ignored with impunity; their validity can be attacked, if necessary, in collateral proceedings; they confer no legal rights on anybody. No legally recognized rights found on the assumption of its validity should accrue to any person even before the act is declared to be invalid or set aside in a Court of Law.

Accordingly, I hold that it is open to the learned Deputy Solicitor-General, in these proceedings to impugn the decision of the Appeals Board as being an unlawful or a void decision. The Court cannot issue a *writ of mandamus* compelling the 1st respondent to comply with an

unlawful decision. The petitioner's application is therefore dismissed in all the circumstances without costs.

ROHINI PERERA, J. - I agree.

Application dismissed

MUNASINGHE
v
VANDERGERT

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
DISSANAYAKE, J.
RAJA FERNANDO, J.
FR 333/2005
SEPTEMBER 21, 2006
JANUARY 8, 11, 2007
APRIL 4. 2007

Fundamental Rights violation – Retirement and deduction of pension – Article 12(1) unreasonable unfair, irrational? – Establishment Code Clause 33.1 – Equality – Arbitrariness.

The petitioner alleged that, the decision to retire him from service, on account of general inefficiency and recommending that 1% of his pension be deducted is in violation of Article 12(1).

The respondents contends that, the petitioner had not shown progress of 100% in his performance although warned in writing in 1989, and the petitioner's progress during 1997-2000 was well below 100% and on three occasions his increments had been deferred.

Held:

(1) When the petitioner's conduct and efficiency is considered in the light of Clause 33.1 E code it is apparent that the petitioner had made satisfactory progress in his work and conduct during 1997-2000. The petitioner's progress which had been 0% in 1997 had arisen up to 64% in 2000.

(2) Taking into consideration the Survey-General's letter along with the sequence of events that took place, and the fact that the allegations set out, relate to incidents that had occurred more than 20 years ago at the time the petitioner was a cadet clearly indicates that decision to retire the petitioner on the basis of inefficiency without following the provisions of Clause 33 of Chapter XLVIII of the E code and Circular 6/97 read with the directive issued is arbitrary and unfair.

Per Dr. Shirani Bandaranayake, J.

"There is no doubt that it is necessary to confer authority on administrative officers to be used at their discretion. Nevertheless such discretionary authority cannot be absolute or unfettered, as such would be arbitrary and discriminatory which would negate the equal protection guaranteed in terms of Article 12(1)".

(3) Equality is a dynamic concept with many aspects and dimension and it cannot be cribbed cabined and confined within the traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies – one belong to the rule of law while the other to the whim and caprice of the absolute monarch.

APPLICATION under Article 126 of the Constitution.

Cases referred to:

1. *Arkansas Gas C.* v *Railroad Commission* 261 US 379.
2. *Ameeroonissa* v *Mahboob* 1953 SCR 404.
3. *Padfield* v *Minister of Agriculture Fisheries and Food* 1968 AC 997.
4. *Breen* v *Amalgamated Engineering Union* 1971 2 QB 175.
5. *E.P. Royappa* v *State of Tamil Nadu* 1974 AIR SC 555.
6. *Manekha Gandhi* v *Union of India* AIR 1978 SC 597.
7. *In International Airport Authority* AIR 1579 SC 1628
8. *Ajay Hasia* v Khahi. Miyib AIR 1981 SC 487.

Faiz Musthapha PC with *J.C. Weliamuna* for petitioner.
Sanjay Rajaratnam for respondents.

August 3, 2007

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, a 47 years old Assistant Superintendent of Survey, alleged that by the decision to retire him from service with effect from 07.07.2005, on account of general inefficiency and recommending that 1% of his pension be deducted, his fundamental rights guaranteed in terms of Article 12(1) of the Constitution were violated for which this Court granted leave to proceed.

The petitioner's case, as submitted by him, *albeit* brief, is as follows:

The petitioner had joined the Surveyor-General's Department as an apprentice on 01.11.1978. After joining the said Department, he had successfully completed a Diploma in Survey Technicians Course by 25.09.1983 (P2). Thereafter the petitioner was made permanent as a Surveyor – Class III by letter dated 10.10.1983 to be with effect from 01.11.1978 (P3). Since then, the petitioner had received his promotions and he had also completed the 'Survey Department Junior Examination' in 1988 (P6). Thereafter in 1991 he was promoted to Class III Grade I (P7).