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DIGEST

Singapore location at the time of the Impugned Transfer, and tax receipts showing the Appellants continuous payment of the required property taxes – the most important fact of this case, namely the existence of the Impugned Deed, has not been settled.

Given the existence of the entry in the Register of Lands, the only possible means of putting to rest this disputed existence would be to conclusively prove the impossibility of such an execution of the Impugned Deed. However, even if we assume the veracity of the available evidence and accept the 1st Respondent's assertions (1) that the Notary Public who purportedly attested the Impugned Deed, had died on the 24th January 1992, and (2) that the last Deed attested by the said Notary Public for the month of January 1992 was a Deed numbered 3722 and dated 14.01.1992, neither assertion, even taken together, renders the execution of the Impugned Deed a factual impossibility.

In fact, multiple possibilities can explain the chronological discrepancy of the Deeds. The first possibility is that the Notary Public had pre-dated the Impugned Deed to 11th January 1992 despite having executed it after the 14th of January. This would explain the Impugned Deed bearing a higher number (No. 3729) than the supposedly final Deed executed by the Notary Public that month (No. 3722). The other possibility is the converse, namely that the Notary Public had, in fact, executed the Deed on 11th January 1992 but numbered the Deed in advance. In light of these possibilities, it is clear that the contradictory chronology of the Deed does not unequivocally prove the falsity of the Impugned Deed as the Appellants suggest. Based on this realization and the Registar's suggestion of the Impugned Deeds existence by his reference to its misplacement, the Court finds the existence of the Deed to remain in dispute.

Though the motivation for such actions on the part of the Notary Public is not clear and the probability of such facts having actually occurred may rank low, the duty of this Court in this situation is to simply determine whether any such probability exists to substantiate a factual dispute, not how strong that possibility may be. The requirement that there be no factual dispute for the issuance of a writ of *mandamus* is without qualification.

Hence, while holding that the issue of a writ of *mandamus* is inappropriate, in the circumstances of this case considering the weight of the evidence before this Court it wishes to expressly preserve the right of the Appellants to seek redress in the appropriate District Court, if so advised. It is in such a forum that evidence can be fully and adequately explored and a judgment upon the results, properly made.

For these reasons the Court affirms the judgment of the Court of Appeal dated 5th May 2008. The Appeal is disallowed. No Costs.

AMARATUNGA, J. – I agree

MARSOOF, J. – I agree

Appeal dismissed.

RIZAN AND OTHERS
V.
RATNASIRI

COURT OF APPEAL
BASNAYAKE. J.
CHITRASIRI. J.
CALA 514/06(LG)
DC MATARA 10305/L
JUNE 2, 2009

Civil Procedure Code–Section 121- Section 175 (1) –Section 175 (2) – Document not listed – Discretion given to Court under Section 175 (1) and 175 (2) – Is it wider under Section 175(2) – Guidelines? – All requirements need not exist simultaneously?

The learned District Judge allowed the defendant-respondent to mark 2 unlisted documents in evidence, under Section 175(2). The plaintiff-petitioner sought leave and leave was granted from the said order.

Held

(1) It is pertinent to note that Section 175(1) and Section 175(2) which refer to listing of witnesses/documents envisage two different criteria.

(2) Under Section175 (1) a witness who is not listed could be allowed to be called if and when special circumstances appear to Court in order to meet the interest of justice.
Under Section 175 (2) - a document is allowed to be marked with leave of Court considering the circumstances of each case.

Per Chitrasiri. J.

> "A wider discretion is given to Courts when a document that has not been listed is to be marked in evidence than where an unlisted witness is to be called to give evidence".

(3) The decision in Kandiah's case lays down the guidelines to be followed, one such reason may even be sufficient – to allow an unlisted document to be marked in evidence depending on the circumstances of a given situation –all four requirements *viz*

(i) where it is in the interest of justice to do so

(ii) where it is necessary for the ascertainment of the truth

(iii) there is no doubt about the authenticity of the document

(iv) where sufficient reasons are adduced for the failure to list a document-need not co-exist simultaneously in order to allow an unlisted document to be marked in evidence.

Cases refereed to :

(1) *Kandiah v. Wiswanathan and another 1991*-1 Sri LR 269
(2) *Read v. Samusudeen* – 1 NLR 292
(3) *Fernando v. Fernando*- 7 NLR 147
(4) *Killonchiya v. Clark* – 80, 2 Leader 153
(5) *Jones v. Channel 8 Ch D.* 506
(6) *Andiris Hamy v. Dinneris Appu* – 2 Times 161
(7) *Girantha v. Maria* – 50 NLR 519

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

N.R.M. Daluwatte P.C. with *H.L. Karawita* for substituted plaintiff-appellants-petitioners

Rohan Sahabandu for defendant-respondent.

Cur.adv.vult

CHITRASIRI, J.

Substituted-Plaintiffs-Appellant-Petitioners (hereinafter referred to as the Petitioners) filed this leave to appeal application to set aside the order of the learned Additional District Judge of Matara dated 12th December 2006. Consequently having granted leave, this Court fixed the matter for argument and it was concluded on 2nd June 2009.

This is a *rei-vindicatio* action filed by Mohamed Mustapha Sitthi Fathima against the Defendant-Respondent (herein-

after referred to as the Respondent). The Petitioners were substituted and were named as the Substituted-Plaintiffs to the original action since the said plaintiff Mohamed Mustapha Sitthi Fathima died while the action was pending. When the defendant was giving evidence in the District Court, an application was made to mark two documents in evidence claimed to be the Birth Certificate of the Defendant and the Marriage Certificate of the defendant's parents. The two documents were given the making **"D4"** and **"D5"**. The Plaintiff objected to those documents being marked on the ground that those were not listed in terms of Section 121 of the Civil Procedure Code. Having allowed the parties to file submissions on the matter Court made order allowing the aforesaid two documents to be marked in evidence. It is against this order that this application had been filed.

Admittedly, the two documents in question had not been listed in terms of Section 121 of the Civil Procedure Code. The learned Additional District Judge has allowed these documents to be marked in evidence exercising his authority referred to in section 175(2) of the Civil Procedure Code. Therefore, the issue at hand is to determine whether the learned Additional District Judge has acted in the proper manner when granting leave of Court permitting to mark the documents D4 and D5.

Section 175(2) of the Civil Procedure Code which is the relevant provision in law to the instant issue stipulates thus:

> *"A document which is required to be included in the list of documents filed in Court by a party as provided by Section 121 and which is not so included shall not, without the leave of the Court, be received in evidence at the trial of the action"*

At this stage, it is pertinent to note that Section 175(1) and Section 175(2) of the Civil Procedure Code which refer to listing of witnesses and documents respectively envisages two different criteria. Under Section 175(1), a witness who is not listed could be allowed to be called if and when special circumstances appear to Court in order to meet the interests of justice, whilst Section 175(2) allows a document to be marked with leave of Court considering the circumstances of each case. Therefore, it could be argued that a wider discretion is given to Courts when a document that has not been listed is to be marked in evidence than when an unlisted witness is to be called to give evidence.

Be that as it may, the application in this instance was to mark two documents in evidence. The way in which such an issue had been determined was discussed in detail in the case of *Kandiah v. Wiswanathan and another*[1] This decision of Justice Douglas Wijeratne had been cited by both Counsel in this Court as well as in the District Court. In fact, the learned Additional District Judge, who made the impugned order too has considered this decision of Justice Wijeratne carefully. In this judgment it is stated that;

"The precedents indicate that leave may be granted-

(1) Where it is in the interests of justice to do so.

In the case of *Read v. Samsudin,*[2] *Fernando v. Fernando*[3] and *Killanchiya v. Clark*[4] it was held that technical objections should be disregarded in the interests of justice and documents be admitted if the defendant was not prejudiced.

In the first named case Bonser C.J. quoted the following passage from the judgment of Sir George Jessel, M.R., in the case of *Jones v. Channell*[5]:

> " It is not the duty of a Judge to throw technical difficulties in the way of the administration of justice, but where he sees that he is prevented from receiving material or

available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way, upon proper terms as to costs and otherwise"

In the case of *Andris Hamy v. Dinneris Appu*[6] Sampayo J. stated:

It has been pointed out more than once that Section 54 does not create an absolute bar, but in furtherance of justice and for proper investigation of cases, the Court should admit documents even though they are not included in any list."

(2) Where it is necessary for the ascertainment of the truth.

In the case of *Girantha v. Maria*[7] Gratien J. held that the paramount consideration is the ascertainment of the truth and permitted the calling of a witness in the interests of justice under the proviso to Section 175 (as it then stood) of the Civil Procedure Code. It can be said that similar considerations apply in the case of unlisted documents.

(3) Where there is no doubt about the authenticity of the documents (as for instance certified copies of public documents or records of judicial proceedings).

(4) Where sufficient reasons are adduced for the failure to list a document (as for instance where the party was ignorant of its existence at the time)

Where the Court allows the reception in evidence of an unlisted document, an appropriate order for costs will generally alleviate any hardship caused to the other party.

The learned President's Council Mr. N.R.M. Daluwatta has contended that it is essential to have the aforesaid all four requirements co-exist simultaneously in order to

allow an unlisted document to be marked in evidence. I am not inclined to agree with his contention. In the said judgment no such requirement exists. Also, I do not think that Justice Wijeratne had in his mind such a contention. Those are merely the guidelines that could be considered by a District Judge when allowing an unlisted document to be marked in evidence. One such reason may even be sufficient to allow an unlisted document to be marked in evidence depending on the circumstances of a given situation.

The learned Additional District Judge has considered every aspect of the matter and has concluded that the first three requirements mentioned in the decision of *Kandiah v. Wishvanathan (supra)* have been satisfied in the instant case, though the last requirement namely the failure to adduce sufficient reasons for not listing the document has not been shown by the Respondent. Therefore, it is clear that learned Additional District Judge In this instance has correctly applied the law referred to in Section 175(2) of the Civil Procedure Code and has allowed these two documents to be marked in evidence. He has also given sufficient reasons to support his decision and has considered even the decision namely *Girantha v. Maria (supra)* in which the importance of ascertaining the truth had been acknowledged. The learned trial Judge relying upon the said decision has stated that it is necessary to allow the marking of these two documents in order to ascertain the truth and also in the interests of justice.

In the circumstances, I am not inclined to interfere with the decision of the learned Additional District Judge. Thus learned Additional District Judge is directed to proceed with the trial from the point it was stopped.

For the aforesaid reasons, this application is dismissed with costs.

BASNAYAKE, J. - I agree

Appeal dismissed.

IMAM V. PETER AND OTHERS

COURT OF APPEAL
BASNAYAKE. J.
CHITRASIRI. J.
CALA 492/2006
DC KURUNEGALA 6653/L

Civil Procedure Code – Section 84, Section 86, Section 839 – Vacation of ex parte decree with consent of parties – Legality? – Trial fixed – Return of commission after trial date – Legality? – Inherent Power of Court to prevent abuse.

The Court fixed the case *ex parte* against the 1st defendant and after hearing, judgment was delivered. The 1st defendant brought to the notice of Court that the Court has issued a commission for a date beyond the trial date, at the instance of the plaintiff, and as the trial cannot be ready until the commission is executed, the Court should have cancelled the trial date. The Court with the consent of the plaintiff vacated the *ex parte* judgment and allowed the commission returnable date to stand.

The plaintiff sought to have the order vacating the *ex parte* order set aside on the basis that Court has no jurisdiction to vacate an *ex parte* decree with the consent of parties. The plaintiff contended that the procedure laid down under Section 86 should have been followed.

Held

(1) Section 86 (2) – procedure should apply under normal circumstances. However there is no particular Section that the Judge could refer to a situation like the case under consideration.

Per Eric Basnayake. J

" The Court had used its inherent power to prevent abuse of the process of Court. It was the plaintiff who tried to abuse the process of Court. The date was changed to benefit the plaintiff. The same benefit the plaintiff made use of was to the disadvantage of the defendant. That was prevented by Court through the use of its inherent power. The Court acted with a sense of justice. Then Court need not have obtained the consent of the plaintiff. The fact of the plaintiff placing his signature on the record can be disregarded"

Cases referred to:

1. *Jeyaraj Fernandopulle v. De Silva and others* - 1996-1 Sri LR 70
2. *Jane Nona v. Jayasooriya* - 1986 1 CALR 315
3. *Sirivasa Thero v. Saddassi Thero* - 63 NLR 31
4. *Seneviratne v. Francis Fonseka Abeykoon* -1986-2 Sri LR 1
5. *Sivapathalingam v. Sivubramniam* - 1990 – 1 Sri LR 378
6. *Wijesekera v. Uhivita* – 34 NLR 362 at 364
7. *Eswaralingam v. Sivaganasunderam* - 64 NLR 396

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

Mahanama de Silva for plaintiff-petitioner

Asoka Fernando – defendant-respondent

Cur.adv.vult

June 24th, 2009

ERIC BASNAYAKE J.

The plaintiff – petitioner (plaintiff) filed this action on 27.3.2006 against the 1st and 2nd defendant-respondents (defendants) for a declaration of title and ejectment. The defendants filed proxy on 12.4.2006 and the answer on 2.5.2006. Thereafter the case was fixed for trial (and inquiry with regard to an injunction application) for 17.7.2006. On 17.7.2006 the 1st defendant was present. The 2nd defendant was absent. The Attorney-at-law stated to Court that no instructions were received from the 2nd defendant. The Court fixed the case for trial against the 1st defendant and *ex-parte* trial against the 2nd defendant for 6.11.2006. On 25.7.2006 the plaintiff's Attorney-at-law filed a motion with notice to the defendants and their Attorney-at-law to have the case called on 3.8.2006 to get a commission issued for a surveyor to

draw up a plan. On 3.8.2006 the plaintiff and the defendants were represented and the Court had issued a commission returnable on 14.12.2006. No one brought it to the notice of the Court that the trial was fixed for an earlier date, namely, 6.11.2006.

The case was called on 6.11.2006. On this day the plaintiff was present. The defendants were absent and unrepresented. The Court fixed the case *ex-parte* and after hearing, judgment was delivered. On 15.11.2006 the Attorney-at-law for the 1st defendant filed a motion with notice to the plaintiff and the 2nd defendant to have the case called on 23.11.2006. In the motion the Attorney-at-law mentioned the fact that the Court had issued a commission for a date beyond the trial date. This date was given at the instance of the plaintiff. A commission was issued to identify land. Thus the commission has to return for the case to be ready for trial. At the time of issuing the commission it was not brought to the notice of Court that the case was already fixed for trial. As the trial cannot be ready until the commission is executed, the Court should have cancelled the trial date. By oversight this was not done.

When the case was called on 23.11.2006 the learned Judge, with the consent of the plaintiff, had vacated the *ex-parte* judgment and allowed the commission returnable date to stand. The plaintiff is seeking to have the order vacating the *ex-parte* order set aside. The learned Counsel submits that this order is bad in as much as the specified procedure relating to vacation of *ex-parte* orders has not been followed. The learned Counsel submits that after entering *ex-parte* decree, Court has no jurisdiction to vacate an *ex-parte* decree with the consent of the parties.

Justice Amarasinghe held in *Jayaraj Fernandopulle v. De Silva and others*(1) quoting Halsbury (Halsbury Vol.26

paragraph 556) that **"The Court will treat as a nullity and set aside, of its own motion if necessary, a judgment entered against a person who was infact dead or in certain circumstances, a judgment in default or a consent judgment where there has been some procedural irregularity in the proceedings leading up to the judgment or order ought to be treated as a nullity, the Court will set it side**

In *Jane Nona v. Jayasuriya*(2) a writ was issued while the defendant was dead and the widow was evicted. On an application by the widow to restore her into possession the Court of Appeal made order to restore the petitioner in to possession on the principle that the Court of Justice is under a duty to repair the injury done to a party by its acts. G. P. S. De Silva J. (as he then was) quoted *Sirinivasa Thero v. Saddasi Thero*(3) where the plaintiff was restored to possession of a room he was occupying prior to the execution of a writ. Sansoni J. held in that case that "justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act".

Tambiah J. in *Seneviratne v. Francis Fonseka Abeykoon*(4) following *Sirinivasa Thero's (supra)* held that "not only have our Courts used their inherent powers to repair injuries done to a party by their own acts". In *Sivapathalingam v. Sivasubramaniam*(5) the Court of Appeal issued an injunction on 26.5.1988 in terms of Article 143 of the Constitution restraining the respondents from preventing the petitioner from entering the land described in the schedule. On 29.6.1988 the Court of Appeal stayed the operation of the injunction. The respondent claimed that he was in lawful possession of land on a lease, but the petitioner had him

ejected upon obtaining the injunction. The injunction was dissolved subsequently by the Court of Appeal. The Supreme Court held that when the injunction was dissolved it was competent for the Court to direct that the appellant who had obtained possession of the property on the strength of the injunction by displacing the respondent, be in turn displaced and possession handed back to the respondent.

Gunawardene J. held that (at 392) "a Court whose acts has caused injury to a suitor has an inherent power to make restitution. . . When the injunction issued by the Court of Appeal was dissolved it was competent for the Court of Appeal to direct that the appellant be in turn displaced and possession handed back to the respondent. It is the duty of Courts and it is in their interest to ensure that public confidence in them and in the orders and judgments made by them is maintained and remains undamaged. If an order of Court ...causes damage without justification, it becomes the duty of the itself to undo that damage.... in the interest of the credibility of the Courts"

In *Wijesekara v. Uluwita*[6] Macdonell C.J. held that a writ issued on a *ex-facie* defective petition and affidavit was *per incuriam* and that the District Court has power to vacate or recall an *ex-parte* order. It would indeed be extraordinary if such Court has not the power of vacating an order which had been obtained from it on insufficient or inaccurate information.

In *Eswaralingam v. Sivagaanasunderam*[7] money had been paid out to the plaintiff (the Judge thought it was due to a *"per incuriam"* order) was claimed by the substituted defendants as due to them. The Judge inquired in to this complaint. For that purpose the Court required them to deposit in Court the money which had been paid out to them

until such time as the rights of the parties could be ascertained. Sansoni J. held (at 398) that it was undoubtedly the duty of the Judge to take action to prevent any injustice, especially where such injustice arose from the action of the Judge himself.

In terms of section 84 of the Civil Procedure Code the Court must satisfy itself that the defendant had due notice of the day fixed for the hearing. The section reads as follows:

> 84: If the defendant having filed his answer, if he fails to appear on the day fixed for the hearing of the action, **and if the Court is satisfied that the defendant..... has had due notice.... of the day fixed for the hearing of the action**.....(emphasis added)

The Court originally fixed this case for trial for 6.11.2006. This was done on 17.7.2006. Thereafter on a motion filed by the plaintiff with notice to the defendant the case was called on 3.8.2006. The motion dated 25.7.2006 states that this case is now fixed for trial for 6.11.2006. Before the trial there was a great need to have the land described in the schedule surveyed by a Court Commissioner and a plan made (pg 132 of the brief). The Court thus issued a commission returnable on 14.12.2006. The intention of the plaintiff was to have this commission executed before trial. This commission had to identify the land. Without this plan the plaintiff would not have been in a position to prove his case. This commission was issued at the instance of the plaintiff. Commissions are usually issued before trial. By fixing the date for the commission returnable date, the Court had overlooked the trial date. The trial date was not cancelled. This happened due to an oversight.

It is the plaintiff who was responsible for this mishap. The defendant thought that the new date was 14.12.2006.

Therefore the defendant did not come to Court on 6.11.2006. The plaintiff was present. The plaintiff got the case heard *ex-parte.* The plaintiff did not disclose to Court that he moved for a commission. Thereafter the defendant filed a motion and got the case called with notice to the plaintiff. The Court realized the mistake it had made. The Court vacated the *ex-parte* judgment and allowed the commission returnable date to stand. The Court got the consent of the plaintiff who placed his signature on record.

The learned Counsel appearing for the plaintiff complained that the learned Judge had not followed the procedure laid down by the law. He relied on section 86 of the C.P.C. The learned Counsel submits that the Court should have waited until the decree was served on the defendant. The learned Counsel submits that the Court has no power to get the consent of the plaintiff after the *ex-parte* judgment. The learned Counsel complains that the plaintiff did not consent but rather that the Court had forced the plaintiff to sign the record. The learned Counsel submits that therefore this order cannot stand. The learned Counsel concedes that the defendant can come to Court and explain after the decree is served on him by following the procedure.

The section is as follows:

86 (2) Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies Court, that he had reasonable grounds for such default, the Court shall set aside the judgment and decree and permit the defendant to proceed with his defense as from the stage of default upon such terms as to costs or otherwise as to the Court shall appear proper.

(2A) At any time prior to the entering of judgment against a defendant for default, the Court may, if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default of the defendant and permit him to proceed with his defense as from the stage of default upon such terms as to costs or otherwise as to the Court shall appear fit (emphasis added).

(3) Not reproduced.

The above procedure should apply under normal circumstances. However there is no particular section that the Judge could refer to in a situation like the case under consideration. Two dates were fixed by Court. Usually Court would fix one date at a time. That was done. The date was 6.11.2006. The plaintiff thereafter got another date fixed. That was 14.12.2006. There were two dates of which fact the Court was not aware. It is Section 839 that a court could resort to in a situation like this.

Section 839 is as follows:

839: Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court (emphasis added).

The Court had used its inherent power to prevent abuse of the process of Court. It was the plaintiff who tried to abuse the process of Court. The date was changed to benefit the plaintiff. Now this same benefit that the plaintiff made use of was to the disadvantage of the defendant. That was prevented by Court through the use of its inherent powers. The Court

had acted with a sense of Justice. I am of the view that the learned Judge had correctly vacated the *ex-parte* judgment as against the 1st defendant. In these circumstance the Court need not have obtained the consent of the plaintiff. The fact of the plaintiff placing his signature on the record can be disregarded.

The learned Counsel complained that the *ex-parte* judgment against the 2nd defendant should stand. The 2nd defendant had filed answer on 2.5.2006. The case was fixed for trial for 17.7.2006. On 17.7.2006 the 2nd defendant was absent. The Attorney-at-law informed Court that he has no instructions from the 2nd defendant. Therefore the Court fixed the case *ex-parte* against the 2nd defendant. Therefore the setting aside of the *ex-parte* order should apply only in favour of the 1st defendant. The learned Judge is directed to restore the *ex-parte* judgment against the 2nd defendant and to proceed according to law against the 2nd defendant. The order of the learned Judge against the 1st defendant stands. The appeal is dismissed with costs.

CHITRASIRI J. - I agree

Exparte Judgment against the 2nd Defendant - restored.

Order against the 1st Defendant to stand.

Appeal dismissed subject to variation.

INSTITUTE OF TECHNOLOGICAL STUDIES V. COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
SATHYA HETTIGE PC. J. P/CA
GOONERATNE. J.
CA 970/97
SEPTEMBER 11TH, 2009

Termination of Employment (Sp. Prov) (TEWA) Act No. 45 of 1977 as amended – Section 2, Section 6, Section 6A – Closure of business? Industrial Disputes Act – Section 3 (1), Section 48 – Comparison – Closure of any section, branch or business – within Section 6A?

The petitioner sought to quash the order granting compensation to the workmen under Section 6A TEW Act on the basis that, there was no closure of the business and the compensation granted was excessive.

The respondents who were security personnel employed with the petitioner Company were unilaterally transferred to a security company which took over the security of the petitioner company. The workmen protested and complained to the Commissioner. The Commissioner of Labour after holding that, there was a closure of a business, and acting under Section 6A granted compensation.

Held

(1) Unilateral discontinuance of the 3 workmen in the security division would constitute a constructive closure of the type of work carried out by the 3 workmen in a branch or section within the whole business activity of the petitioner.

(2) The definition contained in Section 48 of the Industrial Disputes Act may be used as a guide to ascertain the meaning of "business".

(3) The Commissioner of Labour could not have ordered reinstatement of the workmen since security of the Petitioner Company had been

handed over to another company, as such the Commissioner was not in error by resorting to Section 6A and making an order to award compensation since Section 6 would be of no purpose to consider reinstatement after the closure of the security division and handing over security to another company.

Per Anil Gooneratne. J

"An error of law on the face of the record should be plain and admissible and not one which can be discovered only after an assiduous search beyond its face".

(4) Closure does not necessarily mean the closure of all business activities of the legal entity that constitutes the employer. It is not any closure but only a closure leading to non employment of workmen that is covered by the Act.

Case referred to:-

1. *Calendonian (Ceylon) Tea and Rubber Estates Ltd v. J. S. Hilman* – 79 NLR 421

APPLICATION for a writ of *Certiorari.*

Shammil Perera with *P. Somachandra* for petitioner

Rohan Sahabandu for 1st respondent.

Vijith Singhe for 2nd and 3rd respondents.

A. Gnanathasan, ASG for 4th and 5th respondents.

Cur.adv.vult

November 16th, 2009

ANIL GOONARATNE J.

This is an application for Writ of *Certiorari* to quash the decision/order of the 4th Respondent (the Commissioner of Labour) dated 14.8.1997. The order in question is marked 'L' and annexed to the Petition, under the provisions of the Termination of Employment (Special Provisions) Act. In brief the order required the Petitioner to pay compensation to the workman concerned (1st - 3rd Respondents) instead of reinstatement. The Petitioner was originally supported in the

Court of Appeal as far back as 19.12.1997, and in view of the fact that the Petition originally filed was defective and not in compliance with the rules of Court, petitioner was permitted to file amended petition (*vide* Journal Entry of 19.12.1997).

The position of the Petitioner is that 1st-3rd Respondents were employed as Security Personnel of the Petitioner's principal place of business. The petitioner alleges that 1st-2nd Respondents interrupted their period of employment (*vide* paragraph 3b of amended petition).

The Petitioner avers that the 1st, 2nd and 3rd Respondents whilst being employed by the Petitioner during the latter part of 1995 and the early part of 1996 displayed a lack of discipline and lapsed in the proper performance of their duties and increasing insubordination to the Management of the Petitioner. As a result of such conduct the Petitioner was compelled to employ a company known as Interco Services Limited to provide a complete security service for the Petitioner with effect from May 1996. In order to assist the 1st to 3rd Respondents and to ensure that they would not be unemployed, the Petitioner arranged with Interco Services Limited to absorb the said Respondents on the same terms and conditions as they were employed by the petitioner with recognition of their previous services. These arrangements were made known to the said Respondents on 7th May 1996. The 1-3 Respondents however acting capriciously, unreasonably and irresponsibly refused to accept employment under Interco Limited, despite attempts made on behalf of the Petitioner to persuade them to accept employment. As these Respondents had decided to leave the Petitioner's employment on that very day, the Petitioners paid their wages prior to their leaving the premises.

When this matter was taken up before this Bench on 11.09.2009, Counsel appearing for all the parties to this

application made very brief submissions and invited this Court to consider their comprehensive written submissions already filed of record. Having perused the written submissions of all parties this Court is more inclined to accept the version of the Respondents both in facts and law, especially the applicability of the provisions of the Termination of Employment Act.

The Respondents have referred to the following evidence at the inquiry before the Commissioner of Labour.

(a) Letters of appointments issued to 1st to 3rd Respondents do not indicate that it is a transferable service. If a transfer takes place it is contrary to terms of employment and services terminated would result in closure of the security division of the Petitioner Company.

(b) Document marked 'F' refer to lapses in the existing management and the Petitioner decided to hand over security to a private company, Respondents were verbally informed. Documents K1 indicates that Respondents wanted the services at the Petitioner Company but employer replied that if the Respondents do not join the proposed new company they could leave the employment of the Petitioner Company. That Edirisinghe (President of Petitioner Company) asked the Respondent not to work in the Petitioner Company and leave the Company.

(c) At this inquiry, the Respondent (and the other Security Officers) gave evidence and on behalf of the Petitioner Company the Manager of the New Security Company and an officer of the Petitioner Company gave evidence. Second witness, Cooray specifically stated that the Sharjah College is an associate company of the Petitioner Company.

Petitioner's contention is that the Commissioner of Labour was in error by taking into consideration an impending closure of the Petitioner company. Petitioner states there was no evidence on that matter and there was no intention on the part of the Petitioner to do so.

The findings and recommendations, duties reported to the Commissioner by documents 'M' and 'N' indicate that termination was viewed in the context of Section 6 and 6A (1) as a violation of Section 2 of the relevant statute. Then the Commissioner has to decide on the applicability of Section 6 or 6A based on material before him. It is apparent that the Commissioner has brought the order within the ambit of Section 6A of the Act since Section 6 would be of no purpose to consider reinstatement after the closure of the security division and handing over security to another company. This could be inferred on a perusal of paragraphs 5 – 7 of the amended petition and documents marked 4R6, 4R7 & 4R8. Further it appears by looking at the entire case of the Petitioner that the Petitioner does not deny the right of the workman to be given compensation, but contest the quantum.

It must also be noted that the unilateral discontinuation of the 3 workmen in the security division would constitute a constructive closure of the type of work carried out by these workman in a branch or section within the whole business activity of the Petitioner.

The 2nd & 3rd Respondents point out in their written submissions that 'closure' is not defined in the statute concerned. But these Respondents seek to support closure of business as follows;

Maxwell on the interpretation of statutes (12th Edition) at page 71, it is observed, the construction which has been

placed on statutes of similar scope may be referred to if an Act of Parliament uses the same language which was used in a former Act of Parliament referring the same subject and passed with the same purpose and for the same subject passed with the same purpose and for the same object the safe and well known rule of construction is to assume that the legislature when using well known words upon which there have been well known decisions use those words in the same manner in which the decisions have attached to them.

In the Industrial Disputes Act (hereinafter referred to as I. D. A.) the interpretation Section uses the word industry or business to the same subject, passed with the same purpose and for the same object and hence when there is a lacuna in the manner of interpreting the word business in terms of the Termination Act as amended one could refer the meaning of business as provided in the I. D. A.

In the Industrial Disputes Act, the business is not defined but industry is defined.

Section 3(1) of the Industrial Disputes Act is worded as follows:- where the Commissioner is satisfied that an industrial dispute exists in any industry or where he apprehends dispute in any industry.

Section 48 of the Industrial Disputes Act defines the industry, includes trade, business manufacture and agriculture, any undertaking or occupation by way of trade, business manufacture or agriculture or any branch or section of trade business, manufacture or agriculture.

Industry includes any section or branch of any business and business is included in the industry.

According to the said definition, <u>business includes any section</u> or branch of <u>business</u>

It is apparent from the above said definition business includes any section or branch of business immaterial of the fact whether educational institute falls within the terms of industry.

I see no reason to express a contrary view to that of the 2nd & 3rd Respondents as stated above. In this context I would also refer to the following views by S. R. de Silva in his book on same concepts of Labour Law. At pg. 184/185

The fourth concept and in fact the third limb of the definition of a termination is, the non-employment of a workman in consequence of the closure by the employer of any trade, industry or business. Several problems arise in connection with this fourth concept.

The first problem relates to the meaning of closure as the term is not defined in the Act. It is not any closure but only a closure leading to non-employment of a workman, that is covered by the Act. Closure, as distinct from retrenchment, presupposes that the employer will not be carrying on the business which is being closed. The Act nowhere defines "trade, industry or business". The Industrial Disputes Act, however, defines 'industry' to include.

(a) trade, business, manufacture and agriculture, any undertaking or occupation by way of trade, business, manufacture or agriculture, and any branch or section of trade, business, manufacture or agriculture;

(b) service, work or labour of any description whatsoever performed by persons in the employment of a local authority, or of a corporation established by or under any written law for carrying on an undertaking whether for the purpose of trade or otherwise;

(c) every occupation, calling or service of workmen;

(d) every undertaking of employers"

The above definition may be used as a guide, at least for the purpose of concluding that the phrase 'trade, business or industry' includes any branch or section of a business and closure does not necessarily mean the closure of all business activities of the legal entity that constitutes the employer.

In all the above circumstances the termination of the workman were on non-disciplinary grounds. Looking at the entire case the 4th Respondent, the Commissioner of Labour could not have ordered reinstatement of the 1st to 3rd Respondents since security of the Petitioner Company had been handed over to another company and there is no dispute about that fact. As such the Commissioner of labour was not in error by resorting to Section 6A of the Termination of Employment Act and making an order to award compensation. Termination was solely by the employer as far as the case in hand, and as such compensation could be considered also for loss of career.

In the *Caledonian (Ceylon) Tea and Rubber Estates Ltd., v. J.S. Hillman*(1)

Held: that where the termination of employment was caused solely by the act and will of the employer in pursuance of his desire to sell the estate, the relief of compensation is available to H, the discharged employee.

Held further : (1) that inasmuch as an appeal lies from an Order of a Labour Tribunal only on a question of law an appellant who seeks to have a determination of facts by the Tribunal set aside, must satisfy the Appellate Court that there was no legal evidence to support the conclusion of facts reached by the Tribunal, or that the finding is not rationally

possible and is perverse even with regard to the evidence on record.

"A Labour Tribunal is thus entitled to grant compensation for loss of career if it thinks such relief is just and equitable in the circumstance, even though the termination is consequent to the exercise, by the employer of his fundamental right to close down his business……By exercising his right to close down his business, the employer may frustrate the employee's re-instatement but he cannot escape his liability to pay compensation to the employee for loss of employment….."

There is no basis to interfere with the Commissioner's findings on the award of compensation and the Commissioner's findings in this regard cannot be faulted by taking into consideration the period worked in the associated Sharjah College. That college was under the Petitioner's establishment which fact was based on evidence of witness Cooray. The award made for compensation is not unreasonable, arbitrary or illegal.

This Court also cannot find an error on the face of the record, or manifest error which is not synonymous with grave or fundamental error. An error of law on the face of the record should be plain on the face of the admissible record and not one which can be discovered only after assiduous search beyond it's face. The Petitioner has not properly placed material to prove an error of law, or establish any other acceptable ground to invoke the jurisdiction of this Court to issue a prerogative Writ of *Certiorari.* As such this application is dismissed with costs.

HETTIGE P/CA - I agree

Application dismissed.

SEYLAN BANK PLC V. LEBBE MOHOMED RAZIK

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.
RATHNAYAKE, J., AND
IMAM, J.
S.C.APPEAL NO.38 A/2008
SC HC CA LA NO.45/2007
NCP/HCCA/APR/LA/07/2007
DC(ANURADHAPURA) CASE NO.21064/M
JUNE, 2ND 2009

Debt Recovery (Special Provisions) Act No.2 of 1990 as amended by Act No.9 of 1994 - Section 6(3), Section 13, Section 15, Section 16, Section 17 – Is a decree nisi made absolute, a final judgment within the meaning of Section 754(1) of the Civil Procedure Code? – Section 13(1) where a decree nisi is made absolute it is deemed to be a writ duly issued on the fiscal - Civil Procedure Code - Section 225 (3).

The petitioner instituted action against the respondent under the provisions of the Debt Recovery (Special Provisions) Act in order to recover certain sums of money. The District Court entered decree nisi against the respondent after a summary trial. The respondent sought leave to show cause against the decree nisi. The learned District Judge made *order absolute* as the respondent failed to disclose a *prima-facie* sustainable defence. The respondent preferred a leave to appeal application to the High Court. The petitioner raised a preliminary objection in the High Court in that the respondent is not entitled in law to institute an application for leave to appeal, because under the Debt Recovery Act, an order making the decree nisi absolute was a final order and not an interlocutory order. The High Court rejected the preliminary objection raised by the petitioner and held that leave to appeal was the only procedure to assail such order.

The only substantive issue before the Supreme Court was whether a leave to appeal application lies against a decree nisi which was made

absolute under Section 6 (3) of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994.

Held:

(1) A decree nisi made absolute under Section 6 (3) of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994, is a final judgment in terms of Section 754 (5) of the Civil Procedure Code and hence a leave to appeal application does not lie against that judgment, in terms of Section 754 (2) of the Civil Procedure Code.

(2) According to the provisions of the Debt Recovery Act when a decree nisi is made absolute under Section 6 (3) of the Act, Section 13 becomes operative immediately.

(3) Section 13 (1) of the Debt Recovery Act provides that where a decree nisi is made absolute, it is deemed to be a writ of execution duly issued on the fiscal in terms of Section 225 (3) of the Civil Procedure Code and notwithstanding anything to the contrary in other written law, the execution of the sale should not be stayed.

Cases Referred to:

1. *Indra v. People's Bank* (2002) Sri L.R. 25.
2. *Somathilaka Bandara v. People's Bank* (2005) 1 Sri.L.R.10.

APPEAL from the Judgment of the High Court of the North Central Province Holden in Anuradhapura.

Palitha Kumarasinghe, P.C. with I Idroos for the Plaintiff – Respondent – Petitioner.

Kamran Aziz for the Defendant – Petitioner - Respondent.

Cur.adv.vult.