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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

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COATS THREAD LANKA (PVT.) LIMITED V. SAMARASUNDARA

SUPREME COURT
J. A. N. DE SILVA, C.J.,
RATNAYAKE, J. AND
EKANAYAKE, J.
S. C. APPEAL NO. 18/2009
S. C. (SPL.) L. A. NO. 57/2008
PHP (KALU) NO. LT/04/2005
KALUTARA LT NO. 18./KT/3107/03
NOVEMBER 11TH, 2009
FEBRUARY 17TH, 2010
MARCH 11TH, 2010

Industrial Disputes Act – Section 31B (1) – Application to a Labour Tribunal by a workman for relief in respect of termination of services – award of gratuity – such other matters relating to the terms of employment or condition of labour of a workman.

The Respondent was employed by the Appellant-Company at the time of the alleged termination. Allegations of corruption were levelled against the Respondent and after conducting an investigation into the allegations, the Appellant suspended the Respondent without pay and proceeded to conduct a full inquiry into the allegations made against the Respondent. During the course of the inquiry, the Respondent informed of his difficulty in attending the inquiry on Saturdays as he had secured employment elsewhere. Upon this revelation, the Appellant-Company considered the Respondent as having repudiated his contract of employment of his own accord and volition. The Appellant later informed the Respondent by a subsequent letter that his services would have been terminated in any event on the strength of the findings of the inquiry.

Held:

(1) In ascertaining the reasonableness of any covenant alleged to be in restraint of trade, the extent of the prohibition and the time period within which the prohibition is operative are important

considerations. Covenants of this nature are upheld where they operate to protect the legitimate interests of the employer, for instance where there is a risk of trade secrets being divulged by an employee.

Per J. A. N. De Silva, C. J. –

". . . A person is entitled to seek employment with multiple employers so as to maximise his monthly income. Where such employment impacts adversely on the quality of his work, appropriate action may be taken at that stage. Therefore I am of the view that such concerns of the employer cannot restrict a person's reasonable right to seek employment at multiple establishments. . . . Hence I hold that the second limb of Clause 16(c) prohibiting employment elsewhere as being void. This position is further justified as the Appellant in this case was employed as a mere work study assistant as opposed to a manager or a similar high position in the organizational hierarchy."

(2) In can now be considered as trite law that for the abandonment of the contract of employment to be proved, there must be proof of physical absence as well as the mental element of intent.

Per J. A. N. De Silva, C.J. –

"I am of the opinion that "absence" here is a reference to the lack of presence when such presence is deemed necessary in the ordinary course of employment. In other words, where the Respondent is required to be present at the work place. . . he absents himself and such absence continues it can be safely assumed that the first ingredient had been met."

The mental element or what is referred to *as animus non revertendi* is the intention to abandon the contract permanently. If the subsequent employment was of a permanent nature, it would be compelling evidence of *animus non revertendi.*

(3) Employers should be granted the opportunity of suspending the employee pending disciplinary inquiry. This is for the purpose of ascertaining whether the worker is guilty of any misconduct in order to decide whether the contract of employment should be terminated.

(4) Per J. A. N. De Silva, C. J., -

". . . I am satisfied that the said proceedings were conducted upon the worker been sufficiently informed of the charges against him and that he was provided an adequate opportunity to explain and establish his innocence. Therefore I see no reason to disturb the findings of the inquiring officer. Therefore under the circumstances I find that the dismissal of the Respondent worker as being justified."

(5) Wages are a natural right of the worker that flows from the contract of employment. Even in a situation where the worker is prohibited from entering the workplace pending a disciplinary inquiry, the employer's duty to pay wages remains.

Cases referred to:

1. *Maxim Nordenfelt Gun Co. v. Nordenfelt* – (1894) AC 335
2. *Ceylon Bank Employees' Union v. The Bank of Ceylon* – (1979) 1 N.L.R. 133
3. *Nova Plastics Ltd. v. Frogatt* – (1982) IRLR 146
4. *Hall Fire Protection Ltd. v. Buckley* – (1995) UKEAT 5-94-0606
5. *Lanka Estate Workers' Union v. Superintendent, Hewagam Estate* – S. C. Minutes 9/69, 2-2-1970
6. *Nelson de Silva v. Sri Lanka State Engineering Corporation* – (1996) 2 Sri L.R. 342
7. *Management of Hotel Imperial, New Delhi and Ors. v. Hotel Workers' Union* – (1959) AIR SC 1342
8. *Hanley v. Pease* – (1915) (1) KB 698

APPEAL from order of the High Court of the Western Province.

Sanjeewa Jayawardana with *Sandamali Chandrasekera* for the Respondent – Respondent – Petitioner.

A.P. Niles with *Irosha Silva* for the Applicant – Appellant – Respondent.

Cur. adv. vult.

July 02nd 2010

J. A. N. DE SILVA CJ.

This is an appeal against an order of the High Court of the western province directing the reinstatement of the Respondent or in the alternative, payment of three years' salary as compensation. Leave was granted on the following questions set out in paragraph 10(a) to (e) and prayers (a), (b) and (c) of the petition.

(a) Did the High Court fall into error by failing to appreciate that the Respondent, by entering into a contract of employment with another organization (within 14 days of the suspension of services of the Appellant), had acted in breach of the aforesaid clause 16(c) of the contract of employment, going to the very foundation of the said contract and thereby, attracting a terminal situation?

(b) In any event did the High Court err by failing to appreciate that there was no termination by the employer as contemplated by section 31B of the industrial disputes act and that as such, no relief could be granted?

(c) Did the High Court misdirect itself by failing to consider that the Appellant, by entering into another organization had intentionally and willfully terminated his contract of employment of his own accord and volition?

(d) Did the High Court misdirect itself by failing to appreciate that a suspension of an employee did not amount to a termination of his contract of employment and that a suspension is only a temporary measure pending investigations and further conclusive evidence?

(e) Did the High Court misdirect itself by holding that the failure of the petitioner to conduct the domestic inquiry

within reasonable time amounted to "constructive termination" despite the Respondent having repudiated the contract within 14 days of the suspension of his services?

(f) Did the High Court misdirect itself by failing to consider that the Respondent had, unjustly enriched himself by accepting the payment of a half month's salary made by the Appellant company while concealing the fact that the Respondent had entered into a contract of employment with another organization?

(g) Did the High Court in any event, err in law by failing to conclusively determine the purported relief to which the workman was entitled to, if at all?

(h) Did the High Court fail to appreciate the fact that the reinstatement of the Respondent would be subversive of discipline and undermine the authority of the management and as such be prejudicial to the establishment?

The facts in so far as they are relevant are as follows:-

The Respondent was employed by the Appellant Company as a work study assistant at the time of the alleged termination. The Respondent had also been elected to the post of treasurer of the staff welfare association of the Appellant Company. Due to discrepancies in the accounts of the welfare association and allegations of corruption leveled against the Respondent the Appellant Company conducted an investigation in to the said allegations. Thereafter the Appellant Company suspended the Respondent without pay in order to conduct a full inquiry in to the allegations. During the course of the inquiry the Respondent intimated his difficulty in attending the said inquiry on Saturdays as he had obtained employment elsewhere. Upon this revelation

the Appellant Company considered the Appellant as having repudiated his contract of employment of his own accord and volition. However the Appellant also informed the Respondent by a subsequent letter that his services would have been terminated in any event on the strength of the findings of the inquiry.

I first turn my attention to the question of repudiation of the contract of employment by the worker. The learned counsel for the Appellants directed our attention to clause 16 (c) of the contract of employment.

"You will not be able to enter into any activities similar to that for which you are employed by this company or ***obtain employment elsewhere while in service with us*****.**

It was urged before us that the said breach was one that could be termed as a fundamental breach resulting in the repudiation of the contract by the employee.

At the outset it is necessary to note that the Respondent had admitted to obtaining employment elsewhere, namely Vinter Fashions Ltd., whom the Appellant submits is a rival business entity. The Respondent denies the said contention.

It was strenuously argued by the Respondent before the labour Tribunal that the said clause was in restraint of trade and hence illegal and void. It is pertinent to note that the Respondent had not canvassed the same in his submissions to this court. Nonetheless I would venture to weigh the merits of this submission.

The test of validity of any covenant alleged to be in restraint of trade is the test of reasonability as held in *Maxim Nordenfelt Gun V. Nordenfelt*[1].

The law on this matter was correctly stated by Lord Mac Naghten in the *Nordenfelt* case. He said:

> *"Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."*

In ascertaining the reasonableness the extent of the prohibition and the time period within which the prohibition is operative are important considerations. Covenants of this nature are upheld where they operate to protect the legitimate interests of the employer, for instance where there is a risk of trade secrets being divulged by an employee.

Does clause 16(c) withstand the test of reasonability? Clause 16(c) envisages a blanket prohibition whilst the worker is in the service of the employer.

Our courts have dealt with a similar issue in the *Ceylon Bank Employees Union v. The Bank of Ceylon*[2]. In the said case Sirimanne J in interpreting a clause to the effect that *"I will give my whole time and attention to the discharge of duties"* held the clause to mean that the workman must not devote any part of his time to any other gainful employment, except with respect minor dealings in his spare time.

In the said case the worker concerned was one holding a responsible position and who was privy to confidential information. In light of the above the said clause it may be

justified in limiting his employment and his sources of income. However I do not think that Sirimanne J intended this to be the general rule. A person is entitled to seek employment with multiple employers so as to maximize his monthly income. Where such employment impacts adversely on the quality of his work, appropriate action may be taken at that stage. Therefore I am of the view that such concerns of the employer cannot restrict a person's reasonable right to seek employment at multiple establishments.

Selwyn's *law of Employment* (9th Ed page 381) offers assistance on the point of an employee taking additional employment. He too suggests that it may be a ground for dismissal if such employment has an adverse effect on the employers business. The cases of *Nova Plastics Ltd v. Frogatt*[3] and *Hall Fire Protection Ltd v. Buckley*[4] are illustrative of this point.

Hence I hold that the second limb of clause 16(c) prohibiting employment elsewhere as being void. This position is further justified as the Appellant in this case was employed as a mere work study assistant as opposed to a manager or a similar high position in the organizational hierarchy.

The above discussion refers to the question of automatic repudiation by the operation of the contract due to the conduct of the employee.

However it yet remains to be seen whether the employee deliberately repudiated his contract by seeking employment elsewhere. As noted earlier, the right to seek secondary employment is subject to the important condition that such employment takes place outside the usual working hours of his primary place of employment. It is pertinent to note that in the instant case the Respondent's alternate employment by his own employment clashes with the working hours of the Appellants.

Weeramantry in his *law of contract* defines repudiation as follows.

> *"Repudiation may occur either expressly, as where a party states in so many words that he will not discharge the obligations he has undertaken, or impliedly, as whereby his own act a party disables himself from performance or makes it impossible for the other party to render performance"*

It was urged before us that the employee in the instant case had by seeking employment elsewhere, impliedly repudiated his contract of employment, in other words that he had vacated his post.

It has been held in several instances by this court, which now can be considered as trite law that for abandonment of the contract to be proved proof of physical absence as well as the mental element of intent needs to be established *(Lanka Estate Workers Union v. Superintendent Hewagam Estate*[5] and affirmed in *Nelson de Silva v. Sri Lanka State Engineering Corp.*[6]

In the instant case the employee had been "suspended" from work and therefore was required to absent himself. This form of absence does not, in my opinion satisfy the requisite absence in order to prove vacation of post.

The Appellant submits that the Respondent had admitted that he commenced work under another employer on 1st January 2003. It is from this point onwards that the aforementioned test must be applied in order to ascertain whether the employee had vacated his post.

I am of the opinion that "absence" here is a reference to the lack of presence when such presence is deemed necessary in the ordinary course of employment. In other words, where

the Respondent is required to be present at the work place at a reasonable hour of the day and he absents himself and such absence continues it can be safely assumed that the first ingredient had been met.

The mental element or what is referred to as *animus non revertendi* is the intention to abandon the contract permanently.

In the present case the Respondent had been suspended and subsequently been called for inquiry. The Respondent had albeit briefly replied to the charge sheet. The inquiry was scheduled to be held on 4th September 2003. The Respondent absented himself on that day. However on the following day of inquiry the Respondent gives evidence and also cross examines witnesses. He however absents himself from the afternoon session held on that very same day. Prior to his departure he requests that the inquiry be held on Sundays. These facts suggest that the Respondent had submitted himself to the jurisdiction of the inquiring body and expressed a willingness to continue to do so. On account of the aforesaid I do not think that the employee's physical absence could be considered as satisfying the prerequisites discussed above. It is also pertinent to note that the employee had expressed a willingness to recommence employment under the Appellant in his evidence before the labour Tribunal. However it must be mentioned here that the Respondent's contract of employment with Vinter Fashions is not on record and unavailable for perusal. Therefore the exact nature of his employment cannot be discerned except to say that the hours of employment were from 8.00 am to 5.00 pm six days of the week. **If indeed the employment was of permanent nature, which would I think be compelling evidence of animus non revertendi.**

It was submitted to us that the Respondent was compelled to seek such alternate employment due to economic hardship suffered resulting from his suspension and other circumstances of life. This is primarily due to the nonpayment of wages during the first four months of "suspension" and half months salary since then. At this juncture I venture to consider the legality of the decision of the by the employer to suspend the employee without pay.

SR de Silva in his "law of Dismissal" states,

> *"It is settled law that the employer has no right of suspension. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the so called period of suspension.*

Abeysekere in his "Industrial Law and Adjudication" concurs.

> *"The right to suspend, in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant. Such a power can only be created by statute governing the contract, or by express provision in the contract. If a master nevertheless, suspends in the sense of forbidding an employee to work,* ***he will be liable to pay wages for the period of suspension.****"*

This Sri Lankan authorities suggest that a suspended worker is entitled to full wages during suspension.

Learned counsel for the Appellant drew our attention to certain passages from Chakravarti's *Law of Industrial*

Disputes which supported the proposition that suspension is allowed as a precursor to a disciplinary inquiry. This is indeed the position in India as a result of the wording in section 33 of the Industrial Disputes Act of that country. In *Management of Hotel Imperial, New Delhi & Ors. Vs. Hotel Workers Union*[7] it was held by the Indian Supreme Court that section 33 by implication modified the common law rules governing suspension as it stood in India. Our Industrial Disputes Act does not contain any provision similar to section 33 of the Indian Act and hence the law in this country is the position held in *Hanley v. Pease* [8].

All authorities refer to the case of *Hanley v. Pease & partners* to support the proposition that an employer has no right to suspend a worker under the common law. Closer scrutiny of the judgment reveals that the word suspension as referred to by the lordships in that case has somewhat of a narrower meaning than the meaning ascribed to the word generally. For convenience I refer to a portion of Lush J's judgment.

> *"assuming that there has been a* ***breach on the part of the servant*** *entitling the master to dismiss him, he may if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding* ***the misconduct or breach of duty of the servant,*** *then the contract is for all purposes a continuing contract subject to the masters right to claim damages against the servant for his breach of contract."*

The word "suspension" has at least two distinct meanings. It is sometimes used in a punitive sense. i. e. *punitive suspension.* This is where a workman is prohibited from work and deprived of pay as punishment for some misconduct committed by the workman. Workers are also suspended in

a secondary sense. That is where the worker is prohibited from entering the work place as an interim measure pending inquiry to facilitate such inquiry.

The Hanley case refers clearly to suspensions of the first category. Their lordships correctly held that,

> *"After electing to treat the contract as a continuing one the employers took upon themselves to suspend him (worker) for one day….. **thereby assessing their own damages for the servant's misconduct** at the sum which would be represented by one day's wages. They have no possible right to do that."*

This is also the position of law in our country. Once an employer suspects a worker of serious misconduct it is incumbent on him to obtain evidence of such misconduct to justify termination. As such some form of inquiry is necessary for the aforementioned purpose. However such inquiries may sometimes be compromised if the alleged offender is permitted to roam free to influence witnesses. If the employee attempts to dismiss the worker summarily his *bonafides* is questioned. Thus the employer would be left with the difficult choice of either dismissing the employee summarily or conducting an inquiry whilst providing continuous work.

Hence In my view it would be within the spirit of the *Hanley* judgment that employers are granted the opportunity of suspending the employee pending disciplinary inquiry. This is for the purpose of ascertaining whether the worker is guilty of any misconduct in order to decide whether the contract of employment should be terminated. The worker cannot be deprived of his wages during this period. This result is further desirable as it also furthers two policy objectives. It acts as an incentive for employers to dispose of such inquiries expeditiously and also offer the worker an opportunity to vindicate himself.

I now turn to the conclusions reached by the learned High Court Judge. The learned High Court judge had formed an opinion that there was constructive termination of services in light of the delay in conducting the disciplinary inquiry and the deprivation to his salary.

The inquiry was first held on 2003-09-04 and then on 2003.09.17 on which date the Respondent gave evidence. On 2003.09.30 by letter marked "A16" the Appellant informed the Respondent that the Respondent is taken to have repudiated the contract by entering into a contract of employment with another company. On the last day further inquiry was fixed for 2003.10.01 though proceedings of such inquiry have not been placed before us. The Respondent in his evidence before the labour Tribunal stated that he did not take part in and was summoned to any further proceedings. Presumably this is due to the Respondent being considered as not being an employee any more. Be that as it may the Respondent was found guilty by the inquiring officer.

I am also of the view that the commencement of the inquiry could have been at an earlier date than the date on which it occurred. However I am not inclined to hold that there was constructive dismissal on those grounds alone.

In my opinion termination occurs by the letter dated 26th January 2004 marked "A19" as it expresses the view that the Respondent would have been terminated in any event on the findings of the inquiry if not for the Respondent's repudiation.

By the said letter the employer in this case has made it abundantly clear that he is not inclined to any further to offer employment to the worker due to the adverse findings made by the board of inquiry.

The Appellant Company drew our attention to the gravity of the charges preferred against the worker, of which the worker has not been found guilty of by the inquiring officer. I am satisfied that the said proceedings were conducted upon the worker been sufficiently informed of the charges against him and that he was provided an adequate opportunity to explain and establish his innocence. Therefore I see no reason to disturb the findings of the inquiring officer.

Therefore under the circumstances I find that the dismissal of the Respondent worker as being justified.

The Appellant finally submits that the Respondent had unjustly enriched himself by accepting wages from the Appellant Company whilst taking employment elsewhere. As mentioned previously wages are a natural right of the worker that flows from the contract of employment. The employer may in certain circumstances (as adverted to previously) decide not to provide work to the worker and prohibit him from attending to work. Yet the employer's duty to pay wages remains. In this instance the employee was merely receiving his contractual dues. The fact that he had received other wages during his suspension from a 3rd party is beside the point.

Finally on consideration of all facts relevant in this case I hold that the dismissal was justified in light of the facts revealed at the inquiry as well as at the labour Tribunal. The Respondent is not entitled to any damages for the dismissal. However he is entitled to all wages deprived of him during the period of his suspension and to any statutory dues he may be entitled to.

RATNAYAKE J. –I agree.

EKANAYAKE J. – I agree.

appeal dismissed.

KULATUNGA VS. HON LOKUBANDARA

SUPREME COURT
J. A. N. DE SILVA, C. J.
AMARATUNGA, J. AND
IMAM, J.
S. C. (FR) APPLICATION NO. 229/2009
FEBRUARY, 8TH 2010.

Constitution-Articles 12(1), 17 and 126 (2) – Infringement of Fundamental Rights. – If a person alleges that his fundamental rights had been infringed or about to be infringed he shall file his application within one month thereof. – lex non cogit ad impossibilia.

The Petitioner invoked the jurisdiction of the Supreme Court alleging that his fundamental rights guaranteed under Articles 12(1), 17 and 126 of the Constitution had been violated.

At the hearing the Respondent took up a preliminary objection to the effect that the application filed by the Petitioner was out of time in terms of Article 126 of the Constitution and moved for the dismissal of the Petitioner's Fundamental Rights application.

Held

(1) The rule in Article 126 of the Constitution is applied strictly, however in a fit matter the Supreme Court may allow an application to proceed even though one month has lapsed from the date of the infringement.

Cases referred to:

(1) *Gamaethige v. Siriwardene and Others* [1988] 1 S.L.R. 384

(2) *Siriwardene v. Rodrigo* [1986] 1 S.L.R. 384

(3) *Jayaweera v. National Film Corporation* [1995] 2 S.L.R. 123

(4) *Ramanathan v. Tennakoon* [1988] 2 CALR 187

(5) *Edirisuriya v. Navaratnam* [1985] 1 S.L.R. 100

APPLICATION for relief for infringement of fundamental rights.

S. A. Parathalingam, P.C. with *Idroos* for the Petitioner.

Manohara De Silva, P.C. with *Ms. Pubuduni Wickremaratne* for the 3rd Respondent.

Nerin Pulle, SSC for 2nd, 4th, 5th, 6th, and 9th Respondents.

Cur.adv.vult.

July 02nd 2010

J. A. N. DE SILVA CJ.

The petitioner in this case was granted leave to proceed on the alleged violation of fundamental rights guaranteed under Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka. Thereafter at the request of both parties several dates have been granted to explore the possibility of settling the dispute between the petitioner and the 3rd respondent.

This application relates to the filling of the vacancy of the post of Director of Catering and House Keeping Services of Parliament of Sri Lanka.

The above post became vacant on the 12th November 2005. The 3rd respondent was appointed to act in the said post and he does so even today. The Secretary General of Parliament called for application for the said post by placing an advertisement in the Sunday Observer and Silumina papers.

Several applicants responded to the above advertisement and four people were summoned for an interview on 7/4/2006 including the petitioner and the 3rd respondent. The composition of the interview board was as follows: Former Secretary General of Parliament Mrs. P. Wijesekera – Chairperson. Assistant General Secretary (5th Respondent) Principal

Ceylon Hotel School (7th Respondent) and Chief Executive Officer of the Hotels Corporation (8th Respondent).

The marks had been awarded under the following criteria at the said interview:-

Qualifications	=	20
Additional Qualifications	=	15
Experience	=	20
Personal Profile	=	30
Conduct & Testimonials	=	15
		100

On the basis of marks allotted at the interview, the board has not considered the petitioner to be the most suitable person for the post in question, but has recommended the 3rd respondent for the job. This is evident from the documents marked R 5 and R 5A. The Secretary General, who was the Chairperson in her affidavit, has stated that marks were given purely on merit and not for any extraneous considerations. She has vehemently denied bias or manipulation on the part of the interview board in awarding marks at any stage of the interview process. The petitioner not being satisfied with the interview process and the outcome of the interview petitioned the Presidential Investigation Unit alleging several misrepresentations made by the 3rd respondent in his application. Presidential Investigation Unit has conducted an inquiry and submitted a report to the Hon. Speaker of the House with a copy to the Secretary General. Thereafter the Secretary General once again published a newspaper advertisement in the Sunday Observer and Silumina on the 24th of Sep 2006 calling for fresh applications for the said post.

When this happened the 3rd respondent invoked the jurisdiction of the Court of Appeal by way of a writ of

certiorari quashing the decision of the Secretary General of Parliament to call for fresh applications for the post of Director Catering and Housekeeping Services of the Parliament. This writ application carried the No. CA 1551/2006. In the same application he has also prayed for a writ of mandamus directing the Secretary General of Parliament to appoint him to the post he was selected under Article 65 (3) of the Constitution. The Petitioner in the present application sought to intervene in the said Court of Appeal writ application on the basis that he was a necessary party.

However, on the 5th of December 2006 when the above matter was taken up for support the learned counsel who appeared for the Hon. Speaker and the Secretary General informed the Court of Appeal that there is a possibility of "an administrative adjustment" and moved for an adjournment. On that day Court was informed that there was no settlement and the Court fixed the matter for support on 2nd February 2007. Having heard all the parties the Court of Appeal quashed the decision of the Secretary General of Parliament to call for fresh applications and indicated that the Hon.Speaker of the parliament is free to consider whether approval should be granted or not to appoint the 3rd respondent who was the petitioner in the writ application. When the writ application bearing No. 1551/06 was pending in the Court of Appeal the petitioner in the instant case too filed a writ application bearing No. 69/2007 on the 17th of July 2006 praying inter alia for a mandate in the nature of certiorari quashing the decision of the interview panel from selecting and recommending the 3rd respondent. However, later in view of the decision given by the Court of Appeal in writ application 1551/07 the petitioner withdrew his application (C.A. Writ 69/7) on 2/2/2007.

On 3/7/2007 the petitioner invoked the jurisdiction of this Court alleging the violation of fundamental rights guaranteed under Article 12(1) in terms of Article 17 and 126 of the Constitution. At the hearing of this application all counsel who appeared for the respondents took up a preliminary objection to the effect that the application of the petitioner should be dismissed in limine as the petition of the petitioner falls outside the stipulated time in terms of Article 126 of the Constitution.

Article 126 of the Constitution reads as follows ("Where any person alleges that any such fundamental right . . . has been infringed or is about to be infringed by executive or administrative action, he may. . . Within one month thereof apply to the Supreme Court by way of petition.") The Supreme Court has constantly held that this one month rule is mandatory. In *Gamaethige vs. Siriwardene and others*[1] Fernando J made the following observation "time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required. . . . time beings to run only when both infringement and knowledge exists. The pursuit of other remedies judicial or administrative, does not prevent or interrupt the operation of time limit." This rule has been consistently applied by our Supreme Court in a number of cases. e.g. *Siriwardene vs. Rodrigo*[2], *Jayaweera vs. National Film Cooperation*[3] and *Ramanathan vs. Tennakone*[4].

It is to be noted that although this rule is generally applied strictly there are certain very rare instances where Supreme Court may allow an application to proceed even though one month has lapsed from the date of the infringement of the fundamental right of the petitioner. In the Case of *Edirisuriya vs. Navaratnam*[5] the Supreme Court held that in a fit matter the court would entertain

an application made after the lapse of the stipulated period provided an adequate excuse for the delay could be adduced by the petitioner. Such excuses include a situation where the petitioner has been held incommunicado, where the principle *lex non cogit ad impossibilia* would be applicable. It is clear from the facts narrated above the petitioner in this case knew the historical developments of the events that led to the selection and recommendation of the 3rd respondent to the post in question. The fact that he chose to seek a writ from the Court of Appeal too demonstrate the knowledge on his part. The petitioner withdrew this writ application on 2.2.2007 and subsequently after lapse of almost five months on 3.7.2007 he sought to invoke the jurisdiction of this Court. It is pertinent to note that the petitioner has prayed for identical relief in Court of Appeal application No. 69/2007.

I uphold the preliminary objection that this petition is time barred and the petition is dismissed without costs.

AMARATUNGA, J. – I agree.

IMAM, J. – I agree.

application dismised.

FERNANDO V. TENNAKOON

SUPREME COURT
TILAKAWARDANE, J.
AMARATUNGA, J., AND
MARSOOF, PC. J.
S. C. APPEAL NO. 19/2008
S. C. (HC) C. A. L.A NO 44/2007
WP/HCCA/ COL NO. 77/2007 (LA)
D. C. MOUNT LAVINIA NO. 951/06/SPL
JUNE 17TH, 2008.

Civil Procedure Code – Section 18 – Addition of Parties – Necessary Party – Parties improperly joined may be struck out – Section 19 – Intervention in a pending action not otherwise allowed – prescription Ordinance – Section 6 – time limit for filing an action to 'establish' a partnership? Prevention of Frauds ordinance 7 of 1840 – Section 18(c) – Partnership agreement – In writing?

An action was filed in the District Court of Mount Lavinia for the dissolution and winding up of an alleged partnership between E.V.T. de Silva, Geetha Amarasinghe and Sena Ranjith Fernando in the name of 'General Trade Agency'. The District Court permitted the Intervenient – Petitioner - Respondent – Respondent. 'Tennakoon' to intervene in the action filed by E.V.T de Silva and Geetha Amarasinghe who were the 1st and 2nd Plaintiffs in the District Court Action.

The High Court (Civil Appeal), by its order dated 3rd December 2007, affirmed the Order of District Judge permitting the intervenient-Petitioner. Tennakoon to intervene in the District Court action and refused leave to appeal.

It the Supreme Court the main question for determination was whether Tennakoon has slept over his rights, and if so, whether his delay and/ or laches would disentitle him to intervene into the action in the District Court.

Held

In deciding whether the addition of a new party should be allowed under Section 18(1) of the Civil Procedure Code, which is already pending in Court between two parties, - to avoid multiplicity of

actions and to diminish the cost of litigation, the lower Courts were justified in permitting intervention and determine the rights of all in one proceeding.

Per Saleem Marsoof J. –

"I have no hesitation in following the wider construction expounded by Lord Esher" in (*Byrne v. Browne and Diplock)*

Cases referred to:-

(1) *Norris v. Breazley* (1877) 2 CPD 80

(2) *Byrne v. Browne and Diplock* (1889) 22 QBD 657

(3) *Arnmugam Coomaraswamy v. Andiris Appuhamy and Others* (1985) 2 S.L.R. 219

(4) *Hilda Enid Perera v. Somawathie Lokuge and Another* (2000) 3 S.L.R. 200.

APPEAL from an order of the High Court (Civil Appeal) Western Province.

Nihal Fernando, PC with *Rajindra Jayasinghe* and *Ranil Aangunawela,* instructed by *Ms. Iresha Soysa* for the Defendant-Respondent-Petitioner-Appellant.

Rohan Sahabandu with *Ranjith Perera* for the Intervenient- Petitioner – Respondent – Respondent.

Chathura Galhena for the Plaintiff – Respondent – Respondent – Respondents.

Cur.adv. vult.

July 22nd 2010

SALEEM MARSOOF, J.

This is an appeal against the decision of the High Court of Civil Appeal of the Western Province dated 3rd December 2007 refusing leave to appeal from the order of the District Court of Mount Lavinia dated 25th May 2007. By the said order, the learned District Judge permitted the Intervenient Petitioner – Respondent – Respondent, Tennakoon Mudiynselage Ranjith

Tennakoon (hereinafter referred to as Tennakoon) to intervene into an action instituted by Edirimuni Vijith Thejalal de Silva and Geetha Amarasinghe, who are respectively the 1st and 2nd Plaintiff - Respondent- Respondent – Respondents to this appeal against one Sena Ranjith Fernando, the Defendant-Respondent – Petitioner – Appellant, seeking to enforce a partnership agreement. This was an action for the dissolution and winging up of an alleged partnership between the said Edirimuni Vijith Thejalal de Silva (hereinafter referred to as E.V.T. deSilva),Geetha Amarasinghe (hereinafter referred to as Geetha Amarasinghe) and Sena Ranjith Fernando (hereinafter referred to as Fernando) which has been registered under the Business Names Ordinance, No. 6 of 1918 as subsequently amended, in the name and style of 'General Trade Agency.'

The facts relevant to this appeal may be briefly outlined as follows. It appears from the Certificate of Registration dated 21st June 1983 annexed to the Plaint marked 'P1', which was issued under the Business Names Ordinance, that the said Tennakoon and one Rangoda Liyanarachchige Udaya Silva (who is now deceased and who was the husband of Geetha Amarasinghe, the 2nd Plaintiff – Respondent- Respondent – Respondent to this appeal) commenced a business of repairing of motor vehicles and distribution of merchandise in partnership under the name and style of 'General Trade Agency' on 17th May 1983. It also appears that prior to migrating to Australia, the said Tennakoon executed the Power of Attorney bearing No. 176 dated 6th November 1988 and attested by K. A. Wijayadasa, Attorey-at-Law and Notary Public (A4), appointing the said E. V. T. de Silva as his Attorney to operate certain bank accounts he held in Sampath Bank, Colombo and to act for him in relation to the said partnership. By the said Power of Attorney, the said

E. V. T. de Silva was authorized by Tennakoon "to act for me and on my behalf in all matters pertaining to the Partnership called and known as 'General Trade Agency' ".

It is evidence from the extracts of the Business Names Register produced as DP (Y2) that on 7th February 1989 the said Udaya Silva made a statement of change, under oath, purportedly under Section 7 of the Business Names Ordinance, to the effect that the said Tennakoon ceased to be a partner on that date and that the said E.V.T. de Silva was admitted as a new partner in his place. It also appears from the said extract that the Registrar of Business Names, Western Province, relying on the said Statement of Change has accordingly altered the Register by the inclusion of the name of the said E.V.T. de Silva in substitution of the name of Tennakoon. However, nowhere in the Register is there an indication as to the circumstances in which Tennakoon ceased to be a partner. Thereafter in 1992, the Defendant-Respondent-Petitioner – Appellant, Fernando was admitted as a partner. In 2004, the existing business lines were expanded to include a mechanical workshop, the import, sale and distribution of moter vehicles, machinery spare parts, electrical items, drugs and chemicals, transport and tourism, insurance, and manpower services, and the partnership was re-registered (*vide* – Certificate of Registration dated 29th November 2004 marked 'P4'). After the death of Udaya Silva, his wife namely, Geetha Amarasinghe entered the partnership with E. V. T. de Silva and Fernando, and a new firm was registered in June 2005. It is noteworthy that the only record of Tennakoon's alleged partnership in the Business Names Register is in the Certificate of Registration dated 21st June 1983 marked 'P1', and in none of the subsequent registration of the partnership business Tennakoon's name is reflected as a partner.

Although the original partnership business commenced in 1983, and there is little or no evidence that the initial partner Tennakoon, who left Sri Lanka in 1988, had any role to play in the partnership business after his departure, no legal proceedings had been commenced in this regard till 31st May 2006, when E.V.T. de Silva and Geetha Amarasinghe commenced action against Fernando in the District Court of Mount Lavinia seeking to have the partnership dissolved and wound-up. It is to this action that Tennakoon, acting through his Attorney Ranjith Amarasinghe, sought to intervene by his Petition dated 2nd February 2007, which was made in terms of Section 18 of the Civil Procedure Code No. 2 of 1889, as subsequently amended. The said application for intervention was made on the basis that the business called "General Trade Agency" was started by Tennekoon on 17th May 1983 with one Udaya Silva and that the agreement between the partners was later reduced into writing, which was the Partnership Agreement dated 30th June 1988 purportedly signed by Rangoda Liyanarachchige Udaya Silva and Tennakoon in the presence of two witnesses, a copy of which was produced by Tennakoon marked 'A3' with his application for intervention.

The said Partnership Agreement expressly provides in clause 10 thereof that without the consent of all the other partners no rights of the partners may be transferred or alienated or any new partners admitted into the partnership. In paragraph 5(c) of the said application for intervention, it has been pleaded that the partnership between the said Rangoda Liyanarachchige Udaya Silva and Tennakoon came to an end by the death of the former which occurred on or about 5th June 2005, and that as the surviving sole partner, the said Tennakoon is entitled to all the assets and capital of the partnership subject to the rights of the heirs of the said Rangoda Liyanarachchige Udaya Silva. In paragraph 6

of the said application, it has been pleaded that the original plaintiffs, E.V.T. de Silva and Geetha Amarasinghe and the defendant Fernando are seeking to divide the capital and assets of the partnership exclusively amongst themselves, and that by reason of the prejudice that would thereby be caused to Tennakoon, he is a necessary party to this action, and should be added as an intervenient party.

The learned District Judge who inquired into the application for intervention after the other parties filed their respective objections thereto, has by his order dated 25th May 2007, concluded that Tennakoon is a necessary and material party and should be added. By its order dated 3rd December 2007, the High Court of Civil Appeal of the Western Province affirmed the said order of the learned District Judge and refused leave to appeal. This court has on the 22nd of February 2008 granted special leave to appeal against the order of the High Court of Civil Appeal on the following substantial questions of law:-

(a) Has the High Court of Civil Appeal (Colombo) erred in not considering the delay of almost 18 years and the fact that different partnerships came into being during the period of 18 years?

(b) Whether the High Court of Civil Appeal (Colombo) erred in dismissing the application for leave to appeal of the Defendant-Petitioner (Fernando)?

(c) Whether the High Court of Civil Appeal (Colombo) erred in holding that the Intervenient Petitioner (Tennakoon) is a necessary party to enable the court of effectually and completely adjudicate upon and settle all the questions involved in the said action?

(d) Whether the High Court of Civil Appeal (Colombo) has erred by not considering the fact that the Intervenient

Petitioner (Tennakoon) is in any event not entitled to any relief as he is guilty of laches and/or inordinate delay?

(e) Whether the High Court of Civil Appeal (Colombo) has erred in not holding that the any alleged claim of the Intervenient Petitioner (Tennakoon) is prescribed in law and as such the Intervenient Petitioner (Tennakoon) is not entitled to intervene?

The primary question for determination by this Court is whether Tennakoon has slept over his rights, and if so, whether his delay and/ or laches would disentitle him to intervene into the action in the District Court. In order to deal with the questions arising on this appeal, it is necessary to go into the facts in some depth. However, since the trial has not commenced and at the Interim Injunction Inquiry no oral evidence was led, the facts can be only be gathered from the affidavits of the parties filed in the original court and in the course of the appellate proceedings.

It may be noted at the outset that the Plaint dated 31st May 2006 filed in the original court did not disclose the existence of any partnership agreement "in writing and signed by the party making the same" which is necessary for "establishing a partnership where the capital exceeds one thousand rupees" as provided in Section 18 (c) of the Prevention of Frauds Ordinance No. 7 of 1840 as subsequently amended, and in fact, the original court has refused the grant of interim-injunction by its order dated 30th June 2006, mainly on the ground that despite the initial capital exceeding one thousand rupees, no written partnership agreement has been produced in evidence. The Application for leave to appeal against the said order dated 30th June 2006 filed in the Court of Appeal bearing No. CALA 274/06 is pending in that Court, and appears to have been kept in abeyance until the present appeal is disposed of by the Supreme Court.