THE

Sri Lanka Law Reports

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

[2010] 1 SRI L.R. - PART 12

PAGES 309 - 336

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company (Printers) Ltd.

Price: Rs. 25.00

DIGEST

GUNAWARDENA V. DERANIYAGALA AND OTHERS

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, J.,
MARSOOF, J. AND
P.A. RATNAYAKE, J.
S.C. APPEAL NO. 44/2006
S.C. (SPL) L.A. NO. 252/2005
C.A. APPEAL NO. 455/99(F)
D.C. NEGOMBO NO. 3576/L
MARCH 23RD, 2009

Issue raised for the first time in appeal - Can it be entertained? Pure question of Law - Mixed question of fact and Law?

The Court of Appeal held that a new matter had been raised for the first time in appeal and such mixed question of fact and law cannot be raised for the first time in appeal. The Appellant preferred an application for Special Leave to Appeal, which was granted by the Supreme Court.

Held:

(1) It is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed.

The Appellate Court may consider a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material that is required to decide the question.

Accordingly the Court of Appeal had correctly refrained from considering an issue that was raised for the first time in appeal, which was at most a question of mixed law and fact.

Cases referred to:

1. *Talagala v. Gangodawila Co-operative Stores Society Ltd.* – (1947) 48 N.L.R. 472
2. *Setha v. Weerakoon* – (1948) 49 N.L.R. 225
3. *The Tasmania* – (1980) 15 A.C. 223

4. *Appuhamy v. Nona* – (1912) 15 N.L.R. 311
5. *Manian v. Sanmugam* – (1920) 22 N.L.R. 249
6. *Arulampikai v. Thambu* – (1944) 45 N.L.R. 457

APPEAL from the Judgment of the Court of Appeal.

Gamini Marapana, P.C., with *Keerthi Sri Gunawaradena* and *Navin Marapana* for Defendant-Appellant-Appellant

D.S. Wijesinghe, P.C., with *Kaushalya Molligoda* for Plaintiffs-Respondents-Respondents.

Cur.adv.vult.

June 03rd 2010

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 13.10.2005. By that judgment the Court of Appeal had affirmed the judgment of the District Court of Negombo dated 30.03.1999, which had decided in favour of the plaintiffs-respondents-respondents (hereinafter referred to as the respondents) and had dismissed the appeal instituted by defendant-appellant-appellant (hereinafter referred to as the appellant).

The appellant preferred an application for Special Leave to Appeal, which was granted by this Court.

When this matter was taken up for hearing, learned President's Counsel for the appellant submitted that the main issue in this appeal was founded on the question as to whether on the basis of the documentary evidence placed before the District Court by the respondents, it is clear that the land, which was the subject matter of the action, had vested in the Land Reform Commission and whether the

Land Reform Commission could have by their letter dated 19.10.1982 (P18) divested itself of its title in favour of the respondents, by stating that the said land had been excluded from the category of 'agricultural land'. Accordingly, learned President's Counsel for the appellant contended that the main point of law on which the Supreme Court had granted special leave to appeal was on the following:

> "Whether the Land Reform Commission could divest itself of title to property vested in it, in the manner it had purported to do by the letter P18."

Learned President's Counsel for the appellant also contended that this question was raised in the same form in the Court of Appeal, but the Court of Appeal had held that it was a new matter that had been raised for the first time in appeal and such mixed question of fact and law cannot be raised for the first time in appeal.

Learned President's Counsel for the respondents strenuously contended that the said question was a new point raised for the first time in the Court of Appeal, which was not a pure question of law.

The facts of this appeal as submitted by the appellant, *albeit brief,* are as follows:

The respondents had instituted action in October 1987, in the District Court of Negombo, claiming *inter alia* a Declaration of title to the land morefully described in Schedule 2 to the Plaint. The respondents' position was that at one point of time, Justin Ferdinand Peiris Deraniyagala owned the said land and that upon his death in 1967, his Estate was vested in his brother and sister, namely the 1st and 2nd respondents and one P.E.P. Deraniyagala. The

respondents had also stated that the interests of the said P.E.P. Deraniyagala had devolved on the 3rd respondent. They had produced the Inventory filed in Justin Deraniyagala's Testamentary case bearing D.C. Gampaha No. 948/T at the trial marked P_4. The said Inventory had revealed that the said Justin Deraniyagala had possessed agricultural land well in excess of 500 Acres (P_4). The respondents' position had been that they had made a request to the Land Reform Commission to have this land released to them as it was not agricultural land. In June 1978 the respondents by their letter dated 22.06.1978 (P_{28}) had requested the Land Reform Commission to exempt the land in question from the operation of Land Reform Law on the basis that it was a marshy land. The Land Reform Commission had, by its letter dated 15.10.1979 (P_{29}) refused the request of the respondents. The respondents, by their letter dated November 1979 (P_{24}) appealed against the said decision and the Land Reform Commission had decided to exclude the land from the definition of 'agricultural land'.

The District Court had held in favour of the respondents and the Court of Appeal had affirmed the said order of the learned District Judge.

Learned President's Counsel for the respondents contended that the respondents, being the plaintiffs in the District Court of Negombo case, had instituted action against the appellant seeking inter alia a declaration of title to the land described in Schedule II to the Plaint and for ejectment of the defendant, who is the appellant in this appeal from the said land. The respondents had traced their title to the land described in Schedule II to the Plaint, known as Muthurajawela, from 1938 onwards through a series of deeds. The respondents had also made a claim for title based on prescriptive possession. The appellant had filed answer and had taken

up *inter alia* the position that he had prescriptive title to the land and that he had the right to execute his deed of declaration. The appellant had taken up the position that his father had obtained a lease of the land in question from Justin Deraniyagala, who was the respondents' predecessor in title, which lease expired on 01.07.1967. The appellant had further claimed that his father and the appellant had overstayed after the expiry of the lease adversely to the title of the respondents and he had further stated that he had rented out part of the land to the added respondents.

Learned President's Counsel for the respondents referred to the issues framed both by the appellant and the respondents before the District Court and stated that on a consideration of the totality of the evidence of the case and having rejected the evidence of the appellant as 'untruthful evidence'; the learned District Judge had proceeded to answer all the issues framed at the trial in favour of the respondents.

It was the contention of the learned President's Counsel for the respondents that although the appellant had preferred an appeal to the Court of Appeal, the appellant had not urged any of the grounds stated in the Petition of Appeal, but instead informed Court that he will confine his submissions to the question with regard to the maintainability of the action on the ground that title to the land in suit remains vested in the Land Reform Commission and that the respondents are not entitled to succeed in that action.

The contention of the learned President's Counsel for the respondents was that, the submission of the learned President's Counsel for the appellant on the basis of the question, which was referred to at the outset, was not taken up in the District Court as there was no issues to that effect

nor was it referred to in the Petition of Appeal to the Court of Appeal. Therefore the learned Counsel for the respondents had objected to that matter being taken up in the Court of Appeal, as it was not a pure question of law, which could have been raised for the first time in appeal.

Learned President's Counsel for the appellant strenuously contended that the main point on which the Supreme Court had granted special leave to appeal was based on as to whether the Land Reform Commission could divest itself of title to property vested in it in the manner it had purported to by the letter marked as P8 and the said matter was taken up in the same form in the Court of Appeal. Learned President's Counsel for the appellant contended that although the Court of Appeal had held that the said question was a new matter, which was raised for the first time in appeal and that mixed questions of fact and law cannot be so raised for the first time in appeal, that not only the appellant, but also the respondents had taken up the issue in question in the District Court.

Accordingly it is evident that the main issue in question is to consider whether the question of vesting of the land with the Land Reform Commission was urged before the District Court, and it would be necessary to consider the said question in the light of the decision of the Court of Appeal.

Learned President's Counsel for the appellant referred to the documents marked as P18, P24, P28, P29 and P36 and stated that the main issue in this appeal, which is raised on the basis as to whether the Land Reform Commission could divest itself of title to property vested in it in terms of letter P18 was taken up before the District Court, although learned District Judge had misunderstood the question.

The trial had commenced in June 1989 and in the absence of any admissions, issues 1-6 were raised on behalf of the respondents and issues 7-9 were raised on behalf of the appellant. The said issues were as follows:

1. Does the ownership of the land described in Schedule II to the amended Plaint vest with the plaintiffs [respondents in this appeal] as stated in the amended Plaint?

2. Has the defendant [appellant in this appeal] claimed title to the said land by making a false and illegal declaration by deed No. 897 as stated in paragraph 9 of the amended plaint?

3. Has the defendant [appellant in this appeal] interrupted the possession of the plaintiffs [respondents in this appeal] on or about November 1985, as stated in paragraph 10 of the Plaint?

4. Has the defendant [appellant in this appeal] caused damage/losses to the said land as stated in paragraph 4 of the Plaint?

5. If the issues 1, 2 and/or 3 and/or 4 above are answered in favour of the plaintiffs [respondents in this appeal] are the plaintiffs [respondents in this appeal] entitled to the relief claimed in the prayer to the Plaint?

6. If so, what are the damages that the plaintiffs [respondents in this appeal] are entitled to?

7. Has the defendant [appellant in this appeal] acquired a prescriptive title to the land described in Schedule II to the amended Plaint?

8. If issue No. 7 is answered in the affirmative, should the action of the plaintiffs [respondents in this appeal] be rejected?

9. If the issues of the plaintiffs [respondents in this appeal] are decided in favour of the plaintiffs [respondents in this appeal] is he [the defendant] [appellant in this appeal] entitled to the sum claimed by him in respect of improvements – what is that amount?

As stated earlier, learned District Judge has answered all these issues in favour of the respondents.

A careful examination of the issues clearly reveals that the issue as to whether the land in question, being vested in the Land Reform Commission, had not been raised before the District Court. It is also to be noted that when the matter was before the District Court, the appellant had failed to plead that the property in question was vested in the Land Reform Commission. Instead, the appellant had denied the title of the respondents and had pleaded title upon prescriptive possession.

This position could be clearly seen, when one examines the proceedings before the District Court.

The appellant took up the position in the District Court that although the respondents had declared both agricultural and non-agricultural land to the Land Reform Commission, they had not made a declaration regarding the land in question as the said land did not belong to them. The respondents at that time had taken the position that, they had not taken steps to declare the land in question to the Land Reform Commission, as it was not agricultural land within the

meaning of Land Reform Law. Considering the title of the respondents, learned District Judge had clearly stated that,

> "Another attack on title of the plaintiffs was launched on the basis that the 1st plaintiff had not declared this land as another land belonging to them under the Land Reform Law of 1972. To substantiate this, the defendant produced D1 of 1st November 1972 and D2 of same date and D8 to D11 of 19th September 1973. These documents show that the plaintiffs have not declared this land as part and parcel of their property under the Land Reform Law.
>
> But the 1st plaintiff by letters addressed to the Chairman of the Land Reform Commission in November 1976 (P24) and letter of 22nd June 1978 (P28) informed the Commission.
>
> P28 discloses all the circumstances why this land has not been declared and why it should be regarded as a non-agricultural land. They also submitted the plan and report made by A.F. Sameer dated 03.11.1977, 03.04.1979, respectively.
>
> In response to these the Commission has taken various steps as evidenced by their documents P36 dated November 1981, P37 dated 6th November 1981 and P39 dated 17th August 1981, respectively.
>
> By P29 dated15.10.1979 the Commission originally rejected the plea of the plaintiffs.
>
> Thereafter the Commission has decided that this land is a non-agricultural land by their documents P18 dated 19.11.1982 and P38 dated 27th November 1981."

After considering all the aforementioned documents for the purpose of ascertaining as to the ownership of the land in question, learned District Judge clearly had stated that,

> "It is abundantly clear from these documents listed above that the plaintiffs and their predecessors-in-title were the owners of this land for a long period of time."

Except for the aforementioned paragraphs, the District Court had not considered as to whether the land in question was vested in the Land Reform Commission by operation of the provisions of the Land Reform Law. Learned President's Counsel for the respondents, correctly submitted that, for the Court to determine whether any land had been vested in the Land Reform Commission by operation of the provisions of the Land Reform Law, the Court has to decide two preliminary issues in terms of section 3(2) of the Reform Law, No. 1 of 1972, viz.,

1. Whether the land was agricultural land under the provisions of Land Reform Law of 1972;

2. If so, whether the land in question had vested in the Land Reform Commission by operation of law.

It is to be borne in mind that the respondents had instituted action in the District Court against the appellant and had prayed for a declaration of title and for ejectment of the appellant and in his answer dated 02.09.1986 the appellant took up the position that he had prescriptive title to the land and that he had the right to execute his deed of declaration. The documents referred to by learned President's Counsel for the appeal (P18, P24, P28, P29 and P36) all were documents filed by the respondents in the District Court. Out

of them the appellant had made specific reference to P18 to show the decision taken by the Land Reform Commission.

All the aforementioned letters referred to by the appellant, deal with correspondence regarding the exemption of the land in question from the operation of the land Reform Law on the basis that the said land being a non-agricultural land.

The document marked P18 is dated 19.01.1982, which was addressed to the 1st respondent and reads as follows:

"**ඉඩම් ප්‍රතිසංස්කරණ පනත**

ඉහත සඳහන් පනතේ 18 වන වගන්තිය යටතේ ඔබ විසින් ඉදිරිපත් කරන ලද ප්‍රකාශනය හා බැඳේ.

ඔබගේ ප්‍රකාශනයේ විස්තර කර ඇති ඉඩම් අතුරෙන් පහත උප ලේඛනයේ දී ඇති ඉඩම/ඉඩම් කෘෂිකාර්මික ඉඩම් සනයෙන් බැහැර කර ඇති බව කොමිෂන් සභාවේ අණ පරිදි දක්වනු කැමැත්තෙමි.

උප ලේඛණය

ඉඩමේ නම	**පිහිටීම**	**ප්‍රමාණය**
මුතුරාජවෙල ඒ. එෆ්. සමීර් ගේ පිඹුරු අංක 1886 හි ලොට් ඩී සහ ඩී (කොටසක්)	මීගමුව	අ. 16 රූ. 02. පර්. 23

මෙයට,
විශ්වාසී,
ප්‍ර. අධ්‍යක්ෂ,
සභාපති වෙනුවට,
ඉඩම් ප්‍රතිසංස්කරණ
කොමිෂන් සභාව."

It is to be noted that this letter was sent to the original 1st respondent. It refers to a declaration made by the 1st respondent, but the Administrative Assistant of the Land Reform Commission, who gave evidence on the declarations made by the 1st respondent had stated in the cross-examination that the 1st respondent had not made a declaration in respect of the land in question either as an agricultural land or as a non-agricultural land. Accordingly, it is evident that the document marked P18 is contradictory to the direct evidence given by the officer of the Land Reform Commission. It is also to be borne in mind that there had been no evidence that the land in question was agricultural land in terms of the provisions of the Land Reform Law, No. 1 of 1972. The obvious reason for the said lack of evidence as to the status of the land was due to the fact that there was no issue raised by the parties as part of the case in the District Court.

A careful perusal of the proceedings before the District Court and the judgment of the District Court of Negombo, clearly reveal that the question as to whether the land in issue was agricultural or not in 1972 was not raised as an issue before the District Court and therefore the said issue had not been considered by the District Court.

In such circumstances it is clearly evident that the question whether the land in issue was vested in the Land Reform Commission and/or whether the land in question was agricultural or not in 1972, was taken up for the first time by the appellant in the Court of Appeal.

In *Talagla v. Gangodawila Co-operative Stores Society Ltd.*(1), the question of considering a new ground for the first time in appeal was considered and Dias J., had clearly stated that as a general rule it is not open to a party to put forward

for the first time in appeal a new ground unless it might have been put forward in the trial Court under of the issues framed and the Court of Appeal has before it all the requisite material for deciding the question.

The same question as to whether a new point could be raised in appeal was again considered by Howard C. J., and Dias, J. in *Setha v. Weerakoon*[2], where it was held that,

> "a new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more."

There are similarities in the facts in *Setha v Weerakoon (supra)* and the present appeal. In *Setha (supra)* learned Counsel for the appellant had sought to raise a new point, which was neither covered by the issues framed at the trial, nor raised or argued at the trial. Learned Counsel for the respondent had objected either to this new contention being raised or argued at that stage.

Examining the question at issue, Dias, J., referred to a decision of the House of Lords and a series of decisions of the Supreme Court.

In **Tasmania**[3] considering the question of raising a new point in appeal, Lord Herschell had stated that,

> "It appears to me that under these circumstances, a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first

> time, if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box."

The decision in *The Tasmania (supra)* was followed in *Appuhamy v. Nona* (4), in deciding whether it could be allowed to raise a point in appeal for the first time. Examining the said question, Pereira, J., clearly held that,

> "Under our procedure all the contentious matter between the parties to a civil suit is, so as to say, focused in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by one party or the other and I do not think that under our procedure it is open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under someone or other of the issues framed and when such a ground that is to say, a ground that might have been put forward in the Court below, is put forward in appeal for the first time, the cautions indicated in the **Tasmania** may well be observed."

The question of raising a matter for the first time in appeal came up for consideration again in *Manian v. Sanmugam*(5). In that case, for the first time in appeal, learned Counsel for the appellant, in scrutinizing the record had found that the evidence was formally insufficient to justify the finding of the lower Court on that particular item. In that matter, at the hearing, the

plaintiff swore that he gave defendant some jewellery. Defendant's Counsel stated that he could not cross-examine on this point, but that he would call the defendant to deny it and leave it to the Court to decide on the credibility of the parties. The defendant, however, was not called as a witness. The Judge decided for the plaintiff on that matter. On appeal Counsel urged that the evidence was formally insufficient to justify the finding, as the plaintiff did not say in express terms that he supplied the jewellery.

Considering the matter in question, Bertrem, C.J., had held that as the point was not taken in the lower Court, that point could not be taken in appeal. It was further held that,

> "The point is, in effect, a point of law. . . The case seems to me to come within the principles enunciated in the case of **The Tasmania** *(supra)*."

The same question as to a point raised for the first time in appeal came up for consideration in *Arulampikai v. Thambu*[6], where Soertsz. J., had held that the Supreme Court may decide a case upon a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material upon which the question could be decided.

On an examination of all these decisions, it is abundantly clear that according to our procedure, it is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. The appellate Courts may consider a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and

where the Court has before it all the material that is required to decide the question.

The contention of the learned President's Counsel for the appellant was that the Court of appeal should have considered the question as to whether the Land Reform Commission could divest itself of title to property vested in it in terms of P18. As has been described in detail earlier, except for the declaration made by the 1st respondent, there is no evidence as to whether the land in question had been declared in a section 18 declaration by the 2nd and 3rd respondents. Further as stated by the officer from the Land Reform Commission, the 1st respondent had not made a declaration in respect of the said land either as an agricultural land or as a non-agricultural land. The document marked P18 refers to a declaration made by the 1st respondent, which is contradictory to the direct evidence led through the officer of the Land Reform Commission. The Committee of Experts, which had been appointed to inspect the land and to report to the Land Reform Commission, had informed that the said land was a non-agricultural land. The Land Reform Commission had taken into consideration the fact that the said land was a non-agricultural land in 1982 and on that basis had written P18 stating that it could not have been an agricultural land even in 1972. However, it is to be borne in mind that no evidence had been led to ascertain whether the land was in fact an agricultural land in terms of the provisions of the Land Reform Law in 1972.

Accordingly, it is not disputed that there has been no evidence to establish as to whether the land was agricultural or not in 1972 and whether it was vested or not in the Land Reform Commission in 1972.

Learned District Judge had not come to any of such findings since there were no issues framed by the appellant and/or reported in the District Court regarding the said aspects. An issue should have been raised on the basis as to whether the land in question was agricultural land in 1972, before the District Court for both parties to adduce evidence and for the learned District Judge to arrive at a finding in the District Court.

Considering all these circumstances of the appeal it is abundantly clear that the question of vesting of the land with the Land Reform Commission was not urged before the District Court and therefore the Court of Appeal did not have before it all the material that is required to decide the question. Accordingly the Court of Appeal had correctly refrained from considering an issue that was raised for the first time in appeal, which was at most a question of mixed law and fact.

For the reasons aforesaid, the judgment of the Court of Appeal dated 13.10.2005 is affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

MARSOOF, J. – I agree.

RATNAYAKE, J. – I agree.

Appeal dismissed.

FERNANDO, THE CONSERVATOR OF FORESTS AND TWO OTHERS V. TIMBERLAKE INTERNATIONAL PVT. LTD. AND ANOTHER

SUPREME COURT
AMARATUNGA, J.,
MARSOOF, P.C. J., AND
RATNAYAKE, P. C. J.
S.C. APPEAL NO. 6/2008
S.C. (SPL) L.A. NO. 4/2008
C.A. APPLICATION NO. 866/2007
JANUARY 27TH, 2009

National Environmental Act, No. 47 of 1980 – Management Policy for forests – Section 21 (1) – Rational exploitation of forest resources – Forest Ordinance – Section 8 (3) – Authorizes the Forest Department to impose a levy to remove trees from their stumps in any forest reserve – Sections 12, 20 and 52 – Forest Rules, No. 1 of 1979 – Applies to forests not included in a reserved or village forests – Forest Regulations, No. 4 of 1979 – Regulation 3 – Power to prescribe fees, royalties and other payments as specified in Section 20 (1) (h) of the Forest Ordinance – Writ jurisdiction – Who has the right to invoke writ jurisdiction – Amenability of a contractual or commercial matter to writ jurisdiction – stumpage fee – Proprietary charge – Interpretation Ordinance – Sections 2 (f) and 17 – Stumpage – Royalty – Locus standi – Uberrima fides – stipulation alteri misrepresentation – Stumpage tax – Principle of rule of approbate and reprobate

The 4th Respondent – Respondent Pussellawa Plantations Ltd., became the lessee of the Janatha Estate Development Board (JEDB) on a 99 year lease of Delta Estate. Pussellawa Plantations Ltd., on the belief that the pinus plantation found in the said estate too belonged to the Company in addition to its tea plantation, submitted a forestry management plan for harvesting the forest produce from the forestry plantation found in the said estate to the Conservator – General of Forests for his approval, After the receipt of the approval from the Conservator of Forests, Pussallawa Plantations Ltd. entered into an Agreement with Timberlake International Pvt. Ltd. and under and by virtue of the said Agreement sold 42,438 pinus trees planted on 25 blocks of land to Timberlake International Pvt. Ltd.

In terms of the Agreement, in addition to the sums paid by Timberlake International Pvt. Ltd., it agreed to pay the 'stumpage fees' to the Conservator – General of Forests through Pussallawa Plantations Ltd. As there had been a default in the payment of stumpage fees, the Conservator – General of Forests directed Pussellawa Plantations Ltd. to stop the felling of trees. It is this order that prompted Pussellawa Plantations Ltd. and Timberlake International Ltd. to invoke the writ jurisdiction of the Provincial High Court.

In the High Court the parties entered into a settlement and withdrew the High Court Writ Application. However later there were further disputes between the parties and this led to the decision to suspend the issue of transport permits to clear the harvested timber.

Thereafter, Timberlake International Pvt. Ltd. invoked the jurisdiction of the Court of Appeal on the basis that the action of the Conservator – General of Forests in imposing and demanding stumpage fees is inconsistent with or exceeding the stipulated royalty was *ultra vires* his powers under the Forest Ordinance and regulations and rules made thereunder. The Court of Appeal granted interim relief in favour of Timberlake International Ltd.

The Conservator – General of Forests filed a leave to appeal application to the Supreme Court against the order of the Court of Appeal. The Supreme Court stayed the operation of the interim relief and granted special leave to appeal against the order of the Court of Appeal on 11 questions, 14 'a' to 'k'. Questions 'a' to 'e' upon which special leave has been granted by the Supreme Court relate to the alleged authority of the Conservator – General of Forests to charge and recover 'stumpage' for the pinus timber sold by Pussellawa Plantations (Pvt) Ltd. to Timberlake International Pvt. Ltd.

Held

(1) Timberlake International Pvt. Ltd. is not a mere busy body who was interfering in things which did not concern it and as its interests are in fact affected by the actions of the Forest Conservator, Timberlake International (Pvt.) Ltd has standing to invoke the jurisdiction of the Court of Appeal.

(2) Our Courts have provided relief through prerogative remedies in statutory contexts where the contractual or commercial character of a particular transaction is overshadowed by some administrative or regulatory malady that needs to be remedied. Therefore the Court of Appeal did not misdirect itself or err in law in seeking to exercise its beneficial writ jurisdiction in the circumstances of this case.

(3) The 'stumpage fee' was envisaged as part of the consideration for the sale of trees. The 'stumpage' is a proprietary charge and not a tax. The relevant clauses of the agreement create a contractual obligation to pay stumpage fees.

(4) Where a recital to a contract is in conflict with one or more of its operative clauses, the operative clause or clauses will override the recital,

(5) The Royalty rates set out in the Forest Rules, No. 1 of 1979 are not applicable to the commercial exploitation of timber.

(6) If stumpage fees are to be prescribed by a mere order made by the Conservator – General of Forests, as contemplated by Section 2 (f) of the Interpretation Ordinance then the requirement of publishing the same in the Gazette would not apply.

(7) Prerogative writs such as writs of *certiorari* and *mandamus* being prerogative remedies, are not issued as of right, and are dependant on the discretion of Court. It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show *uberrima fides* or ultimate good faith, and disclose all material facts to Court to enable the Court to arrive at a correct adjudication.

Per Saleem Marsoof, J., -

> ". . . the fact that Timberlake International (Pvt) Ltd. did not go back to the High Court despite alleging a reneging on the settlement reached before that Court further undermines its *bona fides*. In my considered opinion, the circumstances outlined above alone would be sufficient to disentitle Timberlake International (Pvt.) Ltd. to any discretionary relief. . ."

Cases referred to:

1. *Durayappa v. Fernando* – 69 N.L.R. 265
2. *R. v. Paddington Valuation Officer* – [1966] 1 QB 380
3. *Premadasa v. Wijewardana and others* – (1991) 1 Sri L.R. 333
4. *De Silva v. Margaret Nona* – 40 N.L.R. 251
5. *University Council of Vidyodaya University v. Linus Silva* – 66 N.L.R. 505
6. *Senathiraja v. Brito* – 4 C.L. Rec. 149
7. *Kumarihamy v. Maitripala* – 44 N.L.R. 153

8. *Boniferro Mill Works ULC v. Ontario* – (2009) ONCA 75
9. *Canadian Industrial Gas and Oil Ltd v. Government of Saskatchewan* – (1978) 2 S.C.R. 545
10. *Connaught Ltd v. Canada (Attorney General)* – 620 (2008) S.S.C. 7
11. *Biso Menika v. Cyril de Alwis* – (1982) 1 Sri L.R. 368
12. *Alphonse Appuhamy v. Hettiarachchi* – 77 N.L.R. 131
13. *Finnegan v. Galadari Hotels (Lanka) Ltd.* – (1989) 2 Sri L.R. 272
14. *Verschures Creameries v. Hull & Netherland Steamship Co. Ltd.* – (1921) 2 KB 608
15. *Visuvalingam v. Liyanage* – (1983) 1 Sri L.R. 203
16. *Ranasinghe v. Premadharma* – (1985) 1 Sri L.R. 63

APPEAL from an order of the Court of Appeal

A.Gnanathasan, P.C., Add. SG with *S. Balapatabendi, SSC* and *N. Wigneswaran, SC* for Respondent – Petitioners

Manohara de Silva, P.C., with *Arienda Wijesundara* instructed by *Bandara Thalagune* for Respondents.

Cur.adv.vult.

January 26th 2009

SALEEM MARSOOF, J.

This is an appeal from the order of the Court of Appeal dated 28th November 2007 staying, until the final hearing and determination of CA Application No. 866/2007, the operation of the letter of the 2nd Respondent-Petitioner, the Range Forest Officer, Nawalapitiya, dated 3rd August 2007 (P28) addressed to the Petitioner-Respondent Timberlake International Pvt Ltd., (hereinafter referred to as "Timberlake IPLtd") intimating to the latter that the issue of permits for the transport of pine timber is suspended until further instructions are received from the 3rd Respondent-Petitioner, the Divisional Forest Officer, Kandy. By the said interim order, the Court of Appeal also directed the 1st Respondent- Petitioner,

the Conservator-General of Forests and his subordinates, the said 2nd and 3rd Respondent-Petitioners (hereinafter sometimes collectively referred to as the "Forest Conservators") "to issue transport permits forthwith to enable the petitioner (Timberlake IPLtd) to transport the timber already felled from blocks G, U, V, W and X." The said blocks are depicted in Plan Nos. 7115 and 7116 dated 22nd October 2002 made by P. Gnanapragasam, Licenced Surveyor, and referred to in the Agreement dated 31st August 2004 (P9) entered into between Timberlake IPLtd and the 4th Respondent-Respondent Pussellawa Plantation Ltd., (hereinafter referred to as "Pussellawa PLtd").

When the application for special leave to appeal against the said order of the Court of Appeal was supported before this Court on 21st January 2008, it granted special leave to appeal on the substantive questions of law set out in paragraph 14(a) to (k) of the Petition dated 5th January 2008, and was also pleased to grant interim relief as prayed for in prayers (e), (f) and (g) of the said Petition, which *inter alia* had the effect of staying the operation of the impugned order of the Court of Appeal dated 28th November 2007 until the final determination of this appeal. The substantive questions on which special leave to appeal was granted, are as follows:

(a) Did the Court of appeal misdirect itself and err in law in its interpretation of the scope and objective of the Gazette Notification No. 1303/17 dated 28.08.2003 marked P1?

(b) Did the Court of Appeal misdirect itself and err in law in holding that the 1st Respondent-Petitioner was bound by the Gazette Notification marked P1 in so far as is relevant to the matters set out in the application?

(c) Did the Court of Appeal misdirect itself and err in law in holding that the 1st Respondent-Petitioner was bound to charge stumpage fees in accordance with P1?

(d) Did the Court of Appeal misdirect itself and err in law by failing to consider the fact that the Pine plantations in question were planted and maintained by the Department of Forest Conservation (hereinafter referred to as the "Forest Department") from public funds since the 1980s?

(e) Did the Court of Appeal misdirect itself and err in law in failing to consider that if the 1st Respondent-Petitioner had no authority to charge the stumpage fees then the entire transaction is null and void and cannot be sanctioned by Court?

(f) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner-Respondent cannot approbate and reprobate the charging of stumpage fees as agreed upon?

(g) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner-Respondent was entitled to seek relief before Their Lordships of the Court of Appeal, having agreed to a settlement in the High Court?

(h) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner-Respondent should first seek to set aside the settlement arrived at in the High Court?

(i) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the transaction was amenable to writ jurisdiction?

(j) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner could have maintained the application, as only the 4th Respondent-Respondent (Pussellawa PLtd) had standing in this matter, if any?

(k) Did the Court of Appeal misdirect itself and err in law in failing to consider the serious lack of *uberrima fides* on the part of the Petitioner-Respondent?

Factual Matrix

Before examining the above questions in detail, it is necessary to outline in brief the facts from which the said questions may be considered to arise. In terms of the Indenture of Lease bearing No. 61 dated 5th November 1993 (P2) and attested by Oshadi Jeewa Kottage, Notary Public, the 4th Respondent-Respondent-Pussellawa Plantations Ltd., (Pussellawa PLtd) became the lessee of the Janatha Estate Development Board (JEDB) on a 99 year lease of the Delta Estate, situated in Pupuressa, within the Gampola Division in the Kandy District in the Central Province of Sri Lanka. In 2003, Pussellawa PLtd, which apparently believed that the said estate consisted of a *pinus carribaea* forestry plantation in addition to its tea plantation, submitted a detailed forestry management plan for harvesting the forest produce from the said forestry plantation through the Ministry of Plantation Industries to the Conservator-General of Forests. The Conservator-General of Forests, by his letter dated 3rd September 2003 (P4), indicated that he had no objection to the implementation of the said plan subject to certain guidelines, which included a condition that Pussellawa PLtd should obtain clearance under Section 21 of the National Environmental Act No. 47 of 1980, as subsequently amended, for such activities of the plan that may require environmental clearance, and that all clear felled areas, except coppice areas, should be replanted during the same year or the year following. Thereafter, by his letter dated 18th February 2004 (P5), the Managing Director of Pussellawa PLtd applied to the Conservator-General of Forests through the Director of

the Plantation Management Monitoring Division (PMMD) of the Ministry of Plantation Industries for his approval for harvesting the *pinus* forestry plantation at Delta Estate, and the said letter was forwarded to the Conservator-General of Forests by the Director of PMMD with his letter dated 19th March 2004 (P6). The said letter reveals that the Director of PMMD too believed that "the extent of 74.15 hectares belongs to Delta Estate" and that Pussellawa PLtd is "paying lease rental covering this extent".

By his letter of 20th May 2004 (P7), the Conservator General of Forests informed Pussellawa PLtd that for the granting of permission for the harvesting of the pine plantation in question, the valuation of the plantation is essential, and this would require a "comprehensive enumeration" of the plantation to be carried out, but the process can be expedited through a "sample enumeration of the plantation". After the Director of Natural Resources of the Ministry of Environment and Natural Resources signified his approval for the harvesting of the *pinus* forestry plantation, and environmental clearance obtained, on 31st August 2004, Pussellawa PLtd entered into an Agreement with Timberlake IPLtd (P9) *inter alia* to facilitate the harvesting of the said pine plantation in an expeditious manner. Under and by virtue of the said Agreement (P9), Pussellawa PLtd sold to the purchaser Timberlake IPLtd approximately 42,438 *pinus* trees planted on the 25 blocks of land depicted in Plan Nos. 7115 and 7116 dated 22nd October 2002 and made by P. Gnanapragasam, Licenced Surveyor, for a sum of Rs. 850 per tree "exclusive of dead, rotten, damaged trees or trees with a girth of less than 0.45 meters below the bark".

It is noteworthy in this context that the Agreement (P9) provided that the consideration for the 42,438 *pinus* trees sold thereby shall be paid by Timberlake IPLtd to Pussellawa PLtd in the manner set out in Clause 7 of the Agreement.

Clause 7 provided that in addition to the sum of Rs. 1 million already paid by Timberlake IPLtd and acknowledged in sub-paragraph (a) of the said clause, the latter shall pay Pussellawa PLtd a sum of Rs. 9 million at the time of execution of the Agreement, (clause 7 (b) of P9), a further sum of Rs. 10 million within 60 days of the execution of the said Agreement (clause 7 (c) of P9) and the balance consideration after the harvesting and removal of the trees as provided in detail in clause 7(e). These provisions did not give rise to any dispute, but what is in controversy in this case is the meaning of clause 7(d) of the Agreement P9, in which Timberlake IPLtd, as the "purchaser" of the trees from the vendor, Pussellawa PLtd, agreed to "pay the *stumpage fees* as stipulated by the Conservator-General of Forests for each block, *prior to the harvesting of each block*." It is significant to note that under the above quoted clause, "stumpage" was payable by Timberlake IPLtd to the Conservator-General of Forests *through* Pussellawa PLtd. It is also significant to note that on the very same date the said Agreement P9 was entered into, namely 30th August 2004, the General Manager, Forestry of Pussellawa PLtd wrote the letter marked P10 to the Conservator General of Forests, in which he stated as follows:-

> "We particularly refer to the copy of the letter dated the 21st July 2004 from the Director, Natural Resources of the Ministry of Environment and Natural Resources, sent to you under cover of our letter of the 4th August 2004, wherein we received approval for harvesting and removal of the Pinus plantation of 74.15 hectares at Delta estate. We thank you for your concurrent approval.
>
> We are now pleased to inform you that we have in consequence, sold the said trees to the firm. Timberlake

International Pvt Ltd of 351, Pannipitiya Road, Thalawatugoda, and the harvesting and removal of the said trees would be carried out by them in accordance with the attached harvesting schedule, as required by the Director Natural Resources.

We confirm that Timberlake International Pvt. Ltd, will, on our behalf, make to you the stumpage payment for each block, on your enumeration and will harvest each block only after such payment and your approval.

We also advise that we have authorized Timberlake International Pvt Ltd to act on our behalf directly with your Department in relation to any matters pertaining to the harvesting, removal and transportation of the said trees from Delta estate" *(italics added).*

It is clear from the above that Timberlake IPLtd,. having purchased approximately 42,438 *pinus* trees planted on the 25 blocks of land depicted in Plan Nos. 7115 and 7116 dated 22nd October 2002, stepped into the shoes, so to speak, of Pussellawa PLtd as far as the *obligation to pay stumpage* to the Conservator-General of Forests was concerned. It is also apparent from the correspondence including the letter dated 29th July 2004 (P11 X1) addressed to Pussellawa PLtd by the Conservator-General of Forests that he himself was under the impression that the *pinus* plantation belonged to Pussellawa PLtd and that the pine trees were planted by the Forest Department. On this basis, for the 1,146 *pinus* trees that stood *Block 01A* with total volume of 528.158 cubic meters as enumerated by him, he ordered that a sum of Rs. 753,755.62 be paid as stumpage. I quote below the last paragraph of the said letter which is most revealing.

"Please make arrangements to pay this amount. However I request you to provide documentation to prove that this area has been released to you by LRC. Furthermore, as this activity amounts to clear felling of forest plantations in more than I hectare, Please obtain the environmental clearance as per the National Environmental Act before undertaking felling."

There is no material to show whether Pussellawa PLtd did produce any documentary evidence as to whether Block 01A of the forest plantation was released to Pussellawa PLtd, but that was not a stumbling block to the harvesting having proceeded with as contemplated by the said Agreement (P9). By the letters dated 7th November 2004, 22nd December 2004, 14th February 2005, 5th May 2005, 27th July 2005 and 13th October 2005 marked respectively as P11 X2 to X7, all addressed to Pussellawa PLtd., the Conservator-General of Forests determined the aggregate stumpage fees payable with respect to the pine trees to be removed from *blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P* of the pine plantation as set out in the following table embedded into paragraph 17 of the Petition filed in the Court of Appeal by Timberlake IPLtd:

Table I

Block No.	Volume in cubic meters (m^3)	Total Stumpage	Stumpage Rate
01A	528.158	Rs. 753,755.62	Rs. 1,427.4
01B	673.79	Rs. 690,253.40	Rs. 1,024.43
01C	1082.381	Rs. 1,009,535.62	Rs. 932.70
17Q	1453.959	Rs. 1,618,450.10	Rs. 1,113.13
04D	1064.465	Rs. 1,200,147.06	Rs. 1,296.58
06F	1659.599	Rs. 1,760,520.50	Rs. 1,060.81
16P	1444.982	Rs. 1,671,524.45	Rs. 1,330.30
All 7 blocks	7907.334	Rs. 8,704,186.75	Rs. 1,169.30