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In India there is an identical provision to Section 96(c) of the Act, in the Indian Representation of the Peoples' Act of 1951. Hence, it would be relevant to consider Indian Authorities in dealing with this objection.

The Indian Supreme Court has applied a very strict standard when considering the pleadings relating to corrupt practices in respect of the identical provision in the said Indian Representation of the Peoples' Act. In the case of *Dhartipakar Madanlal Agarwal vs. Shri Rajiv Ghandi*[6] it is stated "Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action. The emphasis of law is to avoid fishing and roving inquiry. It is therefore necessary for the Court to scrutinize the pleadings relating to corrupt practice in a strict manner."

In the case of *Gamini Athukorale vs. Chandrika Bandaranaike Cumaratunge (supra)* the test to be applied to determine whether the required material facts had been correctly pleaded was laid down in the following manner ". . . . . The test required to be answered is whether the Court could have given a direct verdict in favour of the election petition in case the returned candidate has not appeared to oppose the election petition, on the basis of the facts pleaded in the petition." Accordingly, the pleadings should contain sufficient material that could permit the Court to give the decision in favour of the Petitioner if the returned candidate does not appear and oppose.

The Petitioner has averred treating, bribery and false statements as corrupt and illegal practices which grounds fall within Section 91(C) of the Act. The provisions in respect of corrupt practices are laid down from Section 76 to 80 of the said Act.

When it comes to dealing with the corrupt practice of treating and bribery it has to be kept in mind that the 1st Respondent was the Executive President on the material dates referred to in the petition. Accordingly, his official position requires him to have meetings with various groups of people in the performance of his duty. Therefore, it would be necessary for the Petitioner to state material facts which would show that these meetings were at least beyond his performance of official functions.

Sir Hugh Fraser in *The Law of Parliamentary Election and Election Petitions,* 3rd Edition at 108 states thus:-

> "Any act of treating tending to interfere with the free exercise of the franchise was always considered a corrupt and illegal act at common law. But it has never been considered necessarily a corrupt thing for persons interested in particular subjects to invite other persons to a discussion relating to the subject, even though some entertainment may be provided. It would, we think, be to impose restrictions upon the advocacy of many public questions which the Legislature never intended to be imposed, if it were to be held that a temperance meeting or a meeting to advocate the admission of women to the franchise, or a meeting for the disestablishment of the Church in Wales, at which tea or other refreshments were provided, was to be considered as a corrupt act,

simply because the effect of the meeting might be to give force and strength to an agitation in favour of a political measure to carry out the views of the promoters of the meeting."

"When that eating and drinking take the form of enticing people for the purpose of inducing them to change their minds, and to vote for the party to which they do not belong, then it becomes corrupt, and is forbidden by the statute. Until that arrives, the mere fact of eating and drinking, even with the connection which this supper had with politics, is not sufficient to make out treating".

In the above treaties, Fraser has also cited a passage from Willes J. in *Tamworth*[7] as follows:-

"Treating to be corrupt, must be treating under circumstances and in a manner that the person who treated used meat or drink with a corrupt mind, that is, with a view to induce people by the pampering of their appetite to vote or abstain from voting, and in so doing to act otherwise than they would have done without the inducement of meat or drink. It is not the law that eating and drinking are to cease during an election." (emphasis added)

Averments in the petition in respect of the corrupt practice of treating is given in paragraph 14 of the petition. Names of various associations/ groups/ professional bodies have been given and the dates and the venues have also been given. But significantly the names of the persons who participated have not been given. Participants are described as "Artists", "Ayurveda Physicians," "Graduates," "Dharma School teachers" etc. No facts are stated or material given to establish that these meetings went beyond the official functions of the 1st

Respondent who was the Executive President at the relevant time.

Applicable provisions of the Act clearly and expressly state that these acts have to be done with a "corrupt" intention. There was not even an express averment in the petition to this effect.

Averments in respect of the corrupt practice of bribery is given in paragraph 15 of the Petition. Similar deficiencies as stated in respect of the corrupt practice of treating could be seen in these pleadings. It is observed that even in these pleadings there is no express averment of the corrupt intention. Pleadings are also insufficient for the Court to arrive at an inference of a corrupt intention, more so in the context of the fact that the 1st Respondent was performing the function of the Executive President at the relevant time.

Facts relating to the corrupt practice of making false statements are contained in paragraph 16 of the petition. These averments do not give the exact words used in the alleged false statements supposed to have been made by the 1st Respondent or on his behalf by the Respondents referred to. In respect of the "fake document" referred to in paragraph 16 (a) and (b) of the petition at least a copy has not been produced by the Petitioner.

As stated even the Indian Supreme Court has emphasized the necessity of the allegations not being vague. *(Dhartipakar Madanlal Agarwal vs. Shri Rajiv Ghandi (supra)).*

The Learned President's Counsel for the 1st Respondent in his submissions drew the attention of Court to many local and Indian cases to show that false statements made in

respect of the candidates public conduct and character as opposed to his personal conduct and character do not fall into the category of corrupt practice. He took up the position that the statements referred to do not touch on his personal conduct and personal character. In my view, due to the basic deficiencies in the pleadings in respect of the allegation of false statements it is not necessary for this Court to consider or decide on these aspects.

The consequences of non compliance was dealt with in *Kobbekaduwa vs. Jayawardena (supra)* in the following manner:

> "Material facts are those which go to make out the Petitioner's case against the Respondent. The word 'material' means necessary for the purpose of formulating the charge and if any one material fact is omitted statement of claim is bad and liable to be struck out."

In the case of *Udhav Singh vs. Madhav Rao Scindia*[8] the Indian Supreme Court held,

> ". . . . In short all those facts which are essential to cloth the petitioner with a complete cause of action are "material facts" which must be pleaded, and failure to plead even a single material fact amounts to disobedience of the mandate of Section 83(1) (a)".

During the hearing of the case the counsel for the petitioner submitted that the relevant sections of the Act have been expressly quoted and pleaded in the petition and accordingly there is sufficient compliance with the requirements of section 96(c). In this regard, I would like to cite the following quotation from the Indian Supreme Court in the case of *Hari Shanker Jain vs. Sonia Gandhi* [9].

"Material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908. The expression "cause of action" has been compendiously defined to mean every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of the party is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet (See *Samant N Balakrishna etc. vs. George Fernandez and others*[10] *etc.* – (1969) 3 SCR 603, *Jitender Bahadur Singh vs. Krishna Behari* [11](1969) 2 SCC 433.) Merely quoting the words of the section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. In *V.S. Achuthanandam vs. P.J. Francis and another*[12] (1999 3 SCC 737) this court had held on conspectus of a series of decisions of this court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead material fact is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time limit prescribed for filing the election petition." (Emphasis added)

Thus, quoting the relevant sections is not a substitute for the mandatory requirement contained in section 96(c).

Due to the above facts I hold that the election petition does not comply with the requirements contained in Section 96(c) of the Presidential Elections Act. Learned Counsel for the 24th Respondent submitted that no proper affidavit had been filed by the Petitioner to comply with the mandatory requirements contained in Section 96(d) of the Act.

Section 96 or any other provision of the Act do not prescribe the form of the affidavit.

Paragraph 1 of the affidavit sworn by the Petitioner himself states as follows:- I am affirmant hereto and the petitioner above named. I affirm to this affidavit from facts within my personal knowledge and obtained by me from the supporters of the New Democratic Front and the other political parties who supported me at the election held on 26th January 2010 who were connected with me and/or had personal knowledge of the several acts and incidents on which relief is prayed for by me in the election petition."

Based on the above statement and the contents of the affidavit the Respondents allege that the affidavit is based on "hearsay" and accordingly contains facts which are not within the affirmant's personal knowledge but obtained from elsewhere. The Petitioner could have filed affidavits "from supporters of the New Democratic Front and other political parties" referred to in the 1st paragraph to his affidavit who may have personally witnessed the events referred to in the affidavit.

During the course of the submissions the Counsel for the Petitioner referred to the wording of the section which speaks of "an affidavit" and submitted that he was restricted to filing one affidavit. But the Counsel for the Respondents drew the attention of Court to Section 2 of the Interpretation Ordinance

where it states ". . . . . words in the singular number shall include the plural and vise versa".

Jayasinghe vs. Jayakody & others[10] is a case where the election of a Member of Parliament was challenged under the provisions of the Ceylon Parliamentary Election Order in Counsel 1946 as amended by Act 9 of 1970. Section 80 of the Ceylon Parliamentary Election Order in Council also has a similar provision in respect of an affidavit in the following manner.

> "The Petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice."

In paragraph 2 of the affidavit filed by the Petitioner in *Jayasinghe vs. Jayakody, (supra)* it is stated as follows:-

> "That the averments of facts set out in my petition and the particulars of the commission of corrupt practice set out therein are made from my personal knowledge and observation or from personal inquires conducted by me in order to ascertain the details of the incident referred to in the petition."

Even in *Jayasinghe vs. Jayakody (supra)*, the Petitioner did not say in his affidavit which facts in the petition are based on personal knowledge and which of them are based on information. In that case the Election Judge held that the affidavit can be based on personal knowledge or on information and belief provided that in the latter the deponent must disclose the source of information and the grounds of his belief. The Election Judge rejects the affidavit in the said case due to the above reason in the following manner. "I reject

the affidavit filed by the Petitioner on the ground that the Petitioner has not verified and confirmed the facts stated in the petition. I uphold the objection that there was no proper affidavit supporting the allegation of corrupt practice pleaded in the petition and therefore the Petition was defective." But in the appeal to the Supreme Court Sharvananda CJ. held as follows:-

> "I agree with the Election Judge that where some of the statements in the paragraph of the affidavit accompanying the election petition are based on the knowledge of the deponent and some on information received from others, the affidavit is defective. But I do not agree with the Election Judge that the petition should be dismissed on that ground of defect in the verification. The allegation of corrupt practice cannot be ignored merely on the ground that the source of information, is not disclosed, when the allegation is based on information, as it is not a requirement of law that the source of information or the ground of the deponent' belief should be set out, since the form of the mandatory affidavit has not been prescribed. In my view the Election Judge was in error in upholding this objection regarding the affidavit.
>
> I agree with Samarawickrama, J. that an election petition should not be dismissed on the ground of defective affidavit, where no form has been prescribed by law."

Accordingly Sharvananda C.J. held that the affidavit is defective but did not dismiss the election petition on that ground alone.

In the matter before us, the Petitioner has obtained most of the facts in the affidavit "from the supporters of the New

Democratic Front and other political parties who supported" the Petitioner at the election. The name of the supporters or at least the name of the political parties from whom the information was obtained have not been disclosed. In the circumstances, on the same reasoning of Sharvananda CJ in the case of *Jayasinghe vs. Jayakody (Supra)*, I do not dismiss the election petition on this ground alone but hold that the affidavit filed in this case is defective.

The totality of the circumstances referred to above establish defects in the pleadings of the petitioner. It is the duty of the Court to examine the petition and make a decision to reject it if it is misconceived in law. Failure to file proper pleadings, is fatal to an election petition and no amendments of the pleadings are permissible at this stage. If a proper petition had been filed, this Court may, upon such terms as to costs or otherwise as the Court may deem fit allow the particulars of any corrupt practice specified in the petition to be amended or amplified in terms of Section 97 of the Act. However, if the pleadings, do not disclose proper reliefs worth to be tried by Court, the pleadings are liable to be struck off and the election petition is liable to be dismissed in limine.

For the reasons set out above I uphold the preliminary objections raised by the respondents and dismiss the petition in limine. However, I order no cost.

DR. SHIRANI A. BANDARANAYAKE J. – I agree.

SRIPAVAN J. – I agree.

RATNAYAKE J. – I agree.

IMAM J. – I agree

Petition dismissed.

MASTER DIVERS (PVT.) LTD., VS. ANUSHA KARUNARATNE AND OTHERS

COURT OF APPEAL
RANJIT SILVA. J.
SALAM. J.
CA 162/04
HC COLOMBO 7/2000
(ADMIRALITY)

Admiralty jurisdiction – Death of employee – Crew agreement, contractual and delictual claims – Misjoinder of causes of action – Objection taken for the first time in appeal – Lex acquilia – Dependants – Legal heirs – Difference? – Claim for compensation independent of contractual obligations – Civil Procedure Code Section 18, Section 35 – Merchant Shipping Act No. 52 of 71 – Section 127

Plaintiff-respondent (legal heirs of one K) sued the defendant-appellant (owner of vessel) to recover damages arising from a breach of agreement and in addition compensation on account of negligence of the defendant-appellant. The High Court (admiralty) granted the reliefs prayed for by the plaintiff-respondent.

In appeal it was contended by the defendant-appellant that

(1) The High Court could not have entered judgment for compensation both in delict and under contractual obligation.

(2) That in any event the damages could not have exceeded the amount quantified in the crew agreement.

Held

(1) The crew agreement (X5) binds only the legal heirs of K and not the dependents who should be treated on a different footing as far as the claim under lex acquilia is concerned. Even if the legal heirs are estopped from claiming an amount greater than that is

stipulated under Clause 2 (n) 1 of the crew agreement, yet it cannot adversely affect them as the concept of 'legal heirs' and 'dependants' in law are totally different from each other and governed entirely by diverse considerations.

Per Abdus Salam. J.

"What is required in an acquilian action is to prove 'dependency' or the state of relying on the deceased for matrimonial support unlike in the case of 'legal heirs' who inherit the estate of the deceased as of right under the law, in my opinion the fact that the respondents have succeeded as the 'legal heirs' of the deceased in no way can prevent them from complaining of loss of support".

Held further:

(2) The stand taken up that there is a misjoinder of causes of action or misjoinder of plaintiff is untenable in law as these objections have not been raised before the commencement of the trial or at least before judgment. Such a failure would render the procedural defects – if any – as being waived or relinquished.

(3) The right to sue in delict is not taken away by contract although the contract by limiting the scope of the delictual duty or waiving the right to sue in delict may limit or negate the delictual liability where a wrong prima facie support an action in contract and in tort – the party may sue on either or both except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation of concurrency arises because it is always open to the party to limit or waive the duties which the common law would impose on them for negligence.

Per Abdus Salam, J.

"Careful scrutiny of the relevant clause 2 (n) in X5 reveals that the lump sum promised by the appellant is not arrived at compromising with any delictual claims capable of having been preferred by the dependents, in any event the dependents were not parties or signatories to X5 – nowhere in X5 has it been stated that the amount paid should be treated as final and final settlement of all the claims arising from the death of the employee and that it is a bar to any delictual claims being made by the dependents, in the absence of such an exclusionary clause, it is quite unsafe and

absolutely irrational to shut the dependents out from pursuing a legitimate claim in delict".

(4) A delictual action for compensation includes damage and satisfaction for non patrimonial loss, whereas satisfaction and compensation for non contractual damages cannot be claimed ex contractu.

Per Abdus Salam, J.

"It must be observed that unlike in English Law, the Roman Dutch Law looks at the acquilian action extended to the dependents of the decreed as an independent non derivative remedy, unfettered by defences vitiating the deceased's personal right to sue, including the contributory negligence".

APPEAL from the judgment of the High Court (Admiralty jurisdiction) of Colombo.

Cases referred to:-

(1) *Dingiri Appuamy vs. Talakolawewe Pangananda* 67 NLR 89
(2) *Adlin Fernando vs. Lionel Fernando* – 1995 2 Sri LR 25
(3) *Nandakeerthi vs. Karunawathie* 2004 – 1 Sri LR – 205
(4) *Ndamse vs. University College of Port Hare* – 1966 4 SA 137 (e)
(5) *Union Government – vs. Lee* – 1927 AD 202
(6) *Bradburn vs. Great Western Railway* – 1874 – LR Ex - 21
(7) *Payne vs. Railway Executive* – 1952 1 KB 26
(8) *Nunan vs. Southern Railway* – 1924 – 1 KB 223
(9) *In Re vs. Cruz* – 10 app. SL 59

Nihal Fernando PC with *Ragendra Jayasinghe* for appellant
Chandaka Jayasundera with *S. A. Belling* for respondent.

March 9 2010

ABDUS SALAM, J.

The defendant-appellant, Master Divers (Private) Ltd; sometimes referred to by me in this judgment as the

"appellant", in its capacity as the owner of the vessel "Silk Route Supplier III" was sued by the plaintiff-respondents, whom I propose to refer to as the "respondents" in the High Court of Colombo (exercising admiralty jurisdiction). The suit was aimed at the recovery of damages arising from a breach of agreement produced at the trial marked as X5. In the same suit the respondents preferred an additional claim independent of the first claim for compensation on account of the negligence of the appellant, in delict. Hence, the suit constituted of two causes of action, the former arising on the breach of an agreement and the latter founded on delictual liability stemming from the negligence of the appellant.

Apparently there is no dispute about the facts. When unnecessary details are filtered out, the issue that arises for determination would appear to be quite simple and straight-forward. It arises from a crew agreement (X5) entered into between the appellant and Capt. Chitralal Janaka Karunaratna (Deceased) who is the ex-husband of the 1st Plaintiff-respondent and father of the 2nd and 3rd plaintiff-respondents. The agreement X5 had been subscribed to by the deceased as the Master of Motor Tank "Silk Route Supplier III" and by the appellant as the owner of the vessel.

The agreement X5 had been made under the provisions of the Merchant Shipping Act No. 52 of 1971 to facilitate the payment of compensation to the heirs of Capt. Janaka Karunaratna, in the event of his death during the course of employment. It is common cause that Capt. Janaka Karunaratna came by his death as a result of certain injuries sustained in the course of employment, while "Silk Route Supplier III" was providing bunkering services to another vessel, when a securing rope of his vessel snapped and

struck him on his neck. The tragedy took place on 4 August 1999 and Capt. Karuaratna succumbed to his injuries at the National Hospital of Colombo on 15 August 1999 at the age of 40. At the time of his death he had served the appellant for a short spell of 2 1/2 months. Although his age at the time of his death has no relevance to the assessment of damages under X5, incontestably his untimely demise is relevant to assess the quantum of damages under the law of delict.

The respondent are the legal heirs of Captain Karunaratna and by coincidence they were dependant in life on him. The present suit had been filed in the High Court, praying for judgment against the appellant *interalia* in a sum of US$ 62,400/- in terms of clause 2 (n) (i) X5 and a further sum of US dollars 50,000/- being compensation arising from the negligence of the appellant both claims aggregating to $ 112400/-. At the conclusion of a contested trial, the learned High Court Judge entered the impugned judgment in favour of the respondents as prayed for in the plaint.

Even though the appellant has set out several grounds of appeal to establish the impropriety of the impugned judgment, at the hearing of the appeal, the argument was confined mainly to the issue as to whether the amount of compensation and damages awarded to the respondents were excessive and contrary to law. The learned President's Counsel therefore contended that the High Court could not have possibly entered judgment for compensation both in delict and under contractual obligation. The other argument advanced on behalf of the appellant is that damages in any event could not have exceeded the amount quantified in X5.

Admittedly in terms of the agreement entered into between the appellant and late captain Janaka Karunaratne,

in case of the latter's death occurring in the course of employment, the appellant undertook to pay a sum equivalent to the basic payment for 48 months or US$ 10,000/= or the amount of compensation in terms of the National law of the flag of the vessel whichever is the highest to the legal heirs (Emphasis added). It is of much significance to highlight at this stage that X5 contemplates compensation to be awarded to the legal heirs of Capt. Janaka Karunaratna and certainly not to those who were dependent in life on him.

There is no controversy that the highest of the three amounts specified in relevant clause is US dollars 62,400/- or its Sri Lankan rupee equivalent. Learned President's Counsel has submitted that since the agreement has been entered into in terms of the Merchant Shipping Act, the legal responsibility specified in the agreement is a statutory liability to which the appellant and the late Karunaratna have agreed as being the compensation due to the heirs of the latter in the event of his death. As such, it was contended that the respondents are not entitled in law to ask for a greater sum than what has been agreed upon by X5.

It was also contended by the appellant that Capt. Karunaratne was the best person to know the quantum of compensation which is sufficient for his family in the event of his death. Since, the learned President's Counsel clamorously sought to argue that the respondents are not entitled to pull out themselves from clause 2(n) (i) in X5 and seek a larger amount of compensation than what is stipulated in clause 2(n) (i) of X5. Therefore, as the appellant has indirectly conceded the rights of the respondents to receive the amount due under clause 2 (n) (i) we are now

called upon to ascertain only the propriety and legality of the award made in relation to the alleged delictual liability imputed to the appellant.

When X5 is closely scrutinized, it is crystal clear that clause 2 (n) (i), if at all, binds only the legal heirs of Capt. Karunaratne and indeed not the dependents who should be treated on a different footing, as far as the claim under Lex Aquilia is concerned. Therefore, it would be seen that even if the legal heirs are estopped from claiming an amount greater than that is stipulated under clause 2 (n) (i), yet it cannot adversely affect them as the concept of "legal heirs" and "dependents" in law are totally different from each other and governed entirely by diverse considerations.

Basically, what is required in an aquilian action is to prove "dependency" or "the state of relying on the deceased for material support" unlike in the case of "legal heirs" who inherit the estate of the deceased as of right under the law. In my opinion the fact that the respondents have succeeded as the legal heirs of the deceased in no way can prevent them from complaining of loss of support.

Therefore the stand taken up by the appellant is untenable in law, as the mis-joinder of causes of action or mis-joinder of plaintiff have not been raised before the commencement of the trial or at least before judgment. Such a failure would render the procedural defects in the plaintiff's case (if any), as being waived or relinquished. Moreover, such an objection cannot in any event be taken for the first time in appeal. The learned Counsel of the respondents has pointed out that the appellant has failed to take up the question of mis-joinder of causes of action and mis-joinder of plaintiffs in the petition of appeal as ground to avoid the decree.

In terms of Section 37 of the Civil Procedure Code whenever in a plaint, by reason of the fact that several causes of action have been united and they cannot therefore be conveniently disposed of in one action, the defendant may at any time before the hearing, apply for an order confining the action to such cause/causes of action as may be conveniently disposed of in one action.

In the case of *Dingiri Appuhamy v. Talakolawewe Pangananda Thero*[1] it has been laid down that there is no provision in the Civil Procedure Code or any other law requiring an action to be dismissed for a mis-joinder of causes of action. As such, it is rather improper to quash the decision of the learned High Court judge on the ground of mis-joinder of plaintiffs and/or causes of action without the plaintiffs (plaintiff-respondents in this appeal) being afforded an opportunity to amend the plaint. As it cannot be conveniently achieved or done at this stage of the case, the court has no alternative but to tell that defendants-appellant cannot be heard on that objection at this juncture.

For purpose of completeness, let me refer to the decision in *Adlin Fernando vs. Lionel Fernando*[2], where on the question of joinder of causes of action and parties this court laid down that those provisions of the Civil Procedure Code relating to them are rules of procedure and not substantive law.

Needless it is to stress on the approach our Courts which had always adopted a common sense approach in deciding questions of mis-joinder or non-joinder. Section 18 empowers the courts to strike out the name/names of any party improperly joined as plaintiff or defendant on or before the

hearing, upon application of either party. In terms of Section 36 of the Civil Procedure Code provisions have been made for the conduct of separate trials of any causes of action, if it is impracticable to conveniently try and dispose of them together. This can be achieved on the application of the defendant with notice to the plaintiff or even *ex mero motu.*

The learned counsel of the respondents has pointed out that the appellant has failed to take up the question of mis-joinder of causes of action and mis-joinder of plaintiffs in the petition of appeal as ground to avoid the decree. Apparently, the question of mis-joinder of both categories had not been raised before the commencement of the trial or at least before the pronouncement of the judgment. The appellant has not even raised it in its petition of appeal. This trite principle requires no citation of further authorities. Therefore, in my opinion such repeated failures on the part of the appellant should necessarily end up in being told that the court is obliged in law to deprive the appellant of the opportunity to argue the purported mis-joinder as ground of appeal at this late stage.

The appellant asserted that deceased Karunaratna was the best person to determine the quantum of compensation which is sufficient for his family in the event of his death. On the strength of the submission, the learned president's counsel invited us to hold that the respondents are not entitled to maintain the action for damages arising from the alleged delictual liability. To put it in a different form it was contended that the respondent having chosen to sue in terms of the crew agreement, cannot now seek to take up the position that they are not bound by clause 2 (n) (i) of the written agreement. This argument advanced on behalf of the

appellant appears to me as utterly ludicrous and capable of rendering the basis of delictual liability totally irrational and absolutely meaningless. The effect of the submission of the learned President's Counsel on the disputed question would be dealt in detail at a different place in this judgment.

It must be borne in mind that the crew agreement in question contemplates on the payment of compensation to the legal heirs of the deceased whereas in an action under lex aquilia the heirs who succeed to the estate of the deceased are given no prominence at all but on the contrary, it is the dependents, who are given the pride of place. It is one of the fundamental requirements that under lex acquilia the plaintiff must show dependence on the deceased.

In the case of *Nandakeerthi vs. Karunawathie*[3] it was held that under lex aquilia where the right to sue for compensation depends on the facts of the plaintiff being entitled to seek compensation for the wrong done and not for loss of any inheritance; such a right depends on the fact of the plaintiff being dependent of the deceased, where death deprived her of such dependence, and is not a right acquired by reason of inheritance or deprivation of the right to depend as an heir of the deceased.

As far as P5 is concerned the respondents have preferred the claim for a liquidated sum of money under the law governing contracts. In contrast the additional claim of US$ 50,000/-, rightly preferred by the respondents, is for loss of support arising from the demise of Capt. Janaka Karunaratna. This claim has been preferred in their capacity as the dependents of the diseased and is well recognized under lex aquilia. In the circumstances, the main question that arises for consideration in this appeal is whether the respondents

are entitled to maintain a claim for damages in a sum of US$ 50,000/- being the loss and damage caused to the respondents as a result of the death of Capt Karunaratne on the basis that he came by his death due to the negligence of the appellant. The position of the appellant is that when the respondents elect to claim compensation specified in Clause 2 (n)(i), they are estopped by law from ignoring the provisions of the contract and claiming a wider liability in delict. In this regard the learned President's Counsel has adverted us to the various opinions expressed by several jurists some of which are reproduced below for purpose of ready reference.

1. "If the Defendants liability is limited by a contract, the plaintiff cannot, of course, disregard the contract and evade any limitation of liability under it by framing his action in delict."

The Law of Delict – R. G. Mckerron 6 Edition Page

2. "The same act or omission may be both a breach of contract and a delict; and, in such cases, the person injured, if a party to the contract, may sue either in contract or in delict. But where a defendant is protected against liability for negligence by a contract to which the Plaintiff is a party, it is not open to the Plaintiff to ignore the contract but and allege a wider liability in delict."

"The South African Law of Obligations by R.W. Lee and A.M. Honore" at Page 50 Paragraph 721 under the heading 'Delict and Breach of Contract'

As regards the opinion of R. G. McKerron" 6 Edition page 3 from The Law of Delict, (supra) it needs to be stated

that X5 in no way limits the liability of the appellant either expressly or by necessary implication to the sum stipulated by clause 2(n)(i). On the other hand even if the said clause in X5 is to be construed as an absolute limitation, yet it can only operate against the legal heirs of Capt. Karunaratna and not against the dependants who have had access to court for redress has been made through a different Channel namely by means of lex aquillia. Further when one looks at the Crew Agreement, it would be seen that the cause of action in terms of clause 2(n)(i) is based on the compensation payable to the heirs of the employee who dies in the course of employment and is not based on a finding of fault on the part of the Owner. As has been suggested by the learned counsel for the respondents the compensation under the Crew Agreement would be available to the heirs of the deceased even in an instance where the deceased had died in consequence of perils at sea or of an accident between two vessels, which accident could not have been prevented by the Appellant. The only exclusion as set out in the clause itself is that death should not have been caused due to the officer's own willful act, default or misbehavior, and X5 does not preclude the possibility of suing in delict for a given wrong. It also does not expressly absolve the appellant from any delictual liabilities. As far as the court can see it, the right to sue in delict is not taken away by contract, although the contract by limiting the scope of the delictual duty or waiving the right to sue in delict may limit or negate delictual liability.

It is common knowledge that where a given wrong prima facie supports an action in contract and in tort the party may sue in either or both except where the contract indicates that the parties intended to limit or negative the right to sue

in tort. This limitation of concurrency arises because it is always open to the party to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving the sphere of individual liberty. Thus, if a person wishes to engage in dangerous sports, the person may stipulate in advance that he or she waives any right of action against the person who operates the sports facility. Viewed thus, it would be seen that X5, cannot in anyway stand in the way of the respondents to sue the appellant for negligence.

Section 127 of the Merchant Shipping Act, stipulates that the Minister may make such regulations as he considers necessary or expedient to provide for the conditions of service of those serving in Sri Lanka ships or matters connected therewith. Section 127(b) and (c) stipulate that such regulations may provide for the making of and procedures relating to agreements in writing between each person employed in a ship registered in Sri Lanka and the owner or other person so employing him and the engagement of citizens in Sri Lanka as officers and seamen by foreign ships at any port in Sri Lanka.

Acting in terms of the aforementioned Section 127 of the Merchant Shipping Act No. 52 of 1971 the Minister has made regulations including Regulation 10(2) which sets out the terms that the agreement should contain, including Regulation 10(2)(j) which states that the agreement should contain the payment of compensation for personal injury or death caused by accident arising out and in the course of employment. Therefore the Crew Agreement signed by Capt. Karunaratne has been so signed in accordance with these Regulations and that Clause 2(n)(i) was in fact a clause inserted in keeping with Regulation 10(2)(j).

In any event a careful scrutiny of the relevant clause 2 (n) (i) in X5 reveals that the lump sum promised by the appellant is not aimed at compromising with any delictual claims capable of being preferred by the dependents. In any event the dependents were not parties or signatories to X5. Above all nowhere in the document marked X5 has it been stated that the amount to be paid in terms of clauses 2(n)(i) should be treated as full and final settlement of all the claims arising from the death of the employee and that it is a bar to any delictual claims being made by the dependants. In the absence of such an exclusionary clause, it is quite unsafe and absolutely irrational to shut the dependents out from pursuing a legitimate claim in delict.

As has been stated by Mckerron 6th edition at 3, clause 2 (n) (i) of X5 does not limit the liability of the defendant by contract. It is only a payment contemplated on the strength of certain statutory provisions and in the said clause dependents of the deceased were not in contemplation so as to exclude them from being claimants under law of delict.

The notion of JC Macintosh and Norman Scoble cited by the appellant does not apply to the respondents. Quite significantly the opinion of RW Lee and AM Honore at page 50 paragraph 721 under the heading "Delict and Breach of Contract" also does not apply or prejudice the claim of the respondents adversely as it has been admittedly stated in the said treatise that only where the defendant is protected against liability for negligence by a contract to which the plaintiff is a party, would operate against the dependants so as to prevent them from claiming a wider liability. In the instant matter the defendant (appellant) is not protected at all against liability for negligence and at the same time

the plaintiffs (respondents) were not parties to the contract either. Therefore the correct view of the disputed question can be conveniently looked at, as stated by the jurists in the following language. . . . .

Quantum of Damages by Kemp and Kemp (2nd Edition, Sweet & Maxwell, 1961) at page 1

> "In almost all cases if there is a good cause of action in contract, there will also be a good cause of action in tort".

The Law of Delict by R. G. McKerron (Juta & Co. 1977) at page 3

> "Although a delict must be distinguished from a breach of contract, it is to be observed that the same act or omission may be both a breach of contract and a delict. This is the case where the act or omission constitutes both the breach of the duty arising out of a contract and the breach of duty imposed by law independently of the contract. Thus if a surgeon causes harm to a patient upon whom he operates by negligently leaving a surgical swab in his body, the patient upon whom he operates has a cause of action against him both in contract and in delict: in contract, because the surgeon impliedly promised to use due care in the performing the operation; in delict, because every person is under a duty to use care not to cause physical injury to others."

Visser and Potgieter's Law of Damages (2nd Edition, Juta & Co. 2008 reprint) at page 293.

> "A single damage causing event or factual situation may sometimes give rise to different claims for damages and

satisfaction. These remedies may be similar (for example, delictual actions) or dissimilar (delictual and contractual actions, or delictual a duty to pay damages.) The simultaneous presence of claims based upon different forms of damage (concerning different interest) or having different objectives can be described as concurrence in the wide sense. No real theoretical problem arises here as such claims can co-exist where the various actions concerned are directed towards the same objective or performance while the debtor is obliged to pay damages only once"

Visser and Potgieter are of the opinion that concurrence may occur where conduct constitutes both an injuria and a breach of contract. In the case of *Ndamse vs. University College of Port Hare*[4] it was held that a wrongful dismissal from employment (breach of contract) is not in itself an injuria, but 'the manner of a wrongful dismissal may constitute an injuria'.

As stated by Visser and Potgieter the aquilian action and a contractual action for damages concur in a situation where breach of contract also causes patrimonial damage in a wrongful and culpable manner and in practice the aquilian action is available alongside the contractual action only if the conduct complained of, apart from constituting breach of contract also infringes legally recognized interest which exists independently of the contract in a wrongful and culpable manner.

As regards the question of choice available to an aggrieved party as between remedies under the law of contract and the law of delict, Visser and Potgieter (at page 299) states that it is important to consider certain differences between

the two kinds of claims. A delictual action for compensation include damages and satisfaction for non-patrimonial loss, whereas satisfaction and compensation for non-contractual damages cannot be claimed ex contractu.

It may be argued that the consent given by the deceased for the payment of the sum specified in X5 to the legal heirs could be treated as qualified assumption of risk. In other words that the deceased has quantified the damages claimable, in the event of his death only to that amount which is specified in X5. Even if the learned High Court judge had opted to accept this approach, still the dependents of the deceased will not be affected by such an approach as the claim for compensation is quite independent of the contractual obligation of the appellant.

Finally it must be observed that unlike in English law, the Roman Dutch law looks at the aquilian action extended to the dependants of the deceased as an independent, non-derivative remedy, unfettered by defences vitiating the deceased's personal right to sue, including the contributory negligence *Vide Union Government vs Lee*[5].

In the case of *Bradburn v. Great Western Railway*[6] (affirmed in the case of *Payne v. Railway Executive*[7] dealing with a case where the Plaintiff was entitled to a disability pension subsequent to personal injuries suffered, it was held that "The Plaintiff has become entitled to the pension by reason of his naval service, *it being one of the benefits such service affords*. The Pension would have been paid without any negligence on the part of the railway's servants . . . . the plaintiff does not receive the pension because of the accident but because he has made a contract providing for the contingency'.

In the decision reached in *Nunan vs. Southern Railway*[8] it was held that where the deceased had by contract agreed with the Defendant railway Company that the Company's liability for personal injury should be limited to a certain sum and he was killed by the Company's negligence, the damages recoverable by the dependants were not limited to the agreed sum. In that decision Bankes LJ states at 227 as follows:

> *"The amount of damages which the dependants may recover is compensation properly so called. It may seem strange that the dependants can recover a much larger sum than could have been recovered by the deceased, but it has been held by the House of Lords in the Vera Cruz*[9] *that the cause of action of the dependants is a new and distinct cause of action, in respect of which the damages are estimated on an entirely different basis."*

For the foregoing reasons, it is my considered view that the grounds or objection raised by the appellant against the impugned judgment are untenable in law and therefore cannot be endorsed as the correct legal position. Hence, I am compelled to dismiss the appeal, subject to costs.

W. L. R. SILVA, J. – I agree.

Appeal dismissed.