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DIGEST

WICKRAMASINGHE VS. ATTORNEY GENERAL AND ANOTHER

COURT OF APPEAL
SISIRA DE ABREW. J.
ABEYRATNE. J.
LECAM VASAM. J.
CA (PHC) 39/2009
HC NEGOMBO HCAB 490/2006
DECEMBER 8, 2009
JANUARY 22, 2010

Bail Act 30 of 1997 – Section 2, Section 3 (1), Section 14, Section 16, Section 17 – Could a suspect be kept on remand for a period exceeding 24 months? - Should Section 16 – Section 17 of the Bail Act be read subject to Section 14 ? - What is the purpose of remanding a suspect/ accused? - What is the maximum period that a suspect to whom the Bail Act applies can be kept on remand? - Interpretation of Statutes – Prevention of Terrorism (Sp. Prov.) Act 48 of 1979.

The accused was arrested on 28.9.2006 in connection with the offence of murder. The High Court on 30.3.2009 refused bail. The accused had been on remand for 3 years and 5 months. The accused sought to revise the said order.

Held:

(1) Grant of bail shall be regarded as the rule the refusal to grant bail is the exception.

Per Sisira de Abrew. J.

> "The purpose of remanding a suspect/accused is to ensure his appearance in Court on each and every day that the case is called in Court; if the Court feels that, he would appear in Court after his release on bail Court should enlarge him on bail. Court should not remand a suspect/accused in order to punish him".

(2) Section 14, Section 16, Section 17 of the Bail Act do not state that "Notwithstanding anything to the contrary in the provisions of the Act – but Section 16 states 'subject to the provisions of Section 17, and it does not state subject to the provisions of Section 14 – therefore Section 16 and Section 17 are not subject to Section 14.

(3) When one considers Section 3 and Section 16 it is clear that the suspect/accused to whom the Bail Act does not apply can be kept on remand for a period exceeding two years but not the suspects to whom the Bail Act applies.

Per Sisira de Abrew. J.

> "The maximum period that a suspect to whom the Bail Act Applies can be kept on remand is 2 years, the period of 2 years is considered only if the Attorney General acts under Section 17. If there is no application under Section 17 the maximum period that a suspect/accused to whom the Bail Act applies can be kept on remand is 1 year".

Held further

(4) The mere fact that the results of applying a statute may be unjust or absurd does not entitle this Court to refuse to put it into operation, it is however common practice that if there are two different interpretations, so far as the grammar is concerned of the words in the Act the Courts adopt that which is just reasonable and sensible rather than one which is or appears to them to be none of those things.

(5) The role of the Judge is to give effect to the expressed intention of Parliament, as it is the bounden duty of any Court and the function of every Judge to do justice within the stipulated parameters.

APPLICATION in Revision from an order of the High Court, Negombo refusing bail.

Case referred to:

1. *Jayawathie vs. Attorney General* – CA 189/2004 CAM 27/4/2006 (Overruled)
2. *Holmen vs. Bradfiled Rural District Council* – 1949 2 KB 1 at 7
3. *Sebestian Fernando vs. Katana MPCS* – 1900 – 1 Sri LR 342 (SC)
4. *Attorney General vs. Sumathipala* – 2006 2 Sri LR 126

Senerath Jayasundera for petitioner.

Vijith Malalgoda SSC for respondent.

March 04th 2010

SISIRA DE ABREW, J.

The accused in this case was arrested on 28.09.2006 in conection with an offence of murder. Learned High Court Judge has, by his order dated 30.03.2009, refused to grant bail. The accused has been on remand for over a period of three years and five months. The Petitioner has filed this petition to revise the said order of the learned High Court Judge. Learned Counsel for the Petitioner contended that in view of sections 16 and 17 of the Bail Act No. 30 of 1997 (Bail Act) the accused cannot be kept on remand for a period exceeding 24 months. Learned DSG citing *M. H. Jayawathi vs. Attorney General* (1) contended that a suspect could be kept on remand for period exceeding 24 months. His Lordship Basnayake in the said case decided that Sections 16 and 17 of the Bail Act must be read subject to Section 14 of the Bail Act. His Lordship therefore held that a suspect could be kept on remand for a period exceeding 24 months. Therefore the most important question that must be decided in this case is whether Section 16 and 17 of the Bail Act should be read subject to Section 14 of the Bail Act. When considering this question one must consider whether the Bail Act should apply to any suspect taken into custody in respect of any offence. To find an answer to this question, Section 3(1) of the Bail Act should be considered. It reads as follows:

"Nothing in this act shall apply to any person accused or suspected of having committed, or convicted of, an offence under, the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, Regulations made under the Public Security Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law."

When Section 3 of the Bail Act is considered it is seen that the Bail Act shall not apply to a person accused or suspected of having committed or convicted of an offence under

1. The Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979,
2. Regulations made under the Public Security Ordinance, or
3. Any other written law which makes express provisions in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law.

It is therefore seen that when the legislature enacted the Bail Act it was not the intention of the legislature to release each and every suspect who has been on remand for period exceeding 24 months. Thus the legislature when enacting the Bail Act, did not intend to keep each and every suspect on remand for an period. In this connection one must not forget Section 2 of the Bail Act. It says that grant of bail shall be regarded as the rule and the refusal to grant bail as the exception. His Lordship Justice Basnayake in *M.H. Jayawathi vs. Attorney General (supra)* observed thus:

"Only cases that fall outside section 14 would come under sections 16 and 17. To that extent section 16 and 17 are subject to section 14." If this position is going to be accepted where would we draw the line? If the above position is correct can a suspect who has been on remand for a period exceeding five years be kept on remand. If such a person is convicted and sentenced he would have served a good part of his sentence. Further I ask the question: Can a suspect be kept on remand without being prosecuted for an indefinite period? In finding an answer to this question I would like to consider a judicial decision considered by His Lordship *Basnayake in Jayawathi's case (supra). Holmen vs. Bradfield Rural*

District Council[2] Fennimore J said: "Of course the mere fact that the results of applying a statute may be unjust or absurd does not entitle this court to refuse to put it into operation. It is, however, common practice that if there are two different interpretations, so far as the grammar is concerned, of the words in the Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to them to be, none of those things." Assuming that there are two different interpretations of the words in the Bail Act, is it reasonable, sensible or justifiable to keep a suspect or accused on remand indefinitely without being prosecuted? I think not. For these reasons I think that courts will have to interpret the law giving a meaningful interpretation to the intention of the legislature. In this regard it is pertinent to consider a passage of the judgment of Justice Fernando in *Sebestian Fernando vs Katana MPCS*[3] "Statutes which encroach upon the rights of the citizen have to be "strictly" construed: they should be interpreted, if possible, to respect such rights, and if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted. Statutes which impose pecuniary burdens or penalties are subject to the same rule. If there are two reasonable constructions, one of which will avoid the penalty, that construction must be preferred."

A bench of five judges of the Supreme Court in *Attorney General vs. Sumathipala*[4] observed: "A judge cannot under a thin guise of interpretation usurp the function of the legislature to achieve a result that the judge thinks is desirable in the interests of justice. Therefore the role of the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any court and the function of every judge to do justice with in the stipulated parameters." [Justice Shirani Bandaranayake at 143].

Justice Dr. Amerasinghe in his book titled 'Judicial Conduct, Ethics and Responsibilities' page 284 expressed the view thus: The function of a judge is to give effect to the

expressed intention of the Parliament. If legislation needs amendment, because its results in injustice, the democratic process must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years."

Purpose of remanding a suspect/accused is, in my view, to ensure his appearance in Court on each and every day that the case is called in Court. If the Court feels that he would appear in Court after his release on bail, Court should enlarge him on bail. Court should not remand a suspect/ accused in order to punish him.

Sections 14, 16 and 17 of the Bail Act are as follows:

Section 14 (1): "Notwithstanding anything to the contrary in the preceding provisions of this Act, whenever a person suspected or accused of being concerned in committing or having committed a bailable or non-bailable offence, appears, is brought before or surrenders to the Court having jurisdiction, the Court may refuse to release such person on bail or upon application being made in that behalf by a police officer, and after issuing notice on the person concerned and hearing him personally or through his attorney-at-law, cancel a subsisting order releasing such person on bail if the court has reason to believe:

(a) that such person would

(i) Not appear to stand his inquiry or trial:

(ii) Interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice; or

(iii) Commit an offence while on bail; or

(b) That the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

(2) Where under subsection (1), a court refuses to release on bail any person suspected or accused of being concerned

in or having committed an offence or cancels a subsisting order releasing such person on bail, the court may order such suspect or accused to be committed to custody.

(3) The court may at any time, where it is satisfied that there has been a change in the circumstances pertaining to the case, rescind or vary any order made by it under subsection (1)."

Section 16 "Subject to the provisions of section 17, unless a person has been convicted and sentenced by a court, no person shall be detained in custody for a period exceeding twelve months from the date of his arrest."

Section 17 "Notwithstanding the provisions of section 16, on application made in that behalf by the Attorney-General at, the High Court holden in any Zone or a High Court established under Article 154P of the Constitution may, for good and sufficient reasons that shall be recorded, order that a person who has not been convicted and sentenced by a Court, be detained in custody for a period in excess of twelve months:

Provided that the period of detention ordered under this section, shall not in any case exceed three months at a time and twelve months in the aggregate."

Does section 14 of the Bail Act say that 'notwithstanding anything to the contrary in the provisions of this Act?' The answer is no. Does it say 'Notwithstanding the provisions of section 16 and 17 of the Bail Act? The answer is no. But section 16 of the Bail Act says 'subject to the provisions of section 17…. ' It does not say 'subject to the provisions of section 14… 'For the above reasons, I hold that section 16 and 17 of the Bail Act are not subject to the provisions of section 14.

Contention that a suspect/accused who completes two years on remand will be arrested on the following day of his

release on bail for an offence that may be committed by him and therefore he should not be released on bail is, in my view, untenable because in such an event it is the duty of the prosecution to have the case concluded within a period of two years. Contention that in this country it takes more than two years to conclude a criminal case and therefore the intention of the legislature was, when enacting the Bail Act, to keep a suspect/accused on remand for more than two years is also untenable because no one can say that the legislature was unaware of the situation of criminal courts of this country when the Bail Act was being enacted. One can argue that the legislature was aware of the situation of the criminal courts and that was the very reason that it made provisions to release suspects/accused to whom the Bail Act applies after a lapse of two years. When one considers sections 3 and 16 of the Bail Act it is clear that the suspects/accused to whom the Bail Act does not apply can be kept on remand for a period exceeding two years but not the suspects to whom the Bail Act applies. For these reasons I hold that the maximum period that a suspect to whom the Bail Act applies can be kept on remand is two years. The period of two years is considered only if the Attorney General acts under section 17 of the Bail Act. If there is no application under section 17 the maximum period that a suspect/accused to whom the Bail act applies can be kept on remand is one year. For these reasons, with due respect to His Lordship Basnayake I am unable to agree with the view expressed by His Lordship in *M. H. Jayawathi vs Attorney General (supra).*

For the above reasons I set aside the order of the learned High Court Judge dated 30.3.2009 and direct the learned High Court Judge to release the accused on bail on suitable conditions.

ABEYRAHNE, J. – I agree.

LECAMWASAM, J. – I agree.

Application allowed.

KESARA SENANAYAKE V. ATTORNEY GENERAL AND ANOTHER

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.,
SRIPAVAN J. AND
IMAM, J.
S. C. APPEAL NO. 134/2009
S. C. (SPL.) L. A. NO. 218/2009
H. C. APPEAL NO. HCMCA 260.08
M. C. COLOMBO CASE NO. 9283/01/07
MARCH 17TH, 2010

Commission to Investigate Allegations of Bribery and Corruption Act, No. 19 of 1994 – Section 3 – Institution of proceedings against such person for such offence in the appropriate Court – Section 11 – Director General to institute criminal proceedings – Supreme Court Rules 4 and 28 – failure to comply with – consequences – Code of Criminal Procedure Act – institution of proceedings – the person making the complaint or written report would become the complainant.

The Accused – Appellant – Appellant (Appellant) preferred an appeal to the Supreme Court against the order of the High Court whereby the High Court had affirmed the conviction and sentence imposed by the Magistrate. When this matter was taken up for hearing in the Supreme Court, a preliminary objection as to the maintainability of the appeal was raised by the Respondent.

The contention of the Respondent was that the Appellant had failed to name the Director-General of the Bribery Commission, who is the complainant, as a party Respondent in the appeal to the Supreme Court. It was further contended that the Appellant had not complied with Rules 4, 28 (1) and 28 (5) of the Supreme Court Rules of 1990. The learned President's Counsel for the Appellant submitted that the Commission itself was the proper party to have been made a party and there was no necessity to make the Director-General a party.

Held:

(1) If the aggrieved person or persons desire to be the 'complainant', the Code of Criminal Procedure Act would give him the right to make a 'complaint' making himself the 'complainant'. However if the aggrieved person or persons, without exercising their right to make a complaint in terms of the Code of Criminal Procedure Act, state their grievances to the police, who after inquiry decides to institute proceedings on a report filed by the police, in such situation, the police officer who instituted the proceedings would become the complainant.

In terms of the provisions contained in Sections 2 and 136 (1) of the Code of Criminal Procedure Act and the ratio of decisions referred to, it is evident that a person, who makes such a complaint to the Magistrate would be regarded as a complainant.

(2) The provisions of the Commission to Investigate Allegations of Bribery and Corruption Act, No. 19 of 1994, reveal that the functions of the Commission are restricted to investigating allegations and directing the institution of proceedings.

(3) In terms of the provisions contained in sections 11 and 12 of the Act No. 19 of 1994, where in the course of an investigation of an allegation of bribery or corruption, if it discloses the commission of an offence, the Commission to Investigate Allegations of Bribery and Corruption shall direct the Director General to institute criminal proceedings against such person in the appropriate Court. When such a direction is given by the Commission, it is mandatory for the Director – General to institute proceedings.

(4) The totality of Rules 4, 28(1) and 28(5) of the Supreme Court Rules 1990 indicates the necessity for all parties, who may be adversely affected by the success or failure of the appeal to be made parties to the appeal.

Held further per Dr. Shirani Bandaranayake, J.,

"In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be

adversely affected by the result of the appeal should be made parties."

AN APPEAL from the judgment of the High Court Colombo.

Cases referred to:

1. *The Attorney-General v. Herath Singho* – (1948) 49 NLR 108
2. *Nonis v. Appuhamy* – (1926) 27 NLR 430
3. *Babi Nona v. Wijeysinghe* – (1926) 29 NLR 43
4. *Ibrahim v. Nadarajah* – (1991) 1 Sri L. R. 131

C. R. de Silva, P. C., with *R. J. de Silva* and *Dulan Weerawardena* for the Accused- Appellant – Appellant.

Gihan Kulatunga, SSC with *Asitha Anthony* for the Respondents-Respondents.

Cur.adv.vult.

December 06th 2010

DR. SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the order of the High Court dated 28.08.2009. By that order, the High Court had affirmed the conviction and sentence imposed by the learned Magistrate in M. C. Colombo Case No. 9283/01/07. The accused-appellant –appellant (hereinafter referred to as the appellant) preferred an appeal before this Court on which special leave to appeal was granted.

At the stage this matter was supported for special leave to appeal, learned Senior State Counsel for the respondents-respondents (hereinafter referred to as respondents) had raised a preliminary objection as to the maintainability of this appeal. After granting leave, this Court had stated that the said objection would be considered at the stage of hearing.

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

The appellant, who was the Mayor of the Kandy Municipal Council, was prosecuted by the 2nd respondent, in the Magistrate's Court of Colombo in respect of two counts under Section 70 of the Bribery Act, No. 20 of 1994. It was alleged in Count No. 1 of the charge sheet that the appellant, whilst being the Mayor of the Kandy Municipal Council, had obtained funds for the purpose of attending a workshop organized by the International Union of Local Authorities – Asian and Pacific section and scheduled to be held between 13th to 15th April 2004 in Taipei, Taiwan had not attended the said workshop, but had toured Singapore with his wife and thereby caused a loss of Rs. 185,185/56 to the Government.

The second count was also in respect of the same amount and it was alleged therein that he was guilty of obtaining an illegal benefit to the same value.

The appellant stated that he could not get a visa from Sri Lanka to Taiwan since there was no diplomatic relationship between Sri Lanka and Taiwan. He had met with an accident in Singapore on 12.04.2004, while he was on his way to Taiwan Consulate to obtain his visa to proceed to Taiwan. The appellant accordingly had submitted that in the circumstances he did not have the requisite *mens rea* to commit the alleged offences and that he had not acted intentionally.

After trial the appellant was convicted on both counts by the learned Magistrate on 18.09.2008, and sentenced to one year's imprisonment suspended for 5 years and a fine of Rs. 100,000/- with a default term of 3 months simple imprisonment for the first Count and a fine of Rs. 100,000/-

with a default term of 3 months simple imprisonment for the second count.

When this matter came up for hearing it was agreed that the preliminary objection would be taken up for consideration first. Both parties were accordingly heard only on the preliminary issue raised by the learned Senior State Counsel for respondents.

The contention of the learned Senior State Counsel for the respondents was that the appellant had failed to name the Director-General of the Bribery Commission, who is the complainant, as a party respondent in the appeal to the Supreme Court. In the circumstances, it was contended that the appellant had not complied with Rules 4, 28(1) and 28(5) of the Supreme Court Rules of 1990. Accordingly learned Senior State Counsel for the respondents moved that this appeal be dismissed *in limine.*

Learned Persident's Counsel for the appellant conceded that the question of identifying the proper party is an essential question in any type of litigation and that the purpose of having the proper party named is to ensure that any decree of Court or a finding of a Court is properly enforceable once such decree is entered or such finding has been made.

Accordingly it was contended that in order to ascertain as to whether it is necessary to make the Director-General of the Bribery Commission a party to this appeal, it would be necessary to consider the provisions of the Commission to Investigate Allegations of Bribery and Corruption Act, No. 19 of 1994.

Learned President's Counsel for the appellant referred to Sections 2, 3, 4, 5, 6, 7, 8 and 11 of the said Act, No. 19 of

1994 and contended that the said provisions clearly show that the Director-General has to act on the directions given by the Commission and it is the Commission, which has the responsibility of investigation and the institution of proceedings. Accordingly, the learned President's Counsel for the appellant submitted that the Commission itself was the proper party to have been made a party and there was no necessity to make the Director-General a party to this appeal.

The word 'complainant' is not defined by the Code of Criminal Procedure Act. However, the meaning of the word 'complaint' is defined in Section 2 of the Code of Criminal Procedure Act and is stated as follows:

> *"Complaint means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence."*

Chapter XIV of the Code of Criminal Procedure Act deals with the commencement of proceedings before the Magistrate's Courts and Section 136(1) a refers to the fact that proceedings in a Magistrate's Court shall be instituted on a complaint being made orally or in writing to a Magistrate of such Court that an offence has been committed, which such Court has jurisdiction either to inquire into or try such complaint.

Referring to the provisions in the Code of Criminal Procedure Act, which deals with the complaints, Dias, J. in *The Attorney-General v. Herath Singho*[1] had stated that the 'complainant' must mean the person, who makes the 'complaint'. In *Herath Singho (supra)* Dias, J., had to consider the applicability of the word 'complaint'

defined in Section 2 of the Code of Criminal Procedure Act in relation to other relevant sections in the Code. Considering the question, Dias, J., was of the view that the 'aggrieved person or persons' or the police, who have been induced by the aggrieved person or persons, could take up the grievance before Court. In such instances, if the aggrieved person or persons desire to be the 'complainant', the Code of Criminal Procedure Act would give him the right to make a 'complaint' making himself the 'complainant'. If, on the other hand, the aggrieved person or persons, without exercising their right to make a complaint in terms of the Code of Criminal Procedure Act, state their grievances to the police, who after inquiry decides to take up the case and institute proceedings on their own, the said police would file their 'complaint' and the aggrieved person or persons would cease to be 'complainants'. In such situations, it is clear that the police officers, who ' instituted the proceedings' would become the complainant.

Dias, J., in *The Attorney-General v. Herath Singho (supra)* referring to Dalton, J.'s decision in *Nonis v. Appuhamy* [2] had stated that,

> *". . . . for the institution of proceedings by complaint or written report, the person making the complaint or written report is regarded as the party instituting the proceedings against the accused person."*

This position was further affirmed by Dalton, J., in *Babi Nona v. Wijesinghe*[3], where the Court had considered the right of appeal of an aggrieved party in a matter in which the proceedings were instituted on a written report by a police officer.

As stated earlier in terms of Section 136(1) of the Code of Criminal Procedure Act, the proceedings before the

Magistrate's Court would commence after the institution of a complaint being made to the Magistrate. Considering the provisions contained in Section 2 and 136 (1) of the Code of Criminal Procedure Act and the ratio of decisions referred to earlier, it is evident that a person, who makes such a complaint to the Magistrate would be regarded as a 'complainant'.

The powers and functions of the Commission to investigate Allegations of Bribery or Corruption are stipulated in Act, No. 19 of 1994. The Commission consists of a Chairman and two (2) other members and has the power to investigate into allegations of bribery or corruption. A Director-General is appointed to the Commission in terms of Section 16 of the Act, No. 19 of 1994, to assist the Commission in the discharge of the functions assigned to the Commission. Section 3 of the Act, No. 19 of 1994 states that, based on the communication made to the Commission, where there is disclosure of the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, the Commission shall **direct the institution of proceedings** against such person for such offence in the appropriate Court. The said Section 3 of the Act, No. 19 of 1994 is as follows:

> *"The Commission shall subject to the other provisions of this Act, investigate allegations, contained in communications made to it under Section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975,* ***direct the institution of proceedings against such person for such offence in the appropriate Court"*** *(emphasis added).*

Section 4 of the Act, No. 19 of 1994 refers to communications received by the Commission and the conduct of investigations that would be carried out, if it is satisfied that such communication is genuine and discloses material upon which an investigation ought to be conducted. Section 11 of the said Act, No. 19 of 1994, specifies the steps that should be taken by the Commission, where in the course of an investigation conducted by the Commission under Act, No. 19 of 1994, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975. The said Section 11, which is reproduced below, clearly states that the Commission shall direct the Director-General to institute criminal proceedings against such persons.

> *"Where the material received by the Commission in the course of an investigation conducted by it under this Act, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, the* ***Commission shall direct the Director-General to institute criminal proceedings against such person in the appropriate court and the Director-General shall institute proceedings accordingly.***
>
> *Provided, however, that where the material received by the Commission in the course of an investigation conducted by it discloses an offence under Part II of the Bribery Act and consisting of soliciting, accepting or offering, by any person, of a gratification which or the value of which does not exceed two thousand rupees, the Commission shall direct the institution of proceedings against such person before the Magistrate's Court and where such material discloses an offence under that part and*

consisting of soliciting, accepting or offering, by any person of any gratification which or the value of which exceeds two thousand rupees, the Commission shall direct the institution of proceedings against such person in the High Court by indictment" (emphasis added).

An examination of the aforementioned provisions of the Act, No. 19 of 1994, reveals that, the functions of the Commission are restricted to investigating allegations and directing the institution of proceedings. It is also evident that on the material received by the Commission in the course of an investigation conducted by the Commission there is disclosure of the commission of an offence, thereafter the role of the Commission is only to direct the Director-General to institute criminal proceedings and the indictment would be signed by the Director-General. The said procedure is clearly laid down in Section 12(1) of Act, No. 19 of 1994, where it is stated thus:

"Where proceedings are instituted in a High Court in pursuance of a direction made by the Commission under Section 11 by an indictment signed by the Director-General, such High Court shall receive such indictment and shall have jurisdiction to try the offence described in such indictment in all respects as if such indictment were an indictment presented by the Attorney-General to such Court"

Considering the provisions contained is Sections 11 and 12 of the Act, No. 19 of 1994 it is quite obvious that where the material received by the Commission to investigate Allegations of Bribery or Corruption, in the course of an investigation conducted under and in terms of the Act, No. 19 of 1994,

discloses the commission of an offence, the said Commission shall direct the Director - General to institute criminal proceedings against such person in the appropriate Court. The said provisions also indicate, quite clearly that when such a direction is given by the Commission that it is mandatory for the Director-General to institute proceedings. Furthermore in terms of Section 12 of the Act, No. 19 of 1994, the indictment under the hand of the Director-General is receivable in the High Court.

It is therefore evident that the Director-General has to be regarded as the complainant, as the authority to institute criminal proceedings on the offences under Act No. 19 of 1994, is exclusively vested with the Director-General of the Commission.

The provisions contained in Section 3 of the Act, No. 19 of 1994, further clarified this position. The said Section 3 of the Act referred to earlier, deals with the functions of the Commission and clearly states that the functions of the Commission are limited to investigate allegations and to direct the institution of proceeding against such person.

A careful examination of the provisions in Section 3 and 11, thus clearly indicates that, whilst the Commission has the authority to investigate, and on the basis of the findings of such investigation, the Commission has the authority to direct the institution of proceedings, such institution of proceedings shall be carried out in effect by the Director-General of the Commission.

It is common ground that the Director-General has not been made a party to the application before the Supreme Court.

Learned Senior State Counsel for the respondents contended that since the Director-General of the Bribery Commission, who is a necessary party to this application, had not been named as a respondent, that the appellant had not complied with Rules 4 and 28 of the Supreme Court Rules 1990 and therefore the appeal should be dismissed *in limine.*

Rule 4 of the Supreme Court Rules 1990, which deals with the applications for Special Leave to Appeal refers to the necessity in naming as the respondents the necessary and relevant parties. The said Rule reads as follows:

> *"In every such application, there shall be named as respondent, the party or parties (whether complainant or accused, in a criminal cause or matter, or whether plaintiff, petitioner, defendant, respondent, intervenient or otherwise, in a civil cause or matter), in whose favour the judgment or order complained against was delivered, or adversely to whom such application is preferred, or whose interest may be adversely affected by the success of the appeal, and the names and present addresses of all such respondents shall be set out in full."*

Rule 28 deals with other appeals, which come before the Supreme Court and the said Rule reads as follows:

> *"28 (1) Save as otherwise specifically provided by or under any laws passed by Parliament, the provisions of this Rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal.*
>
> . . . .

28 (5) In every such petition of appeal and notice of appeal, there shall be named as respondents, all parties in whose favour the judgment or order complained against was delivered, or adversely to whom such appeal is preferred, or whose interests may be adversely affected by the success of the appeal, and the names and present addresses of the appellant and the respondents shall be set out in full."

The totality of the aforementioned Rules indicates the necessity for all parties, who may be adversely affected by the success or failure of the appeal to be made parties to the appeal.

This position was considered by the Supreme Court in *Ibrahim v. Nadarajah*[4], where the Court had to consider whether there was a violation of Rules 4 and 28 of the Supreme Court Rules.

In that case learned Counsel for the appellant submitted that the party who was not added was, the minor daughter of the respondent, who was named and that no prejudice would be caused because the same counsel might have appeared for the daughter had she been made a party to the appeal and that in any event the decision against the daughter will be the same as that against her mother.

Considering the applicability of the Supreme Court Rules and taking the view that a failure to comply with the requirements of Rules 4 and 28 is necessarily fatal, Dr. Amerasinghe, J., held that,

"It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal

should be made parties and, unless they are, the petition of appeal should be rejected."

As states earlier it is common ground that the Director-General of the Commission to investigate Allegations of Bribery and Corruption was not made a party to this appeal. On the basis of the examination of the provisions of the Act, No. 19 of 1994 it is evident that the Director-General, has to be regarded as the complainant in such an application and therefore is a necessary party to this appeal. **In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be adversely affected by the result of the appeal should be made parties.**

It is thus apparent that the appellant had not complied with Rules 4 and 28 of the Supreme Court Rules of 1990.

For the reasons aforesaid, I uphold the preliminary objection raised by the learned Senior State Counsel for the respondents and dismiss this appeal for non compliance with Supreme Court Rules.

I make no order as to costs.

SRIPAVAN, J. – I agree.

IMAM, J. – I agree.

Preliminary objection upheld Appeal dismissed.

TRICO MARITIME (PVT) LIMITED V. CEYLINCO INSURANCE CO. LIMITED

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.,
SRIPAVAN J. AND
RATNAYAKE, J.
S. C. APPEAL NO. 101/2005
S. C. (SPL.) L. A. NO. 201/2005
H. C./ARB/NO. 1961/2004
DECEMBER 7TH, 2009

Arbitration Act, No. 11 of 1995 – Application for setting aside Arbitral award – Section 35(1) – Power to consolidate an application to set aside with an application to enforce an award – Actus curiae neminum gravabit – An act of Court should not prejudice any man – Default in appearance – Can the award be set aside?.

Trico Maritime (pvt) Limited filed an application in the High Court, Colombo in terms of the Arbitration Act to have the majority award of an Arbitral award enforced. Ceylinco Insurance Co. Limited who was served with notice, filed objections stating *inter alia,* that the arbitration award sought to be enforced has already been set aside by Court. After inquiry, the High Court upheld the said objection and dismissed the application for enforcement of the award. Trico Maritime has filed this appeal to set aside the above-mentioned order of the High Court.

The Supreme Court granted Leave to Appeal against the order of the High Court.

The Petitioner sought to challenge the judgment mainly on the ground that the High Court has failed to consolidate the two applications, HC/ARB/1848/2003 and HC/ARB/1961/2004 made by the Petitioner and the Respondent, in terms of section 35(1) of the Arbitration Act, No. 11 of 1995.

Held

(1) The law contemplates the consolidation of applications made to set aside the award and to enforce the award. It is an accepted

norm in the jurisprudence of this country that "actus curiae nemium gravabit" meaning, an act of Court should not prejudice any man. If the Court has not consolidated both applications a party should not suffer as a consequence of the Court not doing what it should do in terms of the law. It is the duty of the High Court to consolidate the two applications and take them up together.

(2) Default in appearance of the Respondent is not a ground on which an arbitral award can be set aside under Section 32(1) of the Arbitration Act, No. 11 of 1995.

Cases referred to:

1. *United Plantation Workers' Union v. The Superintendent Craig Estate Bandarawela* – 74 NLR 499
2. *Madurasinghe v. Madurasinghe* – (1988) 2 Sri L.R. 142
3. *Sili Nona v. Dayalal Silva and Others* – (1992) 1 Sri L.R. 195
4. *The Young men's Buddhist Association v. Azeez and Another* – (1995) 1 Sri L.R. 237

APPEAL from the judgment of the High Court of Colombo.

D. S. Wijesinghe, P.C., with *Kaushalya Molligoda* for the Petitioner.

S. Sivarasa, P.C., with *N. R. Sivendran* for the Respondent.

Cur.adv.vult.

RATNAYAKE. J.

The Petitioner in this appeal is seeking to set aside the judgment of the High Court of Colombo by which its application for enforcement of an Arbitral award was dismissed.

The Petitioner is a Company by the name of Trico Maritime (Pvt) Ltd., (hereiafter referred to as 'Trico Maritime') which

had an insurance policy with the Respondent by the name of Ceylinco Insurance Company Ltd. (hereinafter referred to as the 'Ceylinco Insurance').The sum insured by the said policy at the relevant date was Rs. 58 million. In April 1999, the Petitioner submitted a claim to the Respondent for a loss that occurred due to the premises going under water. The Ceylinco Insurance paid a sum of Rs. 10 million to Trico Maritime in respect of the claim but Trico Maritime referred the matter for Arbitration in terms of the Arbitration Clause in the policy as Ceylinco Insurance has not met the entire claim. After inquiry two out of the three arbitrators delivered a joint award on 22nd October 2003 granting relied to the Trico Maritime and the other arbitrator delivered a separate award.

The Ceylinco Insurance made an application on 15th December 2003 to the High Court of Colombo in case bearing No. HC/ARB/1848/2003 to set aside the said awards, inter alia on the basis that the arbitrators had no jurisdiction to make the awards. The Ceylinco Insurance supported the application on 19.12.2003 and the Court issued notice on Trico Maritime to show cause as to why the arbitration awards should not be set aside. According to the case record the notice has been served on Trico Maritime but it failed to appear on application of Ceylinco Insurance, the High Court set aside the arbitral award by its Order dated 20th May 2004 and the subsequent decree dated 11th November 2004.

The Petitioner, namely Trico Maritime filed an application on 18th May 2004 in the High Court of Colombo in case bearing No. HC/ARB/1961/2004 under Part VII of the Arbitration Act No. 11 of 1995 to have the majority award enforced. Ceylinco Insurance who was served with notice filed objections and took up the position, inter alia that the arbitration award sought to be enforced has already been set

aside by Court. After inquiry, the High Court upheld the said objection and by its Judgment dated 1st August 2005 dismissed the application. Consequently Trico Maritime has filed this appeal to set aside this judgment of the High Court.

This Court has granted Leave to Appeal on 23rd November 2005 and the proceedings to the said date state as follows:-

> "parties agree that the questions of law that have been formulated in the Petition will not arise. However the new question of law was raised;
>
> "Did the Learned High Court Judge err in law in dismissing the Petitioner's application for enforcement of the arbitral award on the basis of the order dated 20.05.04 and the decree dated 11.11.04 in HC/ARB/1848/2003 of the same High Court"

At the hearing before Court Counsel for the Petitioner sought to challenge the judgment of the High Court on many grounds.

He took up the position inter alia that the High Court has failed to consolidate the two applications i. e. HC/ ARB/1848/2003 and HC/ARB/1961/2004, in terms of Section 35(1) of the Arbitration Act No. 11 of 1995.

According to the pleadings before Court, HC/ARB/ 1961/2004 was filed on 18th May 2004. The Order to enter the judgment as prayed for in HC/ARB/1848/2003 was made only on 20th May 2004. Therefore at the application for enforcement in this case was made to the High Court, the application to set aside the award in HC/ARB/1848/2003 was pending before the same High Court. In the circumstances,

the High Court should have consolidated both applications in terms of Section 35(1) of the Arbitration Act.

Section 35(1) of the Arbitration Act states as follows:-

"Where applications filed in Court to enforce an award and to set aside an award are pending, the Court shall consolidate the applications."

If the Court consolidated the applications as required by the above provision, there may not have been a default in appearance by the Petitioner Trico Maritime.

An argument was advanced by the Respondent Ceylinco Insurance to the effect that the Court could not have known that an application to enforce the award had been filed prior to the order made on 20th May 2004 as the application to enforce the award was filed only on 18th May 2004. It is a matter for the Administration of the High Court to have procedures in place to ensure that such applications are brought to the notice of Court without delay.

The Ceylinco Insurance has also taken up the position that Trico Maritime should have brought to the notice of Court the pending application to set aside the award when it made its application to enforce the award. The Petitioner Trico Maritime has taken up the position that it has not been served with notice prior to the ex-parte judgment in HC/ARB/1848/2003. Therefore the Court cannot find fault with the Petitioner for not disclosing HC/ARB/1848/2003 when application HC/ARB/1961/2004 was filed.

The law contemplates the consolidation of applications made to set aside the award and to enforce the award. It is

an accepted norm in the jurisprudence of this country that *"actus curiae neminum gravabit"* meaning, an act of Court should not prejudice any man [*United Plantation Workers' Union vs. The Superintendent Craig Estate Bandarawela*(1), *Also – Madurasinghe vs. Madurasinghe*(2) *– Sili Nona vs.Dayalal Silva & Others*(3) *– The Young Mens' Buddhist Association vs. Azeez & Another*(4). Therefore, if the Court has not consolidated both applications a party should not suffer as a consequence of the Court not doing what it should do in terms of the law. In the circumstances this Court is of the view that both applications i.e. HC/ARB/1848/2003 and HC/ARB 1961/2004 be consolidated and taken up together.

At this stage it is necessary to consider the merits of the Order of the High Court in HC/ARB/1848/2003 dated 20th May 2004 and the consequent decree dated 11th November 2004 by which the arbitration award was set aside. The proceedings in HC/ARB/1848/2003 of 20th May 2004 as appearing in the document annexed by the Petitioner to its petition dated 12th September 2005 marked as **'A9'** are as follows:-

"IN THE HIGH COURT OF THE WESTERN PROVINCE OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA
(holden in Colombo)

Before: *S. Srikandarajah Esquire – High Court Judge*
Court No. 01
Case No: *HC/ARB 1848/2003*
Date: *20.05.2004*

Attorney-at-law Mr. R. I. Thambirathnam with Attorey-at-Law Mr. N. R. Sivendran instructed by Mala Sabarathnam appear for the Respondent-Petitioner.