THE

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

[2010] 1 SRI L.R. - PART 7

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DIGEST

Mr. Sivendran appearing for the Respondent-Petitioner states as follows:-

"I move to support the motion that have been filed by the Respondent-Petitioner dated 17.05.2004. In this case notice was issued on Claimant-respondent returnable on 31.03.2004. According to the fiscal report that have been filed the said notice regarding in this action has been served on the claimant-respondent prior to the 31.03.2004. The notice has been served on the Manager of the claimant-respondent who is the principal officer of the respondent company. In the circumstances I respectfully state that as the claimant-respondent was not present on 31.03.2004 the respondent is in default and the Petitioner entitled to a relief that the petitioner has prayed for in the prayer to the petition filed in Your Honour's Court.

Order

Enter judgment as prayed for in the prayer to the petition.

Enter decree accordingly.

Sgd.
S. Sriskandarajah
High Court Judge of the
Western Province – Colombo"

The decree dated 11th day of November 2004 of the High Court in Application HC/ARB/1848/2003 as appearing in the document annexed marked "A7" to the Petitioner's petition is an follows:-

"*HC/ARB/1848/2003*

This action coming on for final disposal before Honourable S. Sriskandarajah Esquire High Court Judge of Colombo on

the 20th May 2004 in the presence of Mr. R. E. Thambirathnam Attorney-at-Law with Mr. N. R. Sivendran Attorney-at-Law Instructed by Ms. Mala Sabaratnam on the part of the Respondent-Petitioner and the Claimant-Respondent being absent on the notice returnable dated 31-03-2004, although the notice was served properly on the Manager of the Claimant-Respondent Company requesting them to appear on 31.03.2004 and hearing the submissions of Attorney-at-Law for Respondent-Petitioner.

It is ordered and decreed that the award of the 1st, 2nd & 3rd Arbitrators – Respondents dated 22nd October 2003 is hereby set aside.

It is ordered and decreed that 1st, 2nd & 3rd Arbitrators-Respondents have no jurisdiction to hear and make an award in respect of prayers (a) and (b) of the statement of claim and that the Respondent- Petitioner is entitled to the costs of this action.

Sgd.
High Court Judge of the
Western Province, Colombo

On this 11th day of November 2004

Drawn by: Sgd. Attorneys-at-Law for the Respondent-Petitioner."

Section 32 (a) of the Arbitration Act of No. 11 of 1995 permits a High Court to set aside an arbitral award only in limited circumstances in the following manner.

Section 32(1)

"An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefore, within sixty days of the receipt of the award –

(a) Where the party making the application furnishes proof that –

(i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question under the law of Sri Lanka; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the cope of the submission to arbitration;

Provided however that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside; or

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act; or

(b) Where the High Court finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or

(ii) the arbitral award is in conflict with the public policy of Sri Lanka."

Default in appearance of the Respondent is not a ground on which an arbitral award can be set aside under the above provision.

In the decree of 11th November 2004 the Court has *"further ordered and decreed that 1st, 2nd & 3rd arbitrators – Respondents have no jurisdiction to hear and make an award in respect of prayers (a) and (b) of the statements of claim ....."*.

In accordance with the proceedings of 20th May 2004 as appearing in document 'A9' the Petitioner has not made any submission on the question of lack of jurisdiction of the 1st, 2nd & 3rd Arbitrators. His only application has been to grant relief as prayed for solely based on the default in appearance of the Respondent. In fact the Petitioner has only moved "to support the motion that have been filed by the Petitioner dated 17.05.2004". This motion dated 17.5.2004 is annexed to the Petitioner's petition marked as **'A8'**. It is observed from the case record that a copy of this motion has not been served on the Claimant-Respondent of the said case. In any event the said motion dated 17.05.2004 annexed to the Petitioner's petition marked as 'A8' states as follows:

"HC/ARB/1848/2003

To: The Honourable High Court Judge of the Democratic Socialist Republic of Sri Lanka sitting at Colombo.

***Whereas** notice of this action was issued on the Claimant-Respondent by Court and whereas notice was handed over on the Claimant-Respondent's Manager through the Fiscal of this Court.*

And Whereas *according to the notice served on the Claimant- Respondent notice returnable was on 31st March, 2004*

And Whereas *on 31st March, 2004 the Claimant-Respondent was not present and/or was not represented in Court.*

And whereas *the Claimant-Respondent had not shown any ground as to why the relief claimed for by the Respondent-Petitioner in the Respondent-Petitioner's petition to Your Honour's Court should not be granted.*

And whereas *in the circumstances the Claimant-Respondent is in default and the relief claimed for by the Respondent-Petitioner in the prayer to the petition should be granted.*

We respectfully move that Your Honour's Court be pleased to mention this matter on 20th May 2004 to enable Counsel for the Respondent- Petitioner Mr. R. E. Thambiratnam to support this application.

On this 17th day of May, 2004.

Sgd.
Attorneys-at-Law for the
Respondent-Petitioner"

Accordingly it is clear that there was no application by the Petitioner in this case on 20th May 2004 for an order on the lack of jurisdiction of the 1st, 2nd, & 3rd Arbitrators-Respondents. The only application has been to set aside the arbitration award based on the default in appearance of the Respondent. Submissions have not been made by the Petitioner in terms of the reasons and grounds contained in

the substantive application dated 15th December 2003 filed in the High Court. The proceedings of 20th May 2004 the decree of 11th November 2004 or the motion of 17th May 2004 do not contain any material to show that the reasons and grounds contained in the substantive application dated 15th December 2003 or the aspect of the lack of jurisdiction was considered by Court when making the aforesaid order and decree.

Due to the above reasons, this Court

(i) sets aside the order dated 20th May 2004 and the decree dated 11th November 2004 in Application bearing No. HC/ARB/1848/2003.

(ii) Sets aside the judgment of the High Court dated 1st August 2005 in Application bearing No. HC/ARB/1961/2004; and

(iii) Directs the High Court to consolidate both applications namely HC/ARB/1848/2003 and HC/ARB/1961/2004 and to hear and determine the consolidated application in terms of the law.

In all the circumstances of this case the parties to bear their own costs.

TILAKAWARDANE, J. – I agree.

SRIPAVAN, J. – I agree.

Appeal allowed.

Directions issued.

JAYARATNE VS. CHANDRARATNE AND ANOTHER

COURT OF APPEAL
BASNAYAKE, J.
CALA 196/2004 (LG)
DC NEGOMBO 4747/L
SEPTEMBER 3, 2010

Civil Procedure Code – Section 169 – Evidence of witnesses – Procedure of taking down evidence – Application to correct proceedings – Could Court refuse such an application? – Role of the lawyer is to assist Court?

Held:

(1) Evidence of witnesses shall be taken down in writing by the Judge or in his presence and hearing and under his personal direction and superintendence.

(2) However for convenience, evidence of witnesses is taken down by stenographers in shorthand and typed later. While typing stenographers may make mistakes and what is typed may not be what the witnesses said in evidence – therefore it is the duty of Court to correct proceedings.

Held further:

(3) When an application is made by a lawyer for the Court to correct proceedings the Court cannot refuse that application for the reason that the lawyer is only assisting Court with regard to the function of Court.

The Judge has erred by refusing to correct proceedings.

LEAVE TO APPEAL from an order of the District Court of Negombo with leave being granted.

Muditha Premachandra for plaintiff-petitioner.

Rohan Sahabandu for defendant-respondent.

Cur.adv.vult.

September 03rd 2010

ERIC BASNAYAKE, J.

Both Counsel were heard in support of their respective cases.

The Plaintiff-Petitioner filed this application to have the order dated 20.05.2004 of the learned District Judge of Negombo set aside. By this order the learned Judge had refused to correct proceedings of 13.05.1999 as the defence objected to the proceedings being corrected. I am of the view that it is the duty of Court to maintain a proper record. Sometimes proceedings may not be correctly recorded and unless Counsel mentions that proceedings are not correctly recorded, it may remain uncorrected. By so informing Counsel only assists Court to maintain a proper record.

The evidence of witnesses shall be taken down in writing by the Judge, or in his presence and hearing and under his personal direction and superintendence (Section 169 of the Civil Procedure Code). However for convenience, evidence of witnesses is taken down by stenographers in shorthand and typed later. While typing stenographers may make mistakes and what is typed may not be what the witness said in evidence. Therefore it is the duty of Court to correct proceedings.

When an application is made by a lawyer for the Court to correct proceedings the Court cannot refuse that

application for the reason that the lawyer is only assisting Court with regard to the function of Court. Therefore I am of the view that the Judge has erred by refusing to correct proceedings and I set aside the order dated 20.05.2004 marked 'L'. I direct the learned District Judge to inquire into this and rectify the record with the necessary correction. In the event proceedings cannot be conveniently corrected, the witnesses may be recalled to ascertain what was said in evidence. The Court is further directed to proceed with the case without further delay. The appeal is allowed. No costs.

Appeal allowed.

District Court directed to proceed with the case.

RANASINGHE VS. MINISTER OF FOREIGN AFFAIRS AND OTHERS

COURT OF APPEAL
SATHYA HETTIGE PC (P/CA)
GOONERATNE, J.
CA 601/09
OCTOBER 30, 2009
NOVEMBER 24, 2009
DECEMBER 3, 2009

Writs of Certiorari/Mandamus – Diplomatic Privileges Act 9 of 2009 – Article 1 (e) – Vienna Convention on Diplomatic Relations 1961 – Who is a Diplomatic Agent – Is the petitioner a diplomatic officer? – Duty free concession? – Can concession given under International Covenants be curtailed?

The petitioner an English stenographer attached to the Sri Lanka Mission in Pakistan, on her return to Sri Lanka brought the van imported from Japan and used by her – as 'personal belongings'. The petitioner complaints that she was entitled to import the van 'duty free' but the Customs had informed her to pay the import duties.

Held:

(1) Vienna Convention on Diplomatic Relations of 1961 and Vienna Convention on Consular Relations of 1963 have been given effect to in terms of the Diplomatic Privileges Act 9 of 2009. In terms of Article 1 (e) - a Diplomatic Agent is the head of the Mission or a member of the diplomatic staff of the mission.

(2) An English stenographer appointed to the Sri Lanka Mission in Pakistan, is not a member of the Mission holding diplomatic rank.

Held further:

(3) Customary Laws based on the International Conventions have no application to the petitioner once she returns to Sri Lanka on termination of her duties as a non-diplomatic officer in a foreign

mission abroad and she is subject to the laws of Sri Lanka – and is subject to the provisions of the Customs Ordinance and other laws of Sri Lanka.

APPLICATION for Writs of Certiorari/Mandamus.

K. Deekiriwewa with *L. M. Deekiriwewa* and *N. K. Herath* for petitioner.

A. Gnanathasan, PC ASG with *Anusha Jayatilaka SC* for respondent.

Cur.adv.vult.

December 03rd 2009

SATHYA HETTIGE PC J. (P/CA)

This application was listed for support on 30/10/09. Before this application was supported by the counsel for the Petitioner the learned Additional Solicitor General raised two preliminary objections on the maintainability of this application before considering the application for notice being issued on the respondents.

However, this court permitted the learned counsel for the Petitioner to support the application to consider as to whether there was a *prima facie* case as sought by the petitioner. The court was of the view that the preliminary objections raised by the learned Additional Solicitor General could be considered when deciding as to whether there is a *prima facie* case.

The Petitioner had been selected and posted to the Sri Lanka Mission in Karachchi Pakistan as an English stenographer with effect from 01/09/2004 as per the letter dated 07/07/2004 marked "X 3".

The Petitioner states that she used a Toyota van bearing No. CR 40-0016433 imported from Japan through an Agent

in Pakistan and that she enjoyed a duty free concession when importing the said van as per the rules and conditions applicable to non diplomatic staff attached to a foreign mission in Pakistan. It was submitted further that the Petitioner served in the Sri Lankan Mission in Karachchi for a period of 3 years and 7 (seven) months.

The learned counsel for the Petitioner submitted that the Petitioner, on her return to Sri Lanka in July 2008 brought the said van to Sri Lanka as a "personal belonging" to which she was entitled to bring duty free. The complaint of the Petitioner is that when the motor vehicle was brought to Sri Lanka, the Petitioner had been informed to pay the import duties in a sum of approximately Rs. 4.7 million to clear the vehicle according to the provisions of the Customs Ordinance in Sri Lanka.

The learned counsel for the Petitioner submitted that the Petitioner enjoyed the duty free concessions for all other personal belonging other than the motor vehicle and that the right which accrued to the Petitioner under customary international law based on the Vienna Convention on Diplomatic Relations of 1961 and Vienna Convention on Consular Relation of 1963 cannot be derogated by a Circular provision contained in the Circular (Ministry Instruction Series) no. 165 issued by the Ministry of Foreign Affairs on 07th April 2000. The said Circular is marked "X 11 (c) " to the Petition.

The Petitioner in this application is seeking among other reliefs, a Writ of Certiorari to quash the said Ministry Instructions Series No. 165 dated 07/04/2000 marked "X 11(c)" and also a mandate in the nature of Writ of Prohibition prohibiting the 1st to 5th Respondents from applying the said Circular

marked "X11 (c)" to the vehicle imported by the Petitioner as a personal belonging.

The Petitioner is also seeking a Writ of Mandamus directing the 9th to 11th Respondents not to charge, levy or demand any kind of charges whether basic occupational charges and or penal occupational charges from the Petitioner in respect of the above vehicle bearing chassis no. CR 40-0016433.

The Petitioner also seeks an Interim Relief to clear the said motor vehicle by keeping an irrevocable Bank guarantee in favor of the Director General of Customs for the total Customs Duty.

The learned ASG objected to this application and submitted that the petitioner was only a non-diplomatic officer and that the Petitioner was not entitled to seek duty free concessions when importing the used motor vehicle on her return to Sri Lanka after completion of duties in the foreign mission, which privilege is granted only to diplomatic officers under and in terms of the said Circular and therefore that the application be dismissed *in limine.*

On a perusal of the averments contained in paragraph 2 of the Petition, it is obviously clear that the Petitioner was only an English Stenographer appointed to Sri Lanka's mission in karachchi, Pakistan and not a member of the mission holding diplomatic rank. The learned ASG submitted that the Petitioner cannot seek any facility or any duty concession under the said Circular which is only applicable to diplomatic officers.

The Preamble to the said impugned Ministry Instruction Series dated 07/04/2000 marked X 11 (c) issued by the Secretary Ministry of Foreign Affairs states that as follows:

*"All **Diplomatic Officers** (SLFS and Contract Officers) other than home based staff holding the local rank of Attaché are granted the privilege of importing motor vehicles under the provisions of this Circular. The cost of freight, insurance and GST etc. of such vehicles are met by the Government. They are exempted from payment of Customs Duty and Excise Duty. This privilege is granted because Diplomatic Officers are expected to use their private vehicles on their overseas posts sometimes for official travel also without resorting to hiring of vehicles for such official travel"*

Under eligibility criteria in Para 2 thereof it reads as follows:

"A Diplomatic Officer who has purchased a vehicle within 12 months of his assumption of duties at a Sri Lanka Mission abroad and used it continuously till the end of his tour of duty will become eligible for importing a motor vehicle under this scheme."

On a careful reading of the said Circular marked "X 11 (c)" on page 3 thereof it is further stated that the Circular has been issued with the concurrence of the Secretary to the Treasury and will come into force with effect from 7th April 2000.

It can further be seen that copies of the said Circular has been sent to

1. Secretary to the Treasury
2. S/PA H. A. & Plantation Industries
3. Auditor General
4. D. G./Customs Department
5. Controller/Imports and Exports
6. Registrar of Motor Vehicles.

It should be noted that this Circular has been in force since 07/04/2000.

Moveover, it is to be noted that the Vienna Convention on Diplomatic Relations 1961 has been given effect to in terms of the Diplomatic Privilegas Act No 09 of 2009. Article 1(e) of the Schedule to the said Act defines a "diplomatic agent" as follows:

"a diplomatic agent is the head of the mission or a member of the diplomatic staff of the mission"

Clearly the Petitioner does not fall within either category and therefore the Circular marked "X 11 (c) has no applicability to the Petitioner. I therefore uphold the objections raised by the learned ASG that the Petitioner has no *locus standi* to make this application for Writs of Certiorari and Mandamus on the basis that the Petitioner is not eligible to apply for duty free concessions granted under Circular marked "X 11 (c) and that the Petitioner has no legal right to such concessions.

The counsel for the Petitioner relied on the provisions contained in the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 and the fact that the Petitioner was given duty free concessions from the Ministry of Foreign Affairs in Islamabad, Pakistan when she imported the said vehicle from Japan into Pakistan.

The learned counsel for the Petitioner at the time of support of this application, took pains to explain and convince court that the concessions given under two International conventions cannot be curtailed or withheld by the sending country except by way of a statute. It was heavily argued by the counsel that question of payment of further duty does not arise as already duty concession has been given under Convention provisions.

However, the learned ASG submitted that the Customary laws based on the above international Conventions have no application to the Petitioner once she returns to Sri Lanka on termination of her duties as a non-diplomatic officer (English Stenographer) in a foreign Mission abroad and that she is subject to the laws of Sri Lanka. The Petitioner is an ordinary citizen once she returns on completion of her duties in a foreign Mission. And as such the Petitioner being a non-diplomatic officer is not entitled to any duty free concessions under the Circular marked "X 11 (c)" and is subject to provisions of the Customs Ordinance and other laws of Sri Lanka.

I disagree with the contention of the learned Counsel for the Petitioner that the Petitioner is entitled to any duty free concessions for the reasons stipulated above. In the circumstances I am of the view that there is no merit in this application and this court cannot grant any relief in favour of the Petitioner.

Accordingly I refuse to issue notice. The application is dismissed without costs.

GOONARATNE J. – I agree.

Notice refused.

Application dismissed.

KANAGARAJ VS. ALANKARA

COURT OF APPEAL
ERIC BASNAYAKE J.
CHITRASIRI J.
CALA 33/2007
DC COLOMBO 20660/L
SEPTEMBER 14, 2007
APRIL 23, 2007

Civil Procedure Code amended by Acts Nos 79 of 1988, 9 of 1991 – Section 93 of Pleadings – Law after the 1991 amendment to Section 93 – Rei vindicatio – action – Burden of proof? - Date first fixed for trial?

The trial Judge refused to accept the amended answer of the 1st defendant.

In the rei vindicatio action filed against the 1st, 2nd and 3rd defendants, the plaintiff pleaded that his predecessors in title became the owner of the larger land and he purchased a portion of the property. The plaintiff contended that, the 2nd defendant had begun to use a portion of the property.

The 1st and 2nd defendants filed separate answers – the 1st defendant states that he purchased the land from a third party and that he had leased the land to the 2nd defendant. After the trial was postponed, and before the case was taken up for trial, the defendant sought to amend the answer. By the amendment, the 1st defendant sought to dispute the corpus admitted previously and describe the title of the 1st defendant. This was rejected by the trial Judge on the ground that the 1st defendant has admitted the corpus, and that it is not necessary for the 1st defendant to describe in detail his title.

On leave being sought,

Held:

(1) The Law had undergone tremendous changes Section 93 of the Code was amended by Act 79 of 1988 and later by Act 9 of 1991 –

the wide discretion enjoyed by Court has been restricted. The discretion is allowed to be exercised only to applications made before the day fixed for trial.

(2) Amendments on or after the first date of trial can now be allowed only in very limited circumstances – namely when the Court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party is not guilty of laches.

Held further:

(3) In a Rei Vindicatio action it is the duty of the plaintiff to prove his title. If the plaintiff fails to prove his title, action will be dismissed. If the defendant has a title he could plead it and pray for a declaration. The 1st defendant only seeks a dismissal of the action in the answer and in the proposed amended answer - thus by disallowing the amendment the defendant would lose nothing. At the time of filing the answer, the 1st defendant was well aware of what the 1st defendant now wants in the amendment. No explanation is offered for his failure not to mention them in the answer. What is contemplated by Section 93 (2) are those necessitated due to unforeseen circumstances.

Per Eric Basnayake, J.

"The fact that the trial did not commence has no bearing. What is important is the date first fixed for trial".

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

Cases referred to:-

1. *Abeywardane vs. Euginhamy 1984* – 2 Sri LR 231 (distinguished)
2. *Seneviratne vs. Chadappa* – 20 NLR 60 (distinguished)
3. *Colombo Shipping Co. Ltd vs. Chiraya Clothing (pvt.) Ltd.* – 1995 – 2 Sri LR 97
4. *Silva vs. Goonetilake* – 32 NLR 217
5. *Hamine vs. Appuhamy* – 52 NLR at 49-50
6. *Muthusamy vs. Senaviratne* – 31 CLW 91
7. *Myaka vs. Haveman* – 1948 – 3 SA 457

8. *Jeena vs. Minister of Lands* – 1955 – 2 SA 380
9. *Avdiappa vs. Indian Oversees Bank* – 1995 – 2 Sri LR 13
10. *Kuruppu Arachchi vs. Andreas* – 1996 – 2 Sri LR 11
11. *Ceylon Insurance Co. Ltd vs. Nanayakkara* – 1999 – 3 Sri LR 50

Ikram Mohamed PC with *M. S. A Wadood* for 1st defendant – petitioner.
J. P. Gamage with *K. H. D. Priyadharshani* for plaintiff-respondent.

Cur.adv.vult.

May 05th 2010

ERIC BASNAYAKE J.

The 1st defendant-petitioner (1st defendant) is seeking to have the order dated 23.1.2007 of the learned Additional District Judge of Colombo set aside. By this order the learned Judge had refused to accept the amended answer of the 1st defendant.

This is a *rei vindicatio* action filed on 10.3. 2005 against the 1st, 2nd and 3rd defendants praying inter alia to have the plaintiff-respondent (plaintiff) declared the owner of the property described in the schedule to the plaint and to eject the 1st and 2nd defendants. The plaintiff claimed that his predecessor in title was one H. P. G. S. Abeysiriwardene who become the owner of a larger land by deed No. 2166 of 20.8.1982. The plaintiff purchased, by deed No. 2208 of 2.11.1982, a portion of this property which is described in the schedule to the plaint. The plaintiff states that the 2nd defendant began to use a portion of the property owned by the plaintiff about two months prior to 16.1.2005 and on 16.1.2005 the 2nd defendant commenced constructing a wall.

The 1st defendant filed answer on 16.6.2005. In the answer the 1st defendant admits the corpus stating that he

purchased the land referred to in the plaint on 15.10.2003 from the Central Finance Company Ltd. The 1st defendant also stated that this land was given on a lease by him to the 2nd defendant. The 2nd defendant filed a separate answer. In that the 2nd defendant too referred to the land mentioned in the plaint as the subject matter. He said that this property had been leased to the 2nd defendant by the 1st defendant on 1.1.2005. After filing the answers the case was fixed for trial for 21.10.2005. However the trial was postponed for another date. Before the case was taken up for trial the 1st defendant made an application on 8.3.2006 to amend the answer.

By this amendment the 1st defendant wished to dispute the corpus admitted previously. The 1st defendant had filed three new schedules to the proposed amended answer. He claimed that he is in possession of the land described in the 3rd schedule. The 1st defendant also replaced paragraph 8 of the answer with 13 sub paragraphs to describe the title of the 1st defendant. The 2nd defendant did not move to amend his answer.

The learned Judge had observed that the 1st defendant had admitted the land in question in the answer. The 1st defendant while denying the plaintiff's title to this land, had claimed title to it in the body of the answer. However in the prayer the 1st defendant had prayed for a dismissal of the plaintiff's action and not sought a declaration of title. For this reason the learned Judge found that it is not necessary for the 1st defendant to describe in detail his title and found that in the event the amended answer is refused the 1st defendant would suffer no loss.

The learned counsel for the 1st defendant submitted in the written submissions tendered to court that the amendment was only to describe the devolution of title. It was submitted

that the defendant had challenged the plaintiff's title and pleaded the title of the 1st defendant in the answer. The learned counsel submitted that the trial has not commenced yet. The learned counsel relied on the judgment of *Abeywardene vs. Euginahamy*[1] in support of his submission.

In *Euginahamy's case (supra)* the plaintiff moved to amend the plaint when it was taken up for trial. This move was due to the submission of the counsel for the defendants that the particulars of the plaintiff's title to the land had not been specified. The amendment was refused by the trial Judge. The Court of Appeal however had allowed the amendment for the reason that the amendment was to give full particulars of their title. L. H. De Alwis J Held that (at 233) "all that they sought to do by the amendment was to give full particulars of their title to the land in dispute. . . the lateness of the application for amendment is not a ground for refusing the application. The learned Judge relied on the judgment of *Seneviratne vs. Candappa*[2] where Shaw J said "however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side".

Since the date of pronouncing these judgments the law has undergone tremendous changes due to which the principle on which the amendments were allowed by these decisions cannot be considered as good law. The section relating to amendments of pleadings is found in section 93 of the CPC. At the time of pronouncing Euginahamy's case in 1984, the section stood as follows:-

> **At any hearing of the action or any time** in the presence of or after reasonable notice to the parties to

the action before final judgment, the court shall have full power of amending in its discretion . . . all proceedings. . .

This section was amended by Act No. 79 of 1988 by restricting amendments to cases where there are exceptional circumstances. The section is as follows:-

"The court may, **in exceptional circumstances. . . at any hearing . . . or at any time. . . before final judgment,** amend all pleadings"

The application of the above section was drastically reduced by a further amendment by Act No. 9 of 1991 which stands without an amendment up to now. The relevant portion is as follows:-

93 (1) Upon application made to it before the day first fixed for trial of the action. . . the court shall have full power of amending in its discretion, all pleadings. . .

Thus the wide discretion enjoyed by court all this time has been restricted. This discretion is allowed to be exercised only to applications made before the day first fixed for trial. Section 93 (2) is as follows:-

93 (2) On or after the day first fixed for the trial and before the final judgment, ***no application for the amendment of pleadings shall be alowed*** *unless the court is satisfied for reasons to be recorded by the court that* ***grave and irremediable injustice*** *will be caused if such amendment is not permitted* ***and on no other ground*** *and that the party so applying has* ***not been guilty of laches*** *(emphasis added). (3) & (4) are not reproduced.*

Amendments on and after the first date of trial can now be allowed only in very limited circumstances, namely, when the court is satisfied that grave and irremediable injustice will be caused if the amendment is not permitted and the party is not guilty of laches (*Colombo Shipping Co. Ltd. vs. Chiraya Clothing (pvt.) Ltd* (3)

The learned counsel for the 1st defendant failed to address court with regard to the above requirements in the written submission tendered. This being a *rei vindicatio* action it is the duty of the plaintiff to prove his title. The significance of this requirement is that, where the plaintiff fails to prove title in himself, judgment in the vindicatory action will be given in favour of the defendant, even though the letter has not been able to establish title. "There is abundant authority that a party claiming a declaration of title must have title himself. The authorities unite in holding that the plaintiff must show title to the corpus in dispute and that, if he cannot, the action will not lie" (*Macdonell C. J. in De Silva vs. Goonetilleke*(4) Dias S. P. J. in *Abeykoon Hamine vs. Appuhamy*(5) stated that "this being an action rei vindicatio, and the defendant being in possession, the initial burden of proof was on the plaintiff to prove that he had dominium to the land in dispute". "It is an elementary rule that in an action for declaration of title, it is for the plaintiff to establish title to the land he claims and not for the defendant to show that the plaintiff has no title to it" (Soertsz S. P. J. in *Muthusamy vs. Seneviratne*(6)

"Prima facie, proof that the appellant is owner and that the respondent is in possession entitles the appellant to an order giving him possession, i.e. to an order for ejectment. This prima facie right of the owner could be met by the respondent by proof that he had been given the right of possession either by the appellant or by some other person

who was entitled to grant such right and that the right was still current. In such a case the onus would be on the plaintiff to prove his ownership and the defendant's possession; once he discharged this onus, the onus would be on the defendant to prove the grant of the right of possession to him" (*Myaka vs. Havemann*[7] (*Jeena vs. Minister of Lands*[8] (The law and the cases cited by G. L. Peiris, The Law of Property in Sri Lanka Vol. 1 pg 348, 9)

If the plaintiff fails to prove title, the action will be dismissed. If the defendant has a better title he could plead it and pray for a declaration. The 1st defendant only seeks a dismissal of the plaintiff's action in the answer and the proposed amended answer. Thus by disallowing the amendment the defendant would lose nothing.

At the time of filing the answer the 1st defendant was well aware of what the 1st defendant now wants in the amendment. The 1st defendant does not offer any explanation for his failure not to mention them in the answer. The amendments contemplated by section 93 (2) are those that are necessitated due to unforeseen circumstances. (*Avdiappa vs. Indian Overseas Bank*[9], *Kuruppuarachchi vs. Andreas*[10] *Ceylon Insurance Co. Ltd. vs. Nanayakkara*[11].

The fact that the trial did not commence has no bearing. What is important is the date first fixed for trial. Therefore the submission with regard to that fails.

For the foregoing reason I am not inclined to interfere with the order of the learned Judge. Therefore leave is refused with costs.

CHITRASIRI J. – I agree.

Application dismissed.

BENGAMUWA DHAMMALOKA THERO V. DR. CYRIL ANTON BALASURIYA

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.,
SALEEM MARSOOF, P. C. J., AND
JAGATH BALAPATABENDI, J.
S.C. APPEAL NO. 9/2002
S.C. (SPL) LEAVE TO APPEAL NO. 242/2001
C.A. (REVISION) 1235A/2000
OCTOBER 18TH, 2007
JULY 20TH, 2009

Civil Procedure Code – Section 328 – Specific remedy provided by law to a person who is in possession of property on a right independent of judgment – Debtor who is dispossessed in execution of a decree – Section 329 – Effect of order made under Section 328 – No appeal shall lie against any party other than judgment debtor - Decree a nullity – Does Revision lie?

The Appellant obtained an *ex-parte* Decree in the District Court against the 1st and 2nd Defendants in respect of the land in dispute. Thereafter, a writ of possession was issued by the District Court, and the Fiscal had handed over the premises in suit to the Appellant.

Subsequently, the Respondent had filed a Petition under Section 328 of the Civil Procedure Code, claiming *inter alia* that he was not a party to the said action in the District Court and prayed *inter alia* that he be restored to possession of the premises in question. After an inquiry, the Additional District Judge by his order dated 14.09.2000 dismissed the Respondent's application.

The Respondent had filed a Revision application against the said Order in the Court of Appeal. The Appellant contended that to that date the Respondent had not filed a case in the District Court against the Appellant. The Appellant further contended that the Respondent had no right to file a Revision application in the Court of Appeal to canvass

an order made in terms of Section 328 of the Civil Procedure Code as he was provided with an alternative remedy under Section 329 of the Civil Procedure Code. The Court of Appeal made order on 12.11.2001 allowing the Respondent's application.

The Supreme Court granted special leave to appeal against the aforesaid order of the Court of Appeal on the following three questions:

(1) Whether a petitioner in an application made under Section 328 of the Civil Procedure Code, against whom an order has been made by the District Court, is entitled to canvass the correctness of the order made by the District Judge by way of an application in revision, in the Court of Appeal?

(2) Whether in any event the Court of Appeal could in the exercise of revisionary jurisdiction in relation to an inquiry under Section 328 of the Civil Procedure Code hold that the Decree entered in the case against one of the parties is void?

(3) Whether in an inquiry under Section 328 of the Civil Procedure Code the Court could hold that the Decree entered against the defendants is void?

Held:

(1) It is apparent that the decision of the District Court was not only erroneous but also amounts to a miscarriage of justice. In such circumstances, notwithstanding the provisions contained in Section 329 of the Civil Procedure Code, the Court of Appeal is empowered to set right an erroneous decision of the District Court for the purpose of exercising due administration of justice and for such purpose could exercise its power of revision.

(2) When the need arises on situations, where no direct section could be found in the Civil Procedure Code, it is the duty of a Judge to base his decision on sound general principles, which are not in conflict with any other principles or with the intention of the Legislature.

(3) When the Respondent had been dispossessed due to a Decree which had been issued without serving summons to the 2nd defendant who was dead, such a Decree must be regarded as a nullity and

should be set aside. The Court is under a duty to exercise its inherent powers to repair the injury caused and to meet the ends of justice.

Cases referred to:

1. *H. S. Wattuhewa v. V.S.G. Guruge* – C.A. Application No. 141/90 – C.A. Minutes of 15.10.1990
2. *Letchumi v. Perera and another* – (2000) 3 Sri L. R. 151
3. *Mariam Beebee v. Seyed Mohamed et.al* – 69 CLW 34
4. *Rustom v. Hapangama and Co.* – (1978/79) 2 Sri L.R. 225
5. *Sinnathangam v. Meeramohaideen* – (1958) 60 N.L.R. 393
6. *Rasheed Ali v. Mohamed Ali* – (1981) Sri L.R. 262
7. *Victor de Silva et.al v. Jinadasa de Silva et.al.* – (1964) 68 N.L.R. 45
8. *Sirinivasa Thero v. Sudassi Thero* – (1960) 63 N.L.R. 31
9. *Jane Nona v. Jayasuriya* – (1986) C.A.L.R. 315
10. *Mowjood v. Pussadeniya* – (1987) 2 Sri L.R. 287
11. *Ariyananda v. Premachandra* – (2000) 2 Sri L.R. 218
12. *Wickramanayake v. Simon Appu* – (1972) 76 N.L.R. 166
13. *Sivapathalingam v. Sivasubramaniam* – (1996) Sri L.R. 378

APPEAL from the judgment of the Court of Appeal.

Navin Marapana for Plaintiff-Respondent – Respondent-Appellant

Romesh de Silva, P.C., with *Saumya Amarasekera* for Petitioner – Petitioner –Respondent.

Cur.adv.vult.

March 02nd 2010

DR. SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 12.11.2001. By that judgment, the Court of Appeal set aside the order made by learned District Judge on 14.09.2000 and allowed the appeal of the petitioner-petitioner-respondent (hereinafter referred to as the respondent). The plaintiff-respondent-respondent-appellant (hereinafter referred

to as the appellant) sought special leave to appeal from this Court, which was granted on the following questions:

1. Whether a petitioner in an application made under Section 328 of the Civil Procedure Code, against whom an order has been made by the District Court, is entitled to canvass the correctness of the Order made by the District Judge by way of an application in Revision, in the Court of Appeal?

2. Whether in any event the Court of Appeal could in the exercise of revisionary jurisdiction in relation to an inquiry under Section 328 of the Civil Procedure Code hold that the Decree entered in the case against one of the parties is void?

3. Whether in an inquiry under Section 328 of the Civil Procedure Code the Court could hold that the Decree entered against the defendants is void?

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

The appellant obtained an ex-parte Decree in the District Court of Colombo against the 1st and 2nd defendant in respect of the land in dispute. On 10.01.2000, the Fiscal had handed over possession of the said premises to the appellant. The Fiscal had stated in his report that when he visited the land in dispute, none of the defendants had been present and after some time the substituted 1E defendant had arrived. When the Decree was explained to him, the substituted 1E defendant had consented to the handing over of possession to the appellant and took away his belongings from the premises in question (A1).