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DIGEST

and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways".

In view of the foregoing, I hold that the impugned Revenue Protection Order marked P6, which was subsequently approved by Parliament is not open to attack on the ground that it imposes an import duty on a discriminating basis amongst different countries as the State has a wide discretion in selecting persons, countries or objects it will tax.

If the contention of the Petitioner Company is that it has paid Duty in excess of what was due, then it should have resorted to the provisions contained in Section 18 of the Customs Ordinance which deals with the manner in which any excess payment be refunded. The Petitioner, without resorting to the provisions of Section 18 of the Customs Ordinance cannot seek an Order of Mandamus from this Court for a refund. It has been constantly held by this Court that mandamus is not granted at the fancy of mankind. Since the Petitioner Company has failed to make any claim for a refund as provided in Section 18 of the Customs Ordinance, the Writ of Mandamus sought is also refused. For the reasons stated, the judgment of the Court of Appeal dated 25.03.2003 is affirmed. The appeal is dismissed in all the circumstances without costs.

SARATH N. SILVA C. J. - I agree

P. A. RATNAYAKE J. - I agree

Appeal dismissed.

RUPATHUNGA
vs
ATTORNEY GENERAL AND ANOTHER

COURT OF APPEAL
RANJITH SILVA, J.
SALAM, J.
CA PHC APN 85/08
HC PANADURA NO. 2035
FEBRUARY 13, 2009

Bail Act No. 30 of 1997 - Section 14, Section 14 (a) Section 14 (1) - Section 15 Cancellation of bail - Circumstances? - Cancellation capricious, arbitrary, unjust?

The accused-petitioner was released on bail by the Court of Appeal. When the main case came up for trial an application was made by the State seeking an order of cancellation of bail in view of the fact that he had committed another offence. The bail order was cancelled. It was contended in the revision application filed by the accused-petitioner that, the High Court has not given any reason for the cancellation of the already existing bail order.

Held:

Per Ranjith Silva, J

> "It is pathetic to note that the High Court Judge has not even been mindful of Section 14 and Section 15 of the Bail Act when she made the impugned order. These are orders which could be founded as capricious, arbitrary and unjust . . . . . what shocks the conscience of this Court is that the High Court Judge has not even cared to provide an opportunity to the accused, at least to show cause as to why bail should not be cancelled instead has considered some extraneous matters which are not even covered by Section 14 and has rushed to the conclusion that bail should be cancelled which I shall say is indecent".

(1) With regard to the cancellation of bail the relevant Section of the Bail Act is Section 14 and under Section 15 - Court has to give reasons in writing for such refusal or cancellation or variation.

APPLICATION in revision from an order of the High Court of Panadura.

Dr. Ranjith Fernando for petitioner.
Damithini de Silva for respondent.

Cur.adv.vult

February 13, 2009

RANJITH SILVA, J.

This is an application made in revision in a matter concerning bail arising from an order made by the learned High Court Judge dated 24.09.2007

Document marked as 'g' was produced along with the petition to show that the particular accused was released on bail by this Court, in a murder case bearing No. HC Panadura 93/2007 marked as 'f'.

We notice that State Counsel is not objecting to this application for revision which is a matter of significance.

When the main case came up before the learned High Court Judge on 24.09.2007 for trial an application for a date was made on behalf of counsel for the accused Mr. Ajith Perera, Attorney-at-Law on the grounds of ill health and that application had been allowed. Thereafter the learned State Counsel on the same day had made an application before the learned High Court Judge seeking a cancellation of bail ordered on the accused, in view of the fact that he had committed another offence. (Vide. "F")

At this stage the Court notes that it is in respect of that other offence namely the murder case that this Court has made order granting bail on the accused as indicated by the document marked 'f'. On a perusal of the impugned order, at page 26, the learned High Court Judge has purported to

give her reasons for cancelling bail. The reasons assigned by the learned High Court Judge is that, as the accused was unable to remember the names of his sureties, she was proceeding to cancel the bail order. Other than that there isn't a single reason assigned by the learned High Court Judge for cancelling the existing bail.

With regard to the cancellation of bail, the relevant Section of the Bail Act is Section 14. According to Section 14, (a) Court can either refuse or cancel already existing bail for the following reasons.

Section 14 (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 cause of justice; or

(iii) Commit an offence while on bail; or that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

Section 15 of the Bail Act states *that where a Court refuses to release on bail any person suspected or accused of, or being concerned in committing or having committed any offence or cancels a subsisting order releasing a person on bail or rescinds or varies an order cancelling a subsisting order it shall state, in writing the reasons for such refusal, cancellation or rescission or variation as the case may be.* Therefore, it is the bounden duty of a High Court Judge to state reasons when she is cancelling an already existing bail order. The reasons are set out in Section 14 and it is for those reasons that an already existing bail order could be cancelled. On a perusal of this impugned order we find that she had not given any reason as enumerated in Section 14. Apart from what has already been stated what shocks the conscience of this Court is

that this particular learned High Court Judge had not even cared to provide an opportunity to the accused, at least to show cause as to why bail should not be cancelled instead has considered some extraneous matters which are not even covered by Section 14 and has rushed to the conclusion that bail should be cancelled which I should say is indecent. Although it is pertinent to note that the same learned High Court Judge on a subsequent date namely on 11.07.2008 when an application was made to reconsider the cancellation of bail, has made an order wherein she has stated that when she ordered a cancellation of bail she acted under Section 14 (1)(a)(3) of the Bail Act whereas she had not even mentioned that particular Section in her impugned order dated 24.09.2007. Having completely failed to refer, even in passing, to Section 14 of the Bail Act or any provision of the Bail Act, on 11.07.2008 she has stated in her order that she considered the application for bail under Section 14(1) of the Bail Act. It is pathetic to note that the learned High Court Judge has not even been mindful of Sections 14 and 15 of the Bail Act when she made the impugned order. These are orders which could be branded as capricious, arbitrary and unjust. Therefore, we set aside the said impugned order and the learned High Court Judge is directed to forthwith release the accused from remand custody. **We also direct the registrar of this Court to forward copies of this order to the Secretary to His Lordship Hon. Chief Justice and the Secretary to the Judicial Services Commission along with exhibits marked as 'f' and 'g'.**

Acting in revision we set aside the impugned order of the learned High Court Judge of Panadura dated 24.09.2007.

SALAM, J. - I agree

Application allowed.

GUNASINGHE
vs
PODIAMMA AND OTHERS

COURT OF APPEAL
ABDUL SALAM, J.
CA 1782/2002 (REV.)
DC KULIYAPITIYA 7466/P
AUGUST 25, 2008

Partition Law - Part of a larger land partitioned? - Discrepancy in the extent in the plaint and in the preliminary plan - Investigation of title - Duty of Court - Proof of original ownership - Degree of proof? - Lis pendens.

The petitioner seeks to revise the judgment on the ground that, the District Court had failed to take into consideration the fact that what was sought to be partitioned was a part of a larger land, and the discrepancy in the extent of the subject matter in the plaint and the preliminary plan is about ¾ of an acre and therefore it cannot be treated as marginal or negligible and that the registration of the lis pendens being in respect of an extent of 3½ Acres, the action could not have proceeded without any amendment of the plaint.

Held:

(1) A perusal of the preliminary plan clearly shows that the boundaries of the subject matter as described in the said plan are identical to that of the boundaries set out in the deeds produced by the plaintiff and the land set out in the plaint.

(2) The indefinite or undefined eastern boundary on the preliminary plan would not necessarily mean that the land surveyed for purpose of the action is only a portion of a larger land.

Per Abdul Salam, J

> "It is trite law that proof of original ownership of a land is not always placed at a very high degree and as such the plaintiff should have been shown some leniency relating to the proof of original ownership.

APPLICATION in Revision from an order of the District Court of Kuliyapitiya.

Cases referred to:-

1. *Brampy Appuhamy vs. Mendis Appuhamy* - 60 NLR 337
2. *W. Uberis vs. Jayawardane* - 62 NLR 217
3. *K. M. G. D. Dias vs. Kariyawasam Majuwana Gamage* - CA 897/92

Dr. Jayantha de Almeida Gunaratne PC with *Ayendra Wickremasekera* and *Lasith Chaminda* for petitioner.

M. C. Jayaratne with *N. Senaratne* for 1st and 2nd respondents.

Cur.adv.vult

February 10, 2009

ABDUL SALAM, J.

This is an application made in revision to have the judgment and interlocutory decree dated 2nd May 2002 set aside and/or revised or to have the plaintiffs action dismissed and/or for an order directing a retrial of the case.

The plaintiffs instituted the partition action in respect of a land called Mahawatta alias Innawatta alias Erumaliyadda which was depicted for the purpose of the partition action by preliminary plan No. 620 prepared by R. A. Navaratne, Licensed Surveyor.

Admittedly, the subject matter is depicted as lots 1 and 2 in plan No. 620 aforesaid. The learned district Judge having examined the deeds produced by the parties and the admissions made by them as regards the identity of the corpus, arrived at the conclusion that the subject matter of the partition action comprises of lots 1 and 2 depicted in plan No. 620.

Quite contrary to the admissions recorded at the instance of the parties, the petitioner now seeks to resile from

the agreement and argue that the learned District Judge has failed to take into consideration the fact that what was sought to be partitioned was a part of a larger land. Hence, the petitioner contends that the District Judge ought to have proceeded to take steps to have the correct subject matter depicted in reference to a different survey plan and not entered an interlocutory decree to partition the land.

The petitioner has urged that the discrepancy in the extent of the subject matter as given in the plaint and the preliminary plan is about ¾ of an acre and therefore cannot be treated as a marginal or negligible inconsistency. It is further submitted on behalf of the petitioner that the registration of the *lis pendens* being in respect of an extent of 3 ½ acres, the action could not have proceeded without any amendment of the plaint and a fresh *lis pendens.* The learned President's Counsel of the petitioner relies on the judgments of *Brampy Appuhamy vs Mendis Appuhamy*(1) *W. Uberis vs. Jayawardena*(2) and *K. M. G. D. Dias vs. Kariawasam Majuwana Gamage*(3) to drive home his point that the learned district judge should not have entered interlocutory decree to partition the subject matter.

In the case of *Brampy Appuhamy vs Mendis Appuhamy (Supra)* the corpus sought to be partitioned was described in the plaint as a land about 6 acres in extent and the communication issued to the surveyor was to survey a land of that extent. However the surveyor could survey a land of only 2 acres and 3 roods. Interlocutory decree was entered in respect of the land of 2 acres and 3 roods, without any question being raised by the parties as to the extensive inconsistency between the extent given in the plaint and that which was shown in the plan made by the surveyor. It was held that the court had acted wrongly in proceeding to trial in respect of what appeared to be a portion only of the land described in the plaint.

In the case of *W. Uberis vs. Jayawardena (supra)* the plaint in the partition action was amended so as to substitute a new corpus for the one described in the first plaint and it was held that a fresh lis pendens would be necessary to maintain the action.

In the case of *K. M. G. D. Dias vs Kariawasam Majuwana Gamage (Supra)* the plaintiff sought to partition a land in extent 4 acres 3 roods 12.1 perches being in extent after excluding 5 acres 4.9 perches which was acquired by the State from and out of a larger land in extent 9 acres 3 roods 17 perches. The *lis pendens* registered was in respect of a larger land in extent 9 acres 3 roods 17 perches, which was inclusive of the extent of 5 acres 4.9 perches that formed the portion said to have been acquired by the State. The description of the land even in the plaint was that of the larger land that existed prior to the acquisition. It was held that the District Judge had committed a cardinal error in ordering a partition in respect of the land which is a portion of the larger land.

The facts however in this case are quite different. The plaintiff in his plaint sought to partition a land in extent of about 3½ acres the boundaries of which are described to be on the North, East and West by the lands belonging to Mudalihamy Mahathmaya and others and on the South by lands owned by Sundara Bandara and others. At this stage it is of paramount importance to note the boundaries described in the preliminary plan No. 620. A perusal of the said plan clearly shows that the boundaries of the subject matter as described in the said plan are identical to that of the boundaries set out in the deeds produced by the plaintiff and the land set out in the schedule to the plaint.

Even the document marked P1 sets out the boundaries of the subject matter as the lands belonging to Mudalihamy

Mahathmaya and others on the North, East and West and by lands owned by Sundara Bandara and others on the South. Quite consistent with the boundaries given in P1, the documents marked as P2, P3, P4, P5 and P6 describe the boundaries of the subject matter in the same manner as has been described in P1 and also in the plaint. The lis pendens also contain the identical boundaries given in the plaint.

In the circumstances, the subject matter of the partition action cannot be said to be a portion of a larger land as has been contended by the petitioner. The indefinite or undefined eastern boundary on the preliminary plan would not necessarily mean that the land surveyed for purpose of the action is only a portion of a larger land, as the petitioner had attempted to make out. Consequently, the discrepancy cannot be considered as being so material, particularly in view of the unequivocal admissions made by the petitioner and other parties as to the identity of the corpus.

The learned trial Judge in his judgment has carefully considered the contents of the deeds produced on behalf of the petitioner prior to his concluding that the land dealt in the deeds produced by them are not applicable to the subject matter. Even as regards the original owner referred to by the petitioner the learned District Judge has given cogent reasons, before he rejected the version of the petitioner. According to the learned District Judge the land referred to in the deeds produced by the petitioner is different from the land sought to be partitioned by the plaintiff. Further the surname of Punchirala referred to by the petitioner is totally different from the surname of Punchirala referred to in the plaint as the original owner.

It is trite law that proof of original ownership of a land is not always placed at a very high degree and as such the plaintiff should have been shown some leniency relating

to the proof of original ownership. In any event 14th to 17th defendants have failed to establish the devolution of title to the corpus and also failed to prove prescription accompanied by an element of ouster by an overt act.

For the foregoing reasons it is my view that the revision application of the petitioner should fail. Hence I make order accordingly.

I make no order as to costs.

Application dismissed.

SIVAYANAMA AND ANOTHER
vs
PEOPLE'S BANK AND 7 OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
N. G. AMARATUNGA, J. AND
SALEEM MARSOOF, J.
S.C. APPEAL NO. 71/2007
S. C. (SPL) L. A. NO. 218/2006
C. A. NO. 592/2001
D.C. MATALE NO. 4349/L
MAY 16TH, 2008

Fair hearing - A Court ought not to make an order without hearing and determination of the matter before Court - Auti alteram partem Rule.

The Plaintiff-Appellants-Appellants appealed against the order of the Additional District Judge of Matale dated 26.06.2001. By that order the learned Judge upheld the preliminary objections relating to jurisdiction raised by the 1st Respondent Bank and dismissed the action. The Plaintiffs-Appellants appealed against the aforesaid order of the Additional District Judge.

When the appeal came up for hearing in the Court of Appeal, the 1st Respondent Bank raised a preliminary objection on the ground that the impugned order of the Additional District Judge was not an appealable order.

The Court of Appeal having heard the submission only on the preliminary objection raised by the 1st Respondent-Bank dismissed same but went on to dismiss the appeal on its merits without hearing the Appellants on the main question raised in the petition of appeal. No opportunity had been given to either party to make their submissions on the merits of the appeal.

Held:

(1) A decision of a Court of Law should be based on a fair hearing of the matters before Court and cannot contain orders of issues where parties were not given an opportunity to be heard.

Per Dr. Shirani Bandaranayake, J.

> "The decision of the Court of Appeal, which had decided on the merits of the appeal cannot be accepted, as it had not observed the rudimentary norms, which are applicable in hearing an appeal".

Cases referred to:-

1. *Ranasinghe vs. Ceylon State Mortgage Bank* 1981 1 S.L.R. 121.
2. *Siriwardena vs. Air Ceylon Limited* 1984 1 Sri L.R. 286.
3. *White vs. Brunton* (1984) 2 All E.R. 606.
4. *Ridge vs. Baldwin (1964)* A.C. 40
5. *Anisminic Ltd. vs. Foreign Compensation Commission* (1969) 2 A.C.147
6. *A.G vs. Ryan* [1980] A.C. 143
7. *State Graphite Corporation vs. Fernando* 1982 2 Sri L.R. 590.
8. *Board of Education vs. Rice* (1911) A.C. 179.

APPEAL from judgment of the Court of Appeal.

A. R. Surendran, PC with *K. V. S. Ganesharajan, Nadarajah Kandeepan* and *Ms. Dharshini* for Plaintiffs-Appellants-Appellants.

Manohara de Silva, PC with *D. Weeraratne* for 1st Defendant-Respondent- Respondent.

Cur. adv.vult

May 13, 2009

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 31.07.2006. By that judgment, the Court of Appeal had held that the order made by the learned District Judge dated 20.06.2001 is a final order as it had disposed of the rights of the parties, and had dismissed the appeal filed by the plaintiffs-appellants-appellants (hereinafter referred to as "the appellants"). The appellants filed a special leave to appeal application before this Court against the order made by the Court of Appeal for which special leave to appeal was granted by this Court on the following question:

"Is the judgment of the Court of Appeal which proceeded to decide the appeal on its merits having directed the parties to file written submissions only on the preliminary objection raised by the 1st respondent Bank without giving the appellants an opportunity of being heard on the merits of their appeal, in violation of the principles of natural justice?"

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

The 1st and 2nd appellants are two brothers, who are the owners of the land and premises, which is the subject matter of this appeal. The 1st defendant-respondent-respondent (hereinafter referred to as the 1st respondent) is the People's Bank and the 2nd defendant-respondent-respondent (hereinafter referred to as the 2nd respondent) had been the Authorized officer of the 1st respondent Bank. The 3rd to 8th defendants-respondents-respondents (hereinafter referred to as the 3rd to 8th respondents) were the 3rd to 8th defendants of the D. C. Matale case No. 4349/L.

The appellants' father had been the owner of the land and premises bearing No. 300, Main Street, Matale for over 30 years and had been in possession and occupation of the place in question during that period. By Deed of Gift No. 3397, dated 02.05.1990 attested by S. M. Haleemdeen, the appellants became the owners of the said land and premises and they have been in possession and occupation of the said land and premises for well over 25 years.

In February 1991, The appellants received undated notices from the 1st respondent Bank, issued in terms of Section 72(5) of the Finance Act, No. 11 of 1963, as amended, with a copy to one Suppammal, which stated *inter alia*, that pursuant to a decision made by the Board of Directors of the 1st respondent Bank acting under the Finance Act, No.

11 of 1963 as amended, the land and premises in suit was vested in the 1st respondent Bank on the publication of an order in the Government Gazette of 11.07.1979. The said notices requested the appellants to hand over the land in suit on 15.03.1991 to the 2nd respondent.

The appellants thereafter instituted action bearing No. 4349/L in the District Court of Matale, praying *inter alia*,

1. For a declaration against the 1st respondent Bank that the property in suit is not liable to be acquired under the provisions of the Finance Act, No. 11 of 1963;

2. For an order declaring that the appellants have a right to possession and ownership of the land and premises in suit;

3. For an injunction restraining the 1st respondent Bank from evicting the appellants from the said land and premises.

In the said plaint, the appellants averred the circumstances under which they and their predecessors in title became entitled to the said land and premises and produced their documents of title along with the plaint. The 1st respondent Bank had filed its statement of objections and answered stating, *inter alia*, that pursuant to a vesting order being published in the Gazette dated 11.07.1979, the said land and premises had vested in the 1st respondent Bank. Accordingly the 1st respondent Bank had pleaded that it was entitled to serve the said notice in terms of Section 72(5) of the Finance Act and evict the appellants from the said land and premises.

When the said case came up for inquiry before the learned Additional District Judge, Matale on 20.06.2001 learned

Counsel for the 1st respondent Bank had raised a preliminary issue pertaining to the jurisdiction of the District Court to hear and determine the said action. The said preliminary issue was based on the provisions of Section 70(B)5 of the State Mortgage and Investment Bank Act, which purports to oust the jurisdiction of Courts in respect of certain steps taken by the People's Bank under the provisions of the said Act.

Both parties had thereafter made submissions on the said preliminary issue. The learned Additional District Judge of Matale, by his order dated 20.06.2001, upheld the preliminary objection relating to jurisdiction raised by the 1st respondent Bank and dismissed the said action No. 4349/L stating, *inter alia,* that in view of the finality clause contained in the statute, the Court did not have jurisdiction to hear and determine the said action.

Thereafter, the appellants came before the Court of Appeal against the said order of the learned Additional District Judge of Matale dated 20.06.2001, *inter alia,* on the ground that the failure of the learned Additional District Judge to follow the judgment of the Supreme Court in the case of *Ranasinghe v. Ceylon State Mortgage Bank*(1) was erroneous inasmuch as the learned Additional District Judge was not entitled to ignore a binding judgment of the Supreme Court merely on the basis that the facts of the instant case were different from the facts of *Ranasinghe v. Ceylon State Mortgage Bank (supra).*

When this appeal came up before the Court of Appeal for hearing on 23.08.2004, Counsel for the 1st respondent Bank raised a preliminary objection on the basis that the appellants could not maintain the said appeal as the impugned order of the District Court of Matale was not an appealable order.

The Court of Appeal had reserved order on the preliminary objection. Thereafter by its order dated 31.07.2006, the Court of Appeal had dismissed the 1st respondent Bank's preliminary objection and had held that the appellants were entitled to a right of appeal from the order of the Court of Appeal and having heard submissions only on the preliminary objection and after having reserved its order only on the preliminary objection had proceeded to adjudicate on the merits of the case as well, and had dismissed the appeal without hearing the appellants on the main question raised in the application.

Having set out the facts, let me now turn to consider this appeal.

The contention of the learned President's Counsel for the appellants was that when the appeal came up for hearing before the Court of Appeal on 23.08.2004, learned President's Counsel for the 1st and 2nd respondents had raised a preliminary objection that the order against which the appeal had been lodged was not a final order, but only an interlocutory order and therefore the appellants could not have lodged an appeal against the said order. However, irrespective of the fact that both Counsel had been heard only on the preliminary objections raised by the learned President's Counsel for the respondents, the Court of Appeal had dismissed the appeal on its merits.

Learned President's Counsel for the 1st and 2nd respondents had not disputed the contention of the learned President's Counsel for the appellants.

In fact the judgment of the Court of Appeal dated 31.07.2006 clearly supports the contention of the learned President's Counsel for the appellants, as it had stated thus:

"When the Appeal came up for hearing before this Court on 23.08.2004, Counsel for the Respondent raised a preliminary objection that the order against which this Appeal has been lodged is not a Final Order, but only an Interlocutory Order. He further submitted that thus the Appellants could not have lodged this Appeal against the aforesaid Order. **This Court directed the parties to tender Written Submissions on the aforesaid Preliminary Objections"** (emphasis added).

Thereafter the Court of Appeal had considered the provisions in Section 754(5) of the Civil Procedure Code, Section 71(3) of the Finance Act and Section 22 of the Interpretation Ordinance and the principle laid down in the decision in *Siriwardena v. Air Ceylon Ltd.*[(2)] *White v Brunton* and *Ranasinghe v. Ceylon State Mortgage Bank (supra).* Thus a careful reading of the judgment of the Court of Appeal clearly indicates that it was not restricted to the preliminary objection raised by the learned President's Counsel for the 1st and 2nd respondents. The final paragraph of the judgment, which reads as follows, clearly indicates this position,

"In *Ranasinghe v. State Mortgage Bank* the Court held that notwithstanding the provisions of the Interpretation Ordinance, Declaratory relief is available against the Bank where there is a total lack of jurisdiction. Hence the learned District Judge's decision is correct in law. It is my view that the order made by the learned District Judge on 20.06.2001 is a Final Order as it finally disposed of the rights of parties. Although on a Preliminary issue there exists a right of appeal, an Appeal would be futile for the aforesaid reasons. Hence for the aforesaid reasons I see no reason to interfere with the Order of the learned District Judge dated 20.06.2001,

and hence I dismiss the appeal filed by the Appellants without costs."

It is therefore quite evident that although both parties were heard only on the preliminary objections and both parties had filed their written submissions only on the preliminary objections raised by the learned President's Counsel for the 1st and 2nd respondents, the Court of Appeal had decided the matter not on the basis of the preliminary objection so raised, but on the merits of the appeal.

It is an accepted fact that 'a man's defence must always be fairly heard' (Prof. H. W. R. Wade, Administrative Law, 9th edition, p. 440). A fair hearing, which is regarded as 'a rule of universal application' (*Ridge v Baldwin*[4] has been referred to by Lord Loreburn in his oft -repeated words, as 'a duty lying upon every one who decides anything' (*Anisminic Ltd. v Foreign Compensation Commission* [5] *A. G. v. Ryan* [6].

The said need to give a proper hearing prior to the determination of the matter in issue was considered in *State Graphite Corporation v Fernando*[7] where it was stated that,

> "The Court of Appeal can dispense with a hearing on granting leave *ex mero motu.* In other cases it seems to me where a party wishes to be heard, or the issues involved are such that the Court ought not to make an order without hearing and determination of the application, would generally require a hearing, however summary or brief that hearing may be."

Considering the facts and circumstances of this appeal, it is quite clear that both parties had made their submissions only on the preliminary objection raised by the learned

President's Counsel for the 1st and 2nd respondents. No opportunity had been given to either party to make their submissions on the merits of the appeal. It is not disputed that the arguments were confined only to the said preliminary objections. It is also not disputed that the judgment of the Court of Appeal dated 31.07.2006, whilst as stated earlier, referring to the preliminary objections so raised had not ruled on the said preliminary objections, but had considered the merits of the appeal and had dismissed it.

The Court of Appeal was correct in its approach when it decided to first consider the preliminary objection taken by the learned President's Counsel for the 1st and 2nd respondents. However, what it should have done thereafter was to consider the said objections and make order on the said preliminary objection. Therefore the decision of the Court of Appeal, which had decided on the merits of the appeal cannot be accepted, as it had not observed the rudimentary norms, which are applicable in hearing an appeal. A decision of a Court of law should be based on a fair hearing of the matters before the Court and cannot contain orders of issues, where parties were not given an opportunity to be heard.

The generality of the application of the maxim *audi alteram partem,* commonly known as the rule that no man is to be condemned unheard, and its flexibility in its operations were succinctly pronounced by Lord Loreburn L. C. in the well known decision of *Board of Education v. Rice*[8], where it was stated that it applied to 'everyone who decides anything'. As stated by Loreburn L. C. in *Rice(supra)*

> "I need not add that in doing (deciding) either, they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

On a consideration of all the aforementioned material of the appeal and for the aforementioned reasons, the question on which special leave to appeal was granted is answered in the affirmative.

This appeal is accordingly allowed and the judgment of the Court of Appeal dated 31.07.2006 is set aside. The Court of Appeal is directed to hear this case *de novo*. Since the appeal against the order of the District Court was dismissed on the merits after considering the preliminary objections, respondents, if they so desire, could raise the said preliminary objection to the appeal in the Court of Appeal.

There will be no order as to costs.

AMARATUNGA, J - I agree

MARSOOF, J. - I agree.

Appeal allowed.

Court of Appeal directed to hear case de novo.

CAPTAIN NAWARATHNA
vs
MAJOR GENERAL SARATH FONSEKA AND 6 OTHERS

SUPREME COURT
SARATH N. SILVA, C.J.
SHIRANEE TILAKAWARDANE, J. AND
P. A. RATNAYAKA, J.
S.C. APPEAL NO. 43/07
SC SPL L.A. NO. 91/2007
C.A. WRIT NO. 2402/2004
OCTOBER 8TH, 2008

Army Act No. 17 of 1949 Section 40, - Section 107 and 129(1) - Conduct prejudicial to the good order and to military discipline which are military offences - Bias - Test for bias - Real likelihood of bias or reasonable suspicion of bias - Writ of Certiorari - Availability - Invalid exercise of power and valid exercise of power containing an error of law on the face of the record.

The petitioner who is a captain of the Sri Lanka Army, sought a grant and issue of a Mandate in the nature of Writ of Certiorari from the Court of Appeal to quash the decisions to dismiss the petitioner from the Army and to forfeit the petitioner's seniority, and also sought a grant and issue of a Mandate in the nature of Writ of Prohibition prohibiting the respondent from conducting further summary trial in respect of the same charge against the petitioner.

The Court of Appeal set aside the recommendation made by the 1st respondent to discharge the petitioner from the Army but it rejected the petitioner's application for a Writ of Certiorari quashing the decision to forfeit the petitioner's seniority in 109 numbers among others.

The Supreme Court granted the petitioner special leave to appeal against the 2nd part of the order of the Court of Appeal, refusing to grant a Writ of Certiorari to quash the decision to forfeit the petitioner's seniority.

Held:

(1) Where the petitioners denies that rules of natural justice have not been complied with and the respondents assert the contrary, a

petitioner can do no more than deny the compliance with the rules of natural justice and the burden is on the respondents to establish that rules of natural justice have been complied by producing an acceptable record of proceedings. In the absence of production of such a record of proceedings the Court would not have any option other than to accept the petitioner's version that there has been procedural impropriety leading to a denial of the rules of natural justice.

(2) When an allegation of bias is made the test is whether the facts, as assessed by Court, give rise to a real likelihood of bias.

Cases referred to:-

1. *Mohamed Mohideen Hassan Vs. N. S. Peiris* - (1982) 1 S.L.R. 195.
2. *W. D. Simon v. Commissioner of National Housing* - 75 N.L.R. 471.
3. *Metropolitan Properties Co. (F. G. C.) V. Lannon* - (1969) 1 Q. B. 577
4. *Kumarasena V. Data Management Systems Ltd.,* - (1987) 2 S. L. R. 190
5. *Dimes v. Grand Junction Canal* (1852) 3 H.L.C. 759.
6. *R. V. Sussex Justices ex. p. McCarthy* - (1924) 1 K. B. 256

APPEAL from the judgment of the Court of Appeal.

J. C. Weliamuna for Petitioner.

Janak de Silva, S. S. C. for Respondents.

Cur.adv.vult.

May 28, 2009

P. A. RATNAYAKE, J.

This is an appeal from a judgment of the Court of Appeal. The Petitioner in this case who is a Captain of the Sri Lanka Army, filed an application in the Court of Appeal seeking the grant and issue of a Mandate in the nature of a Writ of Certiorari quashing the decisions to dismiss the petitioner from the Army and to forfeit the Petitioner's seniority in

109 numbers and the grant and issue of a Mandate in the nature of Writ of Prohibition prohibiting the Respondent from conducting a further summary trial in respect of the same charge for which the petitioner has been purportedly found guilty.

According to the pleadings before Court, the Petitioner has joined the Sri Lanka Army on 15.07.1996 as a Cadet Officer. After 2 years training he has passed out as a Second Lieutenant and was promoted to the rank of Lieutenant on 23.04.2000 and thereafter to the rank of Captain on 01.01.2004. He was attached to the 'Singha Regiment' of the Sri Lanka Army from the time he passed out as a 2nd Lieutenant.

It was submitted on behalf of the Petitioner that the 2nd Respondent informed him on 10.05.2004, to appear before the 1st Respondent on the next day at 9.00 a. m. When he appeared before the 1st Respondent, accompanied by the 2nd Respondent at his office as directed, his then fiancée Ms. Rosika Chandrasena and her mother were present at the 1st Respondent's office. The 1st Respondent has submitted that the Petitioner has been summoned to inquire into the complaint made by the said Ms. Chandrasena and her mother. The petitioner had stated that he met Ms. Chandrasena in 1994 prior to joining the Sri Lanka Army and had been associating her as his fiancée since then. When inquired by the 1st Respondent, the Petitioner has admitted that he had an intimate affair with Ms. Chandrasena for over 10 years and that he had sexual intercourse with her on several occasions during the said period having promised to marry her, but he had informed her that he is not prepared to marry her. The 1st Respondent-submits that as the principle Staff Officer of the Sri

Lanka 'Singha Regiment' who is vested with general responsibility of maintaining good order and discipline among the officers and soldiers of his Regiment and also as a responsible senior Officer of the Sri Lanka Army, he explained to the petitioner the gravity of such an act. He had also expressed his view to the effect that when an Officer of the Army conducts himself in such a manner the confidence placed by the General Public on the Army will be lost and as a result of such conduct the reputation of the Army would suffer. At this stage, the Petitioner having discussed the issue with Ms. Chandrasena has voluntarily informed the 1st Respondent that he would take steps to marry Ms. Chandrasena within a period of 6 months. In addition he had voluntarily given in writing to the 2nd Respondent an undertaking to marry Ms. Chandrasena within 6 months from 11.05.2004. A copy of this undertaking has been produced to the Court of Appeal by the 1st Respondent marked as '1R1'.

The petitioner's position is that the letter containing the undertaking to marry Ms. Chandrasena was given based on the direction of the 1st Respondent to hand over such a letter and that he had no option but to hand over a letter to that effect. The Petitioner further states that thereafter his relationship with Ms. Chandrasena was not amiable and accordingly he had informed her on 23.08.2004 that he would not marry her under any circumstances.

When this matter was brought to the notice of the 1st Respondent, he had convened a Court of Inquiry to inquire into the said incident in terms of Army Court of Inquiry Regulation 1952 on the basis that the Petitioner has acted in a manner prejudicial to the good order and military discipline which are military offences punishable under Sections 107 and 129 (1) of the Army Act No. 17 of 1949.

The Court of Inquiry was held and the proceedings of the Court of Inquiry were submitted to the Army Commander who is the 3rd Respondent who directed that disciplinary action be taken against the Petitioner. Thereafter a summary trial was held under Section 40 of the Army Act No. 17 of 1949. The petitioner and the 1st Respondent appear to differ on many aspects of this summary trial. The petitioner states that he was never served a charge sheet but, Respondents have taken up the position that he had been served a charge sheet. Discretion is given to the petitioner as to whether he elects to be tried by a Court Martial. The Petitioner states that he elected to be tried by a Court Martial, but the 1st Respondent states that the petitioner did not do so. The 1st Respondent states that evidence of 4 witnesses were led at the summary trial and the Petitioner was given an opportunity to cross examine the witnesses, but the petitioner has denied these facts. In a case such as this, where the Petitioner denies that the rules of natural justice have not been complied and the Respondents assert the contrary, a Petitioner can do no more than deny the compliance with the rules of natural justice and the burden is on the Respondents to establish that the rules of natural justice have been complied by producing an acceptable record of the proceedings. In the absence of production of such a record of proceedings the Court would not have procedural impropriety leading to a denial of the rules of natural justice by the denial of affording the Petitioner the option to elect a trial by court martial and the opportunity to cross-examine the witnesses.

The petitioner and the 1st and 2nd Respondents agree that the summary trial was held by the 1st Respondent and the Petitioner was found guilty by the 1st Respondent who imposed two punishments i.e. seniority forfeited by 109 number and recommended discharge from the Army.

After the matter was argued before the Court of Appeal, the Court of Appeal has set aside the recommendation made by the 1st Respondent to discharge the Petitioner from the Army. The Petitioner has appealed from the said judgment of the Court of Appeal, in so far as it rejected the Petitioner's application for a Mandate in the Nature of a Writ of Certiorari quashing the decision to forfeit the Petitioner's seniority in 109 numbers among others. This court has granted the Petitioner Special Leave to appeal on the following questions set out in paragraph 11(a), (b), (c), (d) and (e) of the Petition of Appeal and a further question of law raised by the Counsel for the Respondent.

Paragraph 11(a), (b), (c), (d) and (e) of the Petition of Appeal states as follows:

(a) "Did the Court of Appeal err in law, by declining to decide on the procedural impropriety of the Court of Inquiry and the Summary Trial on the basis that no prejudice being caused to the Petitioner?

(b) Did the Court of Appeal err in law when it failed to consider and/or examine the material before Court and/or rule on the question whether the intimate relationship of the Petitioner with Rosika Chandrasena was against the military discipline and Section 129 of the Army Act?

(c) Did the Court of Appeal err in law when it failed to consider the mala fide conduct of the 1st Respondent in the purported disciplinary procedure adopted against the Petitioner?

(d) Has the Court of Appeal erred in law in not setting aside the proceedings and findings of the Court of Inquiry and the Summary Trial?

(e) Did the Court of Appeal err in law when it failed to grant the reliefs sought for by the Petitioner?"

In paragraph 21(iv) of the affidavit, the 1st Respondent states as follows:-

"On the said direction, a charge sheet containing two charges under Section 129(1) of the Army Act, No. 17 of 1949 was framed against the Petitioner. On 15.11.2004 morning he was marched before the 2nd Respondent at the Regimental Headquarters, Ambepussa and served with a copy of the said charge sheet. He had been further informed to be ready to go to Colombo on the following day for the hearing of the said charges. On the following day, he was accompanied to Colombo and marched before me at about 2.00 p.m. on the said date for the purpose of hearing the said charges summarily under Section 40 of the Army Act No. 17 of 1949. There I read the charges to the Petitioner and he confirmed that he understood the charges when it was so clarified. Thereafter when the opportunity was granted to the Petitioner to plead, he pleaded not guilty to the said charge, but did not elect to be trial by a Court-Martial as claimed by the Petitioner in the said averments. Thereafter the four witnesses including Ms. Rosika Chandrasena and her mother were called upon to give oral evidence and the Petitioner was afforded the opportunity to cross-examine them. After following all the formalities required to be adopted at a Summary Trial in accordance with law, the Petitioner was found guilty on the evidence, and a punishment of forfeiture of seniority by 109 numbers on the Officer's Seniority List, 2004 was inflicted on him. Further it was recommended that his commission be withdrawn and he be discharged from the Army according to the direction of the Commander of the Army as mentioned in his opinion on the Court of Inquiry."