THE
Sri Lanka Law Reports

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

[2008] 1 SRI L.R. – PARTS 7 & 8

PAGES 169 - 224

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at Sarvodaya Vishva Lekha, Moratuwa.

Price : Rs. 40.00

DIGEST

ARBITRATION ACT 11 OF 1995 – Section 32 – Application under Section 32 to set aside award – Out of Time? – What is the time period? – Computation of the 60 day period? – Is it from the date of award or date of receipt of award?

Airport and Aviation Services (Sri Lanka) Ltd. v **Buildmart Lanka (Pvt.) Ltd.** 202

CIVIL PROCEDURE CODE – Section 605–Section 615 (2) – Matrimonial actions – Divorce in favour of the defendant – Alimony not awarded – Appeal – Could the decree nisi be made absolute – Could subsidiary order be made under Section 615(2)? – Who could make any application under Section 605?

Jayawardane v Priyashanie 184

CIVIL PROCEDURE CODE – Section 24, Section 87, – Section 145 – Trial – Plaintiff present – Attorney-at-Law absent – Dismissed – Inter parte or ex parte? Revision – Alternate remedy.

Karolis v Wickremaratne 193

CIVIL PROCEDURE CODE – Section 24, Section 27(1), Section 27(2) – Administration of Justice Law 44 of 1973 – Section 326(1) – Who could file a relisting application? – Is it only the registered attorney who has authority?

Jeevani Investments (Pvt) Ltd. v Wijesena Perera 207

CIVIL PROCEDURE CODE – Prosecution for Contempt of Court for violation of a Court Order – Sections 792-800.

Colombo International Nautical & Engineering College (Pvt) Limited (CINTEC) v Kaduwela Pradeshiya Sabha, Kaduwela and Three Others 213

CONSTITUTION ARTICLE 3, 4 – Article 12 (1), 126 – 13th Amendment – Sale of shares of Lanka Marine Services Ltd – Acting without lawful authority – Public Enterprise Reform Commission Act, No.1 of 1996 – Ostensible authority – Right to equality – Privatization – Bias – Rule of law – Locus Standi – Defence of time bar – Severability of executive action – Just and equitable relief under Article 126 – Provincial land list – Advice of Provincial Council necessary? – Petroleum Products (Special. Provisions) Act 63 of 2002.

Vasudeva Nanayakkara v Choksy and others (John Keells Case) 169
(Continued from parts 5 and 6)

CUSTOMS ORDINANCE – Forfeiture of a vessel under Sections 47 and 107 for non-payment of GST and NSL.

Vallibel Lanka (Pvt.) Limited v Director-General of Customs and three others.... 219

WRIT OF MANDAMUS – Land Acquisition Act – Section 38 (a), Section 39, Section 50 – Urban Development Projects (Special Provisions) Act 2 of 1980 – Section 4 – No steps taken for a long period of time – Jurisdiction of the Court of Appeal to entertain an application for a Writ of Mandamus – Public purpose not in existence – Could the land be divested?

Silva and Others v Minister of Lands and Land Development and Minor Exports and Others 187

However, since the bidders were put on "due diligence" to ascertain the truth of the statement in the RFP and since no commitment in this regard being made at the Pre Bid Conference as revealed in the preceding analysis, nothing would have turned only on this incorrect statement. The turning point was the communication that no additional payment will be due in respect of the land. Jayasundera had no authority whatsoever to make such a communication. Having given this assurance, Jayasundera avoided getting a separate assets and business valuations from the Chief Valuer and opted to get only a business valuation from the DFCC Bank. The Bank has quite correctly admitted before the Committee in Parliament that if a net asset valuation was requested they would have engaged the services of real estate valuer.

It is seen from the Report that the valuation of land has been done in a most cursory manner. Land has been referred to only as an item of "Residual value" with an "assumed present value." Acting on this bare statement and having carefully avoided getting a net assets valuation, Jayasundera now takes shelter for actions on the basis that the value of the land has been taken into account in the business valuation whereas he has without any authority and illegally given a prior assurance that no additional payment need be made for the land, before even the business valuation was requested.

In the Agreement to transfer P27 although the CPC is described as the Vendor, it is clear from the terms and conditions of the Agreement itself that the CPC has no title to the land. Hence the Government is brought in with an obligation to ensure the transfer of the land without any payment to JKH. The Agreement is so biased in favour of the JKH that it even includes a clause that the land should be transferred free and all associated costs should be borne by the CPC since the sale of 90% shares of LMSL to JKH was "structured" on such basis. It is significant that this "structuring" was only done in the unauthorized communication made by Jayasundera as evidenced by document Z18 and thereby an illegal obligation was cast on the Government of Sri Lanka to "ensure" the transfer of 8 Acres 2 Roods 21.44 perches of land that comes within the declared limits of the Port of Colombo free of any charge whatsoever, to JKH. The transfer has to be done within 1 year and

to add insult to injury LMSL (now owned by JKH) is entitled to enforce this Agreement by an "order for specific performance."

The alienation and disposition of the State land is a matter regulated in every step by law, and finally governed by the Constitution and cannot possibly be the subject matter of such an outrageous legal fiction as contained in the Agreement which was admittedly prepared by Jayasundera and the PERC.

JKH/LMSL pursued their "rights" under the Agreement P27 and the Government was compelled to seek extensions of the period of 1 year granted to "ensure" the transfer of the land. There were accordingly 4 amendments to the Agreement. Finally the then President made a Grant under the Public Seal of the Republic in respect of the land to LMSL under the State Lands Ordinance. The Grant P30 states that it is made in consideration of Rs. 1,199,362,500/= paid to the Republic by LMSL. It is common ground that this statement is incorrect. In fact no money was paid by LMSL to the Government. The amount is the sum as that paid on 06.09.2002 by JKH to CPC for the purchase of shares of LMSL. Hence the grant is bad in law solely on the ground of the misstatement as to consideration. Any Grant made by the Head of State under the Public Seal of the Republic should have the sanctity of truth in its contents. In normal circumstances a false statement as to a payment to the Government could not be made since, it has to be verified by the Treasury. But regrettably, that check is not there since by now the same Jayasundera who was responsible for the creation of the fiction in favour of the JKH that there would be no additional payment in respect of the land, is now ensconced as the Secretary to the Treasury.

The validity of the Grant P30 has also to be examined in the light of the provisions of the 13th Amendment to the Constitution.

The 13th Amendment to the Constitution certified on 14.11.1987 provided for the establishment of Provincial Councils. Article 154 G(1) introduced by the Amendment vests legislative power in respect of the matters set out in List 1 of the Ninth Schedule (the Provincial Council List) in Provincial Councils. Article 154C vests the executive power within a Province extending to the matters in List I in the Governor to be exercised in terms of Article 154F(1) on

the advice of the Board of Ministers is collectively responsible and answerable to the Provincial Council. Thus it is seen that the 13th Amendment provides for the exercise of legislative and executive power within a Province in respect of matters in the Provincial Council List on a system akin to the "Westminster" model of Government. Item 18 of the Provincial Council List which relates to the subject of land reads as follows:

"Land - Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II:

Appendix II referred to in item 18 reads as follows:

"Land and Land Settlement"

"State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing the matter.

Subject as aforesaid, land shall be a Provincial Council subject, subject to the following special provisions:-

1. State land -

1.1 State land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilization of such land in respect of such subject;

1.2 Government shall make available to every Provincial Council State land within the province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilise such State land in accordance with the laws and statutes governing the matter.

1.3 Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."

It is seen that the power reposed in the President in terms of Article 33 (d) of the Constitution read with section 2 of the State Lands Ordinance to make grants and dispositions of State Lands is circumscribed by the provisions of "Appendix II" cited above.

"Appendix II" in my view establishes an interactive legal regime in respect of State Land within a Province. Whilst the ultimate power of alienation and of making a disposition remains with the President, the exercise of the power would be subject to the conditions in Appendix II being satisfied.

A pre-condition laid down in paragraph 1.3 is that an alienation or disposition of State land within a Province shall be done in terms of the applicable law only on the advice of the Provincial Council. The advice would be of the Board of Ministers communicated through the Governor, the Board of Ministers being responsible in this regard to the Provincial Council.

Another aspect to be considered in regard to the facts of this case is the implication of paragraph 1.1 of Appendix II. The land in question comes within the limits of the Port of Colombo in terms of the order P33, made in terms of the Sri Lanka Ports Authority Act. Ports and Harbours being a Reserved subject in terms of paragraph 1.1 above the land may be used by the Government in accordance with the provisions of the Sri Lanka Ports Authority Act. Hence when the Order P33 is subsisting it would not be lawful to alienate the land in the manner it was purported to be done in favour of LMSL.

To sum up the findings as to the alleged "Deviation" in respect of land, I hold that the Petitioner has established not only that the deviation favours JKH denying to others the equal protection of the law but also that the alienation of the extent of 8 Acres 2 Roods 21.44 perches located within the defined limits of the Port of Colombo is invalid due to the –

a) incorrect statement in the Grant that it is made in consideration of the payment of Rs. 1,100,362,500/-.

b) the Grant was made without the advice of the Provincial Council as required in terms of paragraph 1:3 of Appendix II of List 1 in the Ninth Schedule to the Constitution.

c) The land comes within the defined limits of the Port of Colombo in terms and can only be used by the Government in accordance with the Sri Lanka Ports Authority Act."

I would now deal with the third deviation that is alleged to have favoured JKH.

DEVIATION (iii)

In paragraph 24 of the petition it is alleged that although Jayasundera stated at the Pre Bid Conference that the Government would not take over any pending litigation against LMSL in clause 3.5(d) of the Share Sale and Purchase Agreement (P19(c)) entered into with JKH there is provision that any liability arising pursuant to the claim made by Oxford Jay International (Pte) Ltd., would be the responsibility of the Government.

Jayasundera has denied this allegation and stated in paragraph 27 of his affidavit that a decision was made later that an exception should be made in respect of the large amount claimed in the Oxford Jay case. Ratnayake has also denied the allegation and stated that the exception in respect of Oxford Jay case was made at a meeting of shortlisted bidders held on 24.05.2002 (vide: para 85 of the affidavit). This is confirmed by letter bearing the same day Z22 annexed to his affidavit. This is also confirmed by a copy of a letter to the same effect sent to another shortlisted bidder produced by the Petitioner himself. Hence I hold that although Jayasundera's authority to make such a concession is questionable it has in fact been made at a meeting of the shortlisted bidders at the PERC office.

G. ACCEPTANCE OF THE BID OF JKH

The undated report of the TEC had been signed presumably after the meeting on 06.06.2002. The report recommends that 6 shortlisted bidders be allowed to place financial binds on the Colombo Stock Exchange for the shares of LMSL "subject to Cabinet approval". The DFCC Bank valuation report stating a valuation for 90% of the shares in the range of Rs. 1.016 billion to Rs. 1.286 billion is dated 10.6.2002. Considering that Jayasundera and the PERC had not been authorized by the Cabinet to make even a recommendation as to the privatization of LMSL, if it was

intended to give unsolicited advice to the Cabinet, this was the appropriate stage for the matter to have been referred to the Cabinet. Instead Jayasundera appears to have taken two parallel courses of action.

Firstly, a Cabinet Memorandum dated 20.6.2002 was submitted by the 2nd respondent being the then Minister of Power and Energy. It is clear from its contents that it has been prepared on the basis of information furnished by the PERC. There is a specific reference to the shortlisting of bidders and the valuation by the DFCC Bank. Significantly, it does not refer to a valuation requested from the Chief Valuer which was not pursued. The more importantly the Memorandum makes no reference whatsoever to the previous decision of the Cabinet as regards liberalizing of the bunkering sector. Since PERC is obviously responsible for the preparation of the memorandum, the omission to refer to the previous policy decision has to be attributed to the PERC. It is manifest that the 2nd Respondent who has not filed any objections in Court, has merely adopted a draft submitted by PERC without any examination of its content.

Be that as it may if the matter was submitted to the Cabinet as alleged by the petitioner no further action could have been taken by the PERC whose sole function was to advise and assist the Government, until a decision was made in this regard by the Cabinet.

The observation made by the former President in the Memorandum dated 07.08.2002 (p14) reveals that the Memorandum of the 2nd Respondent had been circulated only on 06.08.2002. Hence there appears to have been no urgency in dealing with the matter in the Cabinet and a decision in respect of the memorandum was made only on 14.08.2002 and confirmed on 21.08.2002.

The decision states that action should be taken on the matter by the Ministry of Power and Energy.

The second course of action taken by PERC was that while its proposal was pending before the Cabinet, to finalise the sale of shares. It is clear that Jayasundera viewed the process pending before the Cabinet as a mere formality. And, acting entirely in

excess of the power vested in the PERC by Act No. 1 of 1996, he called for bids from the shortlisted parties. Thus the shortlisting done by the TEC in the faulty process referred above which favoured JKH become a *fait accompli.* Further, the valuation done by the DFCC Bank which was obtained entirely on the decision of Jayasundera after carefully avoiding a valuation being done by the Chief Valuer became a fait accompli. Jayasundera then, acting on his own fixed the floor price at Rs. 1.2 billion and required the bidders to furnish a bid bond for 10% of the floor price to be eligible to bid at the Stock Exchange for 90% of shares of LMSL. The terminal date for the bid bond was fixed by Jayasundera as being 10.07.2002. As at that date the Cabinet memorandum of the Minister being the 2nd Respondent had not even been circulated amongst the members of the Cabinet. But, there was a flurry of activity on the part of Jayasundera and the PERC which the Petitioner has pleaded by producing contemporaneous accounts of these events published in the Daily News Papers of 10.07.2002, 13.07.2002 and 24.07.2002 produced marked P17.

I would now advert to the events as reported in P17 that are not denied by Jayasundera. On 08.07.2008 Jayasundera had informed the bidders that they should enter into a Memorandum of Understanding (MOU) with the CPC Unions. The bidders protested to this requirement and it appears that due to the exposure in the Newspapers the bidders were summoned for a meeting at the PERC office on 10.07.2002 at 12.30 p.m. and informed that there would be no requirement to enter into such a MOU with the Unions. The complaint of the bidders published in the Newspapers is that they had time only from 1.00 p.m. to 2.00 p.m. on the 10th to furnish the bid bonds and that those with foreign collaborators could not get necessary instructions within the limited space of time. JKH was the only bidder to place the bid bond.

Jayasundera has on his own fixed the sale for bidding at the Stock Exchange for 12.07.2002 and since JKH was the only bidder to have furnished the bid bond, he decided that it was not necessary to go ahead with the bidding process and notified by letter bearing date 12.07.2002 itself to S. Ratnayake of JKH(P15(a)) that "it is proposed to conclude the transaction ..... and signing the Agreements by July 24th 2002". Ratnayake by

letter addressed to Jayasundera bearing the same date 12.07.2002 (P15) stated that JKH is willing to conclude the transaction as set out in Jayasundera's letter.

When looking at the two letters bearing the same date one gets the impression that Jayasundera and Ratnayake sat across the table and exchanged them. Counsel for JKH submitted that they were exchanged by FAX. Jayasundera's FAX letter bears time 4.45 p.m. and Ratnayake's Fax the time 5.30. The documents have not been produced by JKH and I have noted the times based only on submissions. Whatever be the travails of other bidders, the timing fitted well to Ratnayake's affairs since according to document P37 (subsequently obtained by the petitioner from the BOI) by letter dated 11.07.2002 the BOI informed JKH that the application for tax relief in this regard has been allowed I have already under the heading "E" dealt with the false and illegal manner in which JKH secured the tax relief.

Having promptly and without reservation agreed to close the transaction by letter P16, Ratnayake continued to secure more concessions from Jayasundera as noted above by sending letter P18(a) which included the concession as to the amendment of the CUF by incorporating clause 8.2 on the basis of which JKH sought to stave off competitors as revealed in "Deviation "F" above.

It is seen from document P15(a) that Jayasundera stated that the Agreements would be signed by July 24, 2002, well before the Cabinet memorandum being circulated. He admits that PERC got all the Agreements ready pending a decision of the Cabinet. I have set out in "F" that the Agreements are heavily biased or favour JKH and have cast responsibilities on the Government of Sri Lanka that are not even referred to in the Cabinet Memorandum. Impatience of Jayasundera appears to have given way and the Agreements were in fact signed on 20.09.2002, 1 day before the Cabinet minutes were confirmed. Ironically, the decision of the Cabinet is for action to be taken by the Minister of Power and Energy and not by Jayasundera and the PERC.

Based on the preceding analysis contained in sections "A to G" I would summarise the findings as follows:

1. Lanka Marine Services Ltd. (LMSL) was a wholly owned company of the Ceylon Petroleum Corporation (CPC) which had the monopoly of supplying marine fuel (bunkers) with a well developed facility within the Port of Colombo consisting of 12 Tanks and a network of pipes connected to the "South Jetty" and the "Dolphin Berth."

2. the supply of bunkers is a lucrative business and in the year 2000/2001 LMSL made a profit of Rs. 318 million and paid Rs. 163 million as income tax;

3. that due to the unique location of the Port of Colombo the supply of bunkers could have been improved and expanded resulting in a vast economic advantage to the State.

4. that liberalization of bunkering was proposed to the Cabinet by the Minister of Shipping on 24.05.2000 and in view of concerns expressed by several Ministers the proposal was referred to a Committee of Officials including a Director of the Public Enterprise Reform Commission (PERC);

5. the Cabinet approved a careful strategy of liberalization addressing all concerns such as marine pollution and authorized PERC to recommend a process of granting 3 licenses to private sector operators to provide bunkers outside the Port of Colombo. LMSL to continue for 1 year with a monopoly in the Port of Colombo and to be privatized in a situation where the trade is fully liberalized;

6. the PERC chaired by P.B. Jayasundera failed to take action to recommend a process for the granting of 3 licenses and instead devised and carried out without any authority of Cabinet a process of the sale of 90% shares of LMSL;

7. Jayasundera nominated three persons to be on the Technical Evaluation Committee (TEC) and the then Secretary Ministry of Finance appointed three persons. But Jayasundera failed to get a Cabinet Approved Tender Board (CATB) or a Negotiating Committee (CANC) constituted. Thereby he avoided submitting this matter to the Cabinet and reserved for himself the final authority of deciding on all matters.

8. the documents clearly establish that all impugned decisions have been made entirely by Jayasundera at his discretion.

9. that the PERC Act No. 1 of 1996 empowers the Commission of which Jayasundera was Chairman only to advice and assist the Government in the matter of public enterprise reform and to act on any matter or transaction only if authorized by the Government.

10. that Jayasundera failed to take action as authorized by the Government to liberate the trade in bunkering and took action without any authorization of Government to embark on a process of selling of shares of LMSL whilst the monopoly was yet in effect operative thereby benefitting the would be purchaser of the LMSL shares.

11. that Jayasundera avoided getting a valuation of LMSL from the Chief Valuer and instead on his own without any authorization of Government secured a valuation from the DFCC Bank and took all action for the sale of shares of LMSL based entirely on that valuation.

12. that TEC erred in shortlisting the bid submitted by Fuel and Marine (FAMM being a market leader in bunkering) in collaborating with John Keells Holdings (JKH) after it was indicated that FAMM would not continue with their joint bid.

13. that JKH had made a false representation of collaboration with FAMM for the purpose of securing the 70 marks to be shortlisted. This falsity is established by a contemporaneous application made by JKH to the Board of Investment (BOI) for investment relief in which no reference is made to any foreign collaborator.

14. that JKH had an assurance that it would succeed in securing a sale of shares in its favour even before the bid contrary a misrepresentation referred above was accepted, since it made an application to the BOI well before the bidding process, on a false basis that the application is in respect of a new investment whereas the particulars in the application are referable to the business of LMSL. The Tax relief granted to KJH was not permissible under the existing Regulations

and JKH got an amendment tailor made for its purpose and secured the tax exemption. This resulted in the LMSL which was a tax paying company when owned by the CPC becoming a tax free Company when sold to JKH;

15. That Jayasundera made certain significant deviations from that stated at the Pre bid Conference that favoured JKH in particular after the bid was accepted Jayasundera agreed to the inclusion of a clause in the CUF Agreement on the basis of which LMSL owned by JKH attempted to stave off competition in the supply of bunkers by others who subsequently obtained licenses from the Minister. The clause agreed to by Jayasundera was struck down by the Court of Appeal as being illegal;

16. Jayasundera made an unauthorised and illegal representation that the land in extent 8 Acres 2 Roods 21.44 perches within the port of Colombo would be transferred to the purchaser of LMSL shares without any additional payment. Although he seeks to justify this representation on the basis that the value of the land has been taken into account in the business valuation of LMSL, on the sequence of events it is established that the representation was made by Jayasundera even before he requested a business valuation from the DFCC Bank;

17. that Jayasundera pursued the unauthorised and illegal representation as to the land by causing a Notarial Agreement to be entered in terms of which the Government of Sri Lanka is obliged to ensure the transfer of the land without payment to LMSL and the expenditure connected with the transfer has to be met by the CPC;

18. that the Grant of the said land given by the President to LMSL 2½ years later is illegal since it is contrary to the provisions of the 13th Amendment to the Constitution and in any event it contains an incorrect statement that the grant as made in consideration of the payment of Rs.1,197,362,500/- by LMSL whereas no money whatsoever was paid by LMSL.

19. that Jayasundera rushed through the bidding process by giving misleading information to bidders and purported to conclude the transaction with an exchange of letters with Ratnayake on 12.07.2002 at the time when the Proposal of the Minister in charge of the subject had not even been circulated amongst the members of the Cabinet.

On the basis of the aforesaid findings I hold that the entire process of the sale of shares of Lanka Marine Services Ltd., to John Keells Holdings has been done without lawful authority. P.B. Jayasundera being the 8th respondent and the then Chairman of the Public Enterprise Reform Commission, from the very commencement of the process, has acted outside the authority, of the applicable law being the Public Enterprise Reform Commission Act No. 1 of 1996 and the functions mandated to be done by the Commission as contained in the decision of the Cabinet of Ministers. He had not only acted contrary to the law but purported to arrogate to himself the authority of the Executive Government. His action is not only illegal and in excess of lawful authority but also biased in favour of JKH.

From the perspective of JKH I hold that the company has secured advantages and benefits through the illegal process and in specific instances by misrepresentations that have been made.

I have to now consider the foregoing findings in relation to the alleged infringement of the fundamental right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution.

Three well established aspects of our Constitutional Law have to be stated in this regard. They are:

i) That the Rule of Law is the basis of our Constitution as affirmatively laid down in the decision of this Court in *Visvalingam* v *Liyanage*(3) and *Premachandra* v *Jayawickrema*(4) and consistently followed in several subsequent decisions. The Rule of Law "postulates the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of prerogative or wide discretionary authority on the art of the Government" (vide: Law of the Constitution

by A. Dicey – page 202). In the picturesque language of the famous British Chief Justice Lord Coke whose dicta and writings contributed to the early growth of English Constitutional Law, the principle of legality which underpins the Rule of Law assures that the powers of Government will be exercised in accordance with "the golden, and straight metwand of law" as opposed to the "uncertain and crooked cord of discretion",

ii) that as firmly laid down in the Determination of the Divisional Bench of Seven Judges of this Court in regard to the constitutionality of the proposed 19th Amendment to the Constitution (2002 3 SLR page 85) the principle enunciated in Articles 3 and 4 of our Constitution is that the respective organs of Government, the Legislature, the Executive and the Judiciary are reposed power as custodians for the time being to be exercised for the People. In *Bulankulame and others* v *Secretary, Ministry of Industrial Development* (5) this Court observed that the resources of the State are the "resources of the People" and the organs of State are "guardians to whom the people have committed the care and preservation" of these resources (at p. 253). That, there is a "confident expectation (trust) that the Executive will act in accordance with the law and accountably in the best interests of the people of Sri Lanka (page 258);

iii) That there is a "positive component in the right to equality" guaranteed by Article 12(1) of the Constitution as decided in *Senarath* v *Chandrika Bandaranayake Kumaratunga*(6) and where the Executive being the custodian of the People's power act *ultra vires* and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to implead such action before Court.

For the reasons stated above I hold that the petitioner has a sufficient *locus standi* to institute these proceedings in the public interest and has established an infringement of the fundamental right guaranteed by Article 12(1) of the Constitution in respect of the sale of 90% shares of Lanka Marine Services Ltd.; being a

company wholly owned by a State Corporation – the Ceylon Petroleum Corporation. That the impugned transaction and the granting of benefits to John Keells Holdings Ltd.; has been an arbitrary exercise of executive power primarily on the part of the 8th respondent P.B. Jayasundera who functioned at the relevant time as the Chairman of the Public Enterprise Reform Commission.

The defence of time bar pleaded by the respondent must necessarily fail since the impugned transfer was not conducted according to obtain material documents from sources that were not accessible to him. This is borne out by the fact that material documents P31 and P37 on which significant findings have been made were obtained from the Board of Investments after the applications was filed.

Accordingly, I overrule the objections based on *locus standi* and time bar and grant to the petitioner the relief sought in prayer (b) of the petition that there has been an infringement of the fundamental right guaranteed by Article 12(1) of the Constitution by executive or administrative action.

Ordinarily, the grant of a declaration that executive or administrative action is an infringement of the fundamental right guaranteed by Article 12(1) would result in a restoration of the status *quo ante*. However, since the jurisdiction vested in this Court in terms of Article 126(4) of the Constitution is to grant relief or to make directions as it may seem just and equitable, it is open to the Court to ascertain whether the implications of the impugned executive action are severable. On a careful survey of the findings I am of the view, that the Presidential Grant of the land 8 Acres 2 Roods 21.44 Perches which is within the declared limits of the Port of Colombo; the grant of investment relief by the Board of Investments to Lanka Marine Services Ltd., resulting *inter alia* in relief from the payment of taxes that are due and, the entering into of the Common Users Facility Agreement with the Sri Lanka Ports Authority are severable from the sale of shares. Accordingly, I allow the relief prayed for in prayer (g), (h) and (i) of the prayer to the petition and declare the Presidential Grant marked P31 as null and void. The 18th, 19th, 20th and 21st respondents will vacate the land within one month from today and restore possession to Sri Lanka Ports Authority. The Common User Facility Agreement dated

20.08.2002 (P19(a)) is declared null and void and the Sri Lanka Ports Authority may enter into fresh Agreements for the use of facilities within the Port on equal terms with all parties licensed to supply bunkers.

All agreements entered into between the Board of Investment and Lanka Marine Services Ltd., are declared null and void and the Commissioner General of Inland Revenue is directed to recover all taxes due on the basis that such Agreements have not been in force.

In view of the foregoing orders I do not consider it necessary or just and equitable to make an order as regards the sale of shares *per se*.

The findings in the judgment demonstrate that the action of P.B. Jayasundera, 8th respondent has not only been arbitrary and *ultra vires* but also biased in favour of John Keells Holdings Ltd., The allegation of the petitioner that he worked in collusion with S. Ratnayake of John Keells to secure illegal advantages to the latter, adverse to the public interest is established. Accordingly I direct the 8th respondent pay a sum of Rs. 500,000/- as compensation to the State.

The 18th to 21st respondents will pay the petitioner a sum of Rs. 250,000/- as costs.

The Registrar is directed to send a copy of this judgment to the Commissioner General of Inland Revenue who is not a party to these proceedings to take action as directed above.

All parties to the proceedings will take necessary action on the basis of the findings stated above.

AMARATUNGA, J. – I agree.

BALAPATABENDI, J. – I agree.

Application allowed.

JAYAWARDANE
v
PRIYASHANIE

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 170/2006
DC ATTANAGALLA 234/D
FEBRUARY 14, 2007
JUNE 13, 2007

Civil Procedure Code – Section 605–Section 615 (2) – Matrimonial actions – Divorce in favour of the defendant – Alimony not awarded – Appeal – Could the decree nisi be made absolute – Could subsidiary order be made under Section 615(2)? – Who could make any application under Section 605?

The Court granted a divorce in favour of the defendant – She was awarded custody of the child, no alimony was awarded. The defendant appealed against the portion of the order concerning the non payment of alimony.

The plaintiff-respondent sought to have the *decree nisi* made absolute, after the three month period. The Court refused the application, on leave being sought.

Held:

(1) The benefit of Section 605 is available to either party in a divorce case. No restrictions have been imposed that it is the party in favour of whom divorce is granted that could resort to Section 605.

Held further:

(2) The appeal is with regard to the payment of alimony and not the dissolution of the marriage.

(3) Chapter under matrimonial actions contemplated the making of subsidiary orders relating to permanent alimony, custody of children, and other settlements in terms of Section 615, these orders can be discharged, modified temporarily suspended and revised or enhanced. They are not part of the decree.

There is no residuary discretion in the Court to decline it, if any party moves to have the *decree nisi* made absolute.

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

Case referred to:

B.Kaluarathchi v *Wijewickrama* 1990 1 Sri LR 262.

Geeshan Rodrigo for plaintiff-petitioner.

S.N. Vijithsingh for defendant-respondent.

February 11, 2008

ERIC BASNAYAKE, J.

This is a leave to appeal application filed by the plaintiff-petitioner (plaintiff) to have the order of the learned District Judge of Attanagalla dated 26.04.2006 set aside.

The plaintiff filed action in the District Court of Attanagalla to have a decree of divorce on the ground of malicious desertion of the defendant. The defendant filed answer and sought a divorce on the ground of constructive malicious desertion on the part of the plaintiff. The defendant also prayed that she be given the custody of the minor child and Rs. 500,000 as alimony. The learned District Judge by his judgment granted a divorce in favour of the defendant-respondent (defendant). The defendant was also awarded custody of the child. However, no alimony was awarded since no evidence was adduced to prove the income of the plaintiff. The defendant appealed against that portion of the order concerning the non-payment of alimony.

On 01.09.2005 the plaintiff filed a motion to have the *decree nisi* made absolute. By that time three months period had lapsed. The Court after inquiry refused to make the *decree nisi* absolute. The plaintiff is seeking leave to appeal against this order.

Section 605 of the Code of Civil Procedure is as follows:-

> Whenever a *decree nisi* has been made and no sufficient cause has been shown why the same should not have been

made absolute ... *such decree shall on the expiration of such time be made absolute"* (emphasis added).

The benefit of the above provision is available to either party in a divorce case. No restrictions have been imposed that it is the party in favour of whom divorce is granted that could resort to this provision. On an application made by either party whether it is the innocent or the guilty party, court should enter the decree absolute. (*B. Kaluarachchi* v *Nilmini Wijewickrama and another*(1)).

The appeal is with regard to the payment of alimony and not the dissolution of the marriage. The question is as to whether or not the marriage should be dissolved is no longer in issue. The learned Counsel appearing for the defendant submitted that the divorce decree is inter-connected with the matters pending in appeal, namely, the claim in respect of alimony. He further submitted that the plaintiff could not have moved to have the *decree nisi* made absolute for the reason that the divorce was granted in favour of the defendant.

Senanayake, J. (with S.N. Silva, J. (as he then was) agreeing) in *B. Kaluarachchi* v *N. Wijewickrama (supra)* at page 267 stated thus that "the chapter under matrimonial actions contemplated the making of subsidiary orders relating to permanent alimony, custody of the children and other settlements in terms of the provisions of section 615 of the Civil Procedure Code. These orders as stated in section 615 (2) can be discharged, modified, temporarily suspended and revived or enhanced. These orders could be varied at any time and it was not a part of the *decree nisi.*"

Permanent alimony order or any sum ordered for the maintenance of a child or an order for the custody of a child could be varied at any subsequent stage as the circumstances of the parties change. If a party who is given the custody of a child subsequently leads the life of a common prostitute the Courts could vary its own order ... <u>These orders are not entered as a part of the *decree nisi*</u> (emphasis added). Senanayake, J. held (at page 267) "That there is no residuary discretion vested in the Court to decline it if any party moves to have the *decree nisi* made absolute".

Therefore I am of the view that the learned District Judge erred in refusing to make the *decree nisi* absolute. I set aside the order

of the learned District Judge and direct the Court to enter decree absolute. This application is allowed. In the circumstances I make no order with regard to costs.

WIMALACHANDRA, J. – I agree.

Application allowed.

District Court directed to make the decree nisi absolute.

SILVA AND OTHERS
v
MINISTER OF LANDS AND LAND DEVELOPMENT AND MINOR EXPORTS AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
ABEYRATNE, J.
CA 703/2001
MAY 21, 2008

Writ of Mandamus – Land Acquisition Act – Section 38 (a), Section 39, Section 50 – Urban Development Projects (Special Provisions) Act 2 of 1980 – Section 4 – No steps taken for a long period of time – Jurisdiction of the Court of Appeal to entertain an application for a Writ of Mandamus – Public purpose not in existence – Could the land be divested?

The application seeking to quash the Section 38 (a) notice in the Court of Appeal was dismissed on the ground that, His Excellency the President had made order in terms of Section 2 UDA (Special Provisions) Law. The Supreme Court in appeal held that, *when no steps* have been taken for a long time to implement a proposed project upon a land in respect of which a Section 2 order has been made, an application for *mandamus* in respect of an omission to divest the acquired land does not fall under Section 4 of the UDA (Special Provisions) Act. The Court of Appeal has jurisdiction to inquire into same.

It was contended by the petitioner that the acquisition was politically motivated, and there is no public purpose in existence. The possession has always been with the petitioners.

Held:

(1) The Section 38 (a) notice has been published in 1992 and up to now no action has been taken to utilize the land in question. There are no development plans to utilize the said land for the just requirement of the general welfare of the people. It appears that the purpose for which the said land was acquired is now evaporated.

(2) The possession of the land has not been taken over by the relevant authorities therefore the restriction of the title could not be made by divesting the said land under Section 39A but it has to be made only by a revocation order under Section 39 (1).

(3) When the element of public benefit has faded away at some stage of the acquisition proceedings, the policy of the Act was that, the proceedings should terminate and the title of the former owner restored – Section 39 – Section 50.

APPLICATION for Writ of mandamus.

Case referred to:

D Silva v *Atukorale, Minister of Lands, Irrigation and Mahaweli Development and another* 1993 1Sri LR 283.

Faiz Musthapha PC with *Thushani Machado* for petitioner.

A. Gnanathasan ASG for 1st, 2nd and 3rd respondents.

Gamini Perera with *Wijitha Salpitikorale* and *A.N. Amarasiri* for 4th respondent.

June 25, 2008

SRISKANDARAJAH, J.

The Petitioner submitted that the Petitioners became owner of the land called "Palliya Bandarawatta" alias "Kammalawatta" situated at Ambalangoda in the District of Galle containing R1-P1.94 after the demise of their father in the year 1959. The 1st petitioner is also in occupation of the said land. There were several shops on the said land which had been tenanted to various persons and the main source of livelihood of the petitioners was the income that they received from the said land by way of rent from the tenants.

The petitioners submitted that the 4th respondent Council proposed to acquire the petitioners' land under a purported Development Plan for the Ambalangoda town. In response to

several appeals by the 1st petitioner the Additional Secretary to the Ministry of Local Government, Housing and Construction by his letter of 05.03.1986 informed the 1st petitioner that the Urban Development Authority had not finalized the Development Plan and that no steps had been taken to acquire the land. The petitioners in order to develop the said land submitted a plan for the construction of a shopping complex. On a request by the Deputy Director Planning to submit an amended plan an amended building plan was submitted to the then Chairman of the 4th respondent Council. The Chairman of the Ambalangoda Urban Council by his letter of 10.06.1988 approved the said building plan and requested to commence work within 30 days of the receipt of the said letter. Due to various reasons the construction work was not commenced and the application of the petitioners for the extension of the approval of the building plan beyond 08.06.1990 was not granted.

It is common ground that a section 2 notice under the Land Acquisition Act was published on 08.10.1991 and the Minister by an order made under proviso (a) to section 38 of the said Act published in the gazette bearing No. 7132 dated 04.05.1992 directed the Assistant Government Agent to take immediate possession of the said land.

The petitioners thereafter filed an application No. 504/92 in the Court of Appeal seeking a *writ of certiorari* quashing the said order. This application was dismissed on the ground that his Excellency the President made order in terms of section 2 of the Urban Development Project (Special Provisions) Act No. 2 of 1980 which was published in Gazette No. 721/2 dated 29.06.92 and therefore the Court has no jurisdiction to hear and determine the said Application.

The present application was filed by the petitioner on 17.05.2001 invoking the jurisdiction of this Court to issue a writ of *Mandamus* directing the 1st respondent to divest the land depicted in plan bearing No. 22 dated 13.07.1986 referred to in the order of vesting. When the present application was taken up for hearing the 1st and 2nd respondents raised preliminary objection with regard to the maintainability of this application. Shiranee Tilakawardana, J. in the Order on the preliminary objection upheld the preliminary objection and held that in terms of section 4 and 5 of the Urban

Development Projects (Special Provisions) Act No. 2 of 1980, this Court has no jurisdiction to hear and determine this matter and dismissed the application.

The above order was challenged in the Supreme Court in SC Appeal No. 34/2002 and the Supreme Court held that, where no steps have been taken for a long period of time, to implement a proposed project upon land in respect of which a section 2 Order has been made an application for *mandamus* in respect of an omission to divest the acquired land does not fall within the scope of section 4 of the Urban Development Projects (Special Provisions) Act, and must be filed in the Court of Appeal. The Supreme Court allowed the appeal and directed this Court to entertain, hear and determine the application on merits.

Now I will proceed to consider this application on its merits.

The said land was acquired by the Minister of Lands upon the request of the Urban Development Authority and the Urban Council Ambalangoda for the purpose of Urban Development. The Minister by an order under section 38 proviso (a) of the Land Acquisition Act dated 04.05.1992 acquired the said land for an urgent public purpose. His Excellency the President made order in terms of section 2 of the Urban Development Projects (Special Provisions) Act, No. 2 of 1980 in relation to the said land and it was published in Gazette No. 721/2 dated 29.06.92. The Divisional Secretary Ambalangoda the 2nd respondent submitted that there was a change in the Government in 1994 and hence there was some time taken in receiving instruction in proceeding with the said acquisition. The section 5 notice was published on 03.10.1996. In 1999 when the petitioner was requested to hand over possession they refused to do so and the possession of the land was not taken. The petitioners are in possession of the said land even now.

The petitioners contended that the acquisition was politically motivated. The 3rd respondent submitted that the land in question was identified for urban development in 1991 and the request was made to acquire the land through the Urban Development Authority. A notice has been published by the President in terms of section 2 of the Urban Developments (Special Provisions) Act, No. 2 of 1980 that the said land was urgently required for the purpose of carrying

out an urban development project. But it is an admitted fact that no action had been taken to utilize the said land until now. The 2nd respondent's position is that the land was acquired on the request of the 3rd respondent but the 3rd respondent Council has not submitted any development plan in relation to the said land that was acquired. Even at present the 3rd respondent does not have any development plan to utilize the said land for the just requirement of the general welfare of the people.

The question that arises is; in these circumstances is it justifiable for the respondents to have this land without any plan to utilize the same for any public purpose. It appears that the purpose for which the said land was acquired by the 3rd respondent is now evaporated. The 3rd respondent has not shown to Court that they have any public purpose for which this land could be utilized. As the possession of the said land has not been taken over and the public purpose for which the said land was acquired is not in existence, the Minister of land has authority under section 39(1) of the Land Acquisition Act by order published in the gazette to revoke the vesting order of the said land made under section 38 of the said Act.

When a land has been acquired without adequate justification and if immediate possession is taken over by the State the above provisions will not apply and therefore to fill this *lacuna* in the law the Land Acquisition Act was amended and section 39A was introduced to divest a land acquired if certain conditions stipulated in the said section are fulfilled. Even though the petitioners have sought a divesting of their land in this application, in effect the petitioners are seeking the restoration of their title. It is common ground that the possession of the land has not been taken over by the relevant authorities therefore the restoration of title could not be made by divesting the said land under section 39A but it has to be made only by a revocation order under section 39(1).

In *De Silva* v *Atukorale, Minister of Lands, Irrigation and Mahaweli Development and another*[1], Fernando, J. held:

> "The purpose of the Land Acquisition Act was to enable the State to take private land, in the exercise of its right of eminent domain, to be used for a public purpose, for the common

good; not to enable the State or State functionaries to take over private land for personal benefit or private revenge. Where the element of public benefit faded away at some stage of the acquisition proceedings, the policy of the Act was that the proceedings should terminate and the title of the former owner restored; section 39 and section 50."

The amending Act has introduced section 39A and has given discretion to the Minister to make an order to divest a land if possession of the land had been taken over by the State. It has been held that when the conditions in that section are fulfilled even though the Minister has discretion to divest he should exercise his discretion fairly and according to law divest the land and a *mandamus* will lie to compel the Minister to make such an order; *De Silva* v *Atukorale, Minister of Lands, Irrigation and Mahaweli Development and another (supra).*

Similarly when the public purpose is not in existence and the authority which had sought the acquisition has no other identified public purpose for which it could be used it is the duty of the Minister to revoke the vesting order if the possession of the land has not been taken over by the State. Hence this Court issues a *writ of mandamus* directing the 1st respondent and his successors in office to revoke the vesting order made and published in the gazette bearing No. 713/2 dated 04.05.1992. Th application for a *writ of mandamus* is allowed without costs.

UPALY ABEYRATHNE, J. - I agree.

Application allowed.

KAROLIS
v
WICKREMARATNE

COURT OF APPEAL
RANJITH SILVA, J.
SALAM, J.
CA (REV.) 1689/2005
DC MT. LAVINIA 870/96/M
AUGUST 1, 2007
MAY 21, 2008
JUNE 17, 2008
JULY 4, 2008

Civil Procedure Code – Section 24, Section 87, – Section 145 – Trial – Plaintiff present – Attorney-at-Law absent – Dismissed – Inter parte or ex parte? Revision – Alternate remedy.

The plaintiff-petitioner instituted action seeking to recover a certain sum as damages from the defendant-respondent. On a date fixed for trial, the plaintiff was present but his Attorney-at-Law was absent, the application for a date by the petitioner was refused and the Court dismissed the action.

The plaintiff without taking steps to follow the statutory remedy of appealing - moved in revision stating that (i) the judgment is contrary to law (ii) that Court has erred in law by not granting the application for a date by the petitioner who was present in Court (iii) the Court instead of directing/requesting or providing an opportunity to the plaintiff to proceed with the case opted to dismiss same.

It was contended by the plaintiff that, the learned District Judge failed to act under Section 145 of the Code, as he had no power to dismiss the case, as it was his duty to proceed to hear and decide the case.

Held:

(1) Although the plaintiff-petitioner made an appearance in Court he could not have made any application or taken any steps in the absence of his Attorney-at-Law.

The refusal to grant a postponement and the dismissal of the case has to be treated as an order made in default of appearance and this should be treated as an *ex parte order.*

On the other hand if the lawyer was present and moved for a date but was refused it could be treated as an *inter parte* judgment.

(2) The learned District Judge could not have directed the plaintiff to conduct the trial and proceed with the case in person as there was an attorney-at-law – Section 145 is not applicable.

Per Ranjith Silva, J.

"Where an attorney-at-law fails to appear in Court not due to his negligence but because he was indisposed, in such a situation will the plaintiff be prevented from relying on Section 87(3) as it is not the plaintiff who really defaulted? But justice and fair play demand that in such a situation too the plaintiff should be allowed to proceed with Section 87 (3), to purge the default of the attorney-at law, *if* the attorney-at-law did not appear due to his negligence, then the application to purge default shall fail and the attorney-at-law will have to take the responsibility for this default."

(3) In the instant case the petitioner should have made an application to purge default under Section 87 (3), there is no valid reason let alone exceptional circumstances to interfere with the impugned judgment by way of revision.

APPLICATION in revision from an order of the District Judge of Mt. Lavinia.

Cases referred to:

1. *Podimenika* v *Dingiri Mahatthaya and others* CA (Rev) 1491/2002 CAM 14.5.2007.
2. *Soysa* v *Silva and others* 2002 2 Sri LR 235.
3. *Mariam Bee Bee* v *Seyad Mohamed* (1965) 68 NLR 36 at 38.
4. *Jinadasa* v *Sam Silva* 1994 1 Sri LR 222
5. *Hameed* v *Deen and others* 1988 2 Sri LR 266.
6. *Seelawathie* v *Jayasinghe* 1985 2 Sri LR at 266.
7. *Carolis Appuhamy* v *Peter Singho* 26 NLR 376.
8. *Andradie* v *Jayasekera* 1985 2 JUCR 204.
9. *Gamini Abeysundara* v *Malalage Gunapala* CA 676/2000 (App.) DC Colombo 18322/L.
10. *Isek Fernando* v *Rita Fernando and others* 1999 3 Sri LR 29.

Mahinda Nanayakkara for plaintiff-petitioner.
Mauyra Gunawansa for defendant-respondent.

July 04, 2008

RANJITH SILVA, J.

The Plaintiff-Petitioner (hereinafter referred to as the Petitioner) instituted action bearing No. 870/96/M in the District Court of Mt. Lavinia against the defendant-respondent (hereinafter referred to as the Respondent) claiming *inter alia* a sum of Rs. 500,000/- from the respondent as damages caused to the petitioner.

The case took a long time during the preliminary stages as the parties and the Counsel defaulted in taking steps on numerous occasions and once, as far back as 24.09.96 the case was fixed for *ex-parte* trial. Later the *ex-parte* judgment was vacated and the respondent was allowed to file his answer and to proceed with the case. Thereafter once again the parties defaulted at various stages of the case and finally the case was re-fixed for trial for 24.02.2003. On 24.02.2003 both parties raised issues and thereafter the case was re-fixed for further trial for 03.06.2003. On 03.06.2003 the trial commenced and the petitioner in the course of his evidence marked and produced P1 to P11 but did not conclude his evidence. Thereafter the trial was fixed for 01.09.2003 and on the said date the trial was postponed due to an application for a date by Counsel for the respondent on personal grounds. The matter was fixed to be resumed on 13.11.2003. On 13.11.2003 the petitioner was cross-examined by Counsel for the respondent and the Court re-fixed the case for further trial for 01.04.2004. On 01.04.2004 the case was not called as the Court officers were not available as they had gone for election duty and the matter was re-fixed for 16.08.2004. On 16.08.2004, the Attorney-at-Law who appeared for the plaintiff-petitioner revoked the proxy and tendered a fresh proxy and moved for a date on the personal grounds of the Counsel. Thereafter the Court re-fixed the matter to be resumed on 02.12.2004 and ordered that it shall be the final date. On 02.12.2004 the learned Additional District Judge was on leave and trial was re-fixed for 18.04.2005. When the matter came up for trial on 18.04.2005 the petitioner was present in Court but his registered Attorney-at-Law and the senior Counsel was not present in Court. The petitioner under the circumstances moved for a date but the Court refused to grant a date as there were no acceptable reasons, adduced to Court, by the petitioner, to grant a date. By that order dated 18.04.2005 the

learned trial Judge dismissed the said case. Aggrieved by the said decision of the learned District Judge, the petitioner filed notice of appeal but failed to file the petition of appeal and thus failed to follow up the appeal. The petitioner has alleged in his petition that he could not file the petition of appeal and proceed with the appeal because of his poor health and old age.

It was argued on behalf of the petitioner that the judgment of the learned Additional District Judge of Mt. Lavinia in dismissing the action was *per se* erroneous in law. It was submitted on behalf of the petitioner that there were exceptional circumstances that warranted the exercise of the revisionary jurisdiction of this Court despite the fact that the petitioner failed to exercise his right of appeal. The Counsel for the petitioner urged *inter alia* the following grounds as constituting exceptional circumstances.

a) That the said judgment is contrary to law and against the basic legal principles.

b) That the learned trial Judge had erred in law by not granting the application for a date by the petitioner who was present in Court.

c) That the learned District Judge, instead of directing/ requesting or providing an opportunity to the petitioner to proceed with the case opted to dismiss the same, etc.

The petitioner cited several cases namely, *Podimenike* v *Dingiri Mahaththaya and others*(1), *Soysa* v *Silva and other*(2), *Mariam Bee Bee* v *Seyed Mohamed*(3) at 38, in support of their argument that there were exceptional circumstances to warrant the invocation of the Revisionary jurisdiction of this Court although the petitioner failed to exercise the right of appeal.

If one were to assume that the judgment of the learned District Judge dated 18.04.2005, dismissing the action was an *inter-partes* judgment, the question arises whether the petitioner can maintain this revision application against the said judgment when he had an alternative and effective remedy, namely an appeal to the Court of Appeal from the said judgment.

Therefore this Court has to examine carefully the impugned judgment delivered on 18.04.2005.

Counsel for the petitioner contended that the learned District Judge should have acted under section 145 of the Civil Procedure Code, when the petitioner moved for a date on the ground that his Counsel was absent. Section 145 of the Civil Procedure Code reads as follows:

"If any party to an action, to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the action, for which time has been allowed the Court may, notwithstanding such default, proceed to decide the action forthwith."

Counsel for the petitioner contended that according to section 145 of the Civil Procedure Code the learned trial Judge had no power to dismiss the case as it was his duty to proceed to hear and decide the case when he refused to grant a postponement .

In other words the argument of the Counsel was that when the application for a postponement or adjournment made by the petitioner who was present in Court was not allowed, the learned District Judge should have directed the petitioner to proceed with the action and should have proceeded to hear and decide the case, instead of dismissing the action.

According to section 24 of the Civil Procedure Code an appearance of a party may be by an Attorney-at-Law. Once an Attorney-at-Law is duly appointed by the party concerned he forfeits his rights to tender and sign notices or to take any steps in the case as long as the Attorney-at-Law is alive able and competent and his proxy remains valid.

In *Jinadasa* v *Sam Silva*(4) it was held that if there is a oral hearing, then a party is entitled to be legally represented unless the legislature expressly provided otherwise. Therefore unless the legislature provides otherwise, a party can decide whether he will himself go into Court or be legally represented in the exercise of his right.

Once he so elects to have himself represented, he must take all the steps in the action through that Attorney-at-Law. (Vide: *Hameed* v *Deen and others*(5)).

In *Seelawathie* v *Jayasinghe*[6] at 266 it was held that when a party to a case has an Attorney-at-Law on record, such a party must take all steps in the case through such Attorney-at-Law.

In the instant case although the plaintiff-petitioner made an appearance in Court he could not have made any application or taken any steps in the absence of his Attorney-at-Law. He could not have proceeded with the trial, given evidence or called witnesses without the assistance of his lawyer. He could not have in the first place moved even for a date personally, perhaps, other than an application for a date on behalf of his lawyer who was absent. Refusal to grant a postponement and the dismissal of the case has to be treated as an order made in default of appearance and thus should be treated as an *ex-parte* order. On the other hand if the lawyer was present and moved for a date but was refused by the trial judge resulting in a dismissal of the case that could be treated as an *interpartes* judgment. Nevertheless in such a situation the trial Judge must give an opportunity to the Attorney-at-Law to proceed with the case if a request is made in that behalf by the Attorney-at-Law.

The petitioner argued that when the petitioner moved for a date on the ground that his Counsel was not present in Court to go on with the trial, the learned District Judge should have directed the petitioner to proceed with the trial and then make a decision forthwith.

In support of this argument Counsel cited *Carolis Appuhamy* v *Peter Singho*[7], wherein it was held "where a party to an action has been granted time to proceed certain evidence at the hearing, the Court has no power to dismiss the action and it must be proceeded to hear as may be tendered on behalf of the party in default and decided the action forthwith".

In *Carolis Appuhamy* v *Peter Singho (supra)* the facts and circumstances are different. In that case the learned Judge insisted that the plaintiff should lead the evidence of an expert witness in addition to the evidence already led by the plaintiff. The evidence the plaintiff intended to lead, as the Judge was of the view that it would be futile to record any further evidence in the absence of expert evidence. For that reason, when an application was made for a further date to lead expert evidence the learned District Judge refused the application and dismissed the case. With respect I must state that the approach of the learned District Judge in that case was obnoxious

and repugnant to the provisions of section 145 of the Civil Procedure Code. In that case, the learned District Judge should have either allowed the application for a date to summon the expert to give evidence or at least directed the plaintiff to present whatever the evidence the plaintiff intended to lead, even though it was the view of the learned District Judge that the plaintiff would not succeed without leading expert evidence. In the instant case obviously the learned District Judge did not act under section 145 of the CPC. In the instant case the petitioner had not obtained a date, to produce any evidence or to cause the attendance of his witnesses. It was merely fixed for further hearing. In the instant case the petitioner moved for a date not because he wanted a date to lead his own evidence or to summon witnesses to give evidence but because his Counsel did not make an appearance in Court to conduct the case and because he could not have conducted the trial personally, as there was a registered Attorney on record. Therefore when the petitioner moved for a date it was open to the District Judge, to either in his discretion, to allow a date subject to terms or refuse to grant a date and dismiss the case, but the learned District Judge could not have directed the plaintiff to conduct the trial and proceed with the case in person as there was an Attorney-at-Law on record. Hence the judgment of the learned District Judge in dismissing the action cannot be branded as erroneous or illegal. (Vide ss. 82 & 87(1) of the Ci.P.C.)

It is apparent from the tenor of the language of the petition of appeal and the written submissions of the Counsel for the petitioner that the petitioner, made this application for revision on the premise that the impugned judgment or order dated 18.04.2005 was an *inter-partes* judgment. If it were to be considered as an *inter-parte* judgment then the petitioner should fail in this application for revision because the petitioner failed to disclose exceptional circumstances in order to invoke the revisionary jurisdiction of this court when there was an alternative remedy by way of an appeal available to him.

If the judgment were to be considered as *inter-partes*, perhaps one could argue that the judgment is unreasonable or unfair, which is purely a matter of discretion. In which event the petitioner should have appealed against the said judgment. The petitioner could move in revision only if the exercise of discretion was perverse or manifestly illegal.

Let us assume a situation where the Attorney-at-Law fails to appear in Court not due to his negligence but because he was indisposed. In such a situation will the plaintiff be prevented from relying on section 87(3) of the Civil Procedure Code, as it is not the plaintiff who really defaulted? But justice and fair play demand that in such a situation too the plaintiff should be allowed to proceed under section 87(3) to purge the default of his Attorney-at-Law. If it is found that the Attorney-at-Law did not appear due to his negligence, then the application to purge default shall fail and the Attorney-at-Law will have to take the responsibility for his default.

The petitioner moved for a date on 16.08.2004 and the matter was finally fixed for 02.12.2004. As the petitioner moved for a date on that date too, the learned District Judge even though he had the discretion to adjourn the hearing for good reasons, refused to grant further time and dismissed the case. In the instant case the petitioner should have made an application to purge default under section 87(3) of the Civil Procedure Code. Instead the petitioner opted to file this application for revision. Therefore we cannot see any valid reason, let alone exceptional circumstances to interfere with the impugned judgment by way of revision as the petitioner should have made an application to the same Court under section 87(3) to have the said judgment entered upon default set aside.

It was held in *Andradie* v *Jayasekera Perera*[8] that the practice has grown and hardened into a rule that where a decree or judgment has been entered *exparte* or on default of appearance and is sought to be set aside, on any ground, application must in the first instance be made to that very Court and that it is only where the finding of the District Court on such application is not consistent with reason or the proper exercise of the judge's discretion or where he has misdirected himself on the facts or law that the Court of Appeal will grant the extraordinary relief by way of Revision or *Restitutio Intergrum.*

A distinction can be drawn between the various reasons for which a plaintiff may default. It may be the failure on the plaintiff to appear in Court or the failure on the part of his Attorney-at-Law to appear in Court or the failure on the part of both the plaintiff and the Attorney-at-Law to appear in Court on the day fixed for the trial.

In the instant case the petitioner was present in Court but was not represented by his Attorney-at-Law. Therefore there was no proper

appearance on behalf of the petitioner. The presence of the petitioner in Court cannot be considered as an appearance as the petitioner couldn't have taken any action or steps on his behalf without his lawyer. For all purposes the so-called appearance has to be treated as mere presence and not as an appearance. The converse is rather different. If the petitioner was absent and the Registered Attorney-at-Law had moved for a date on the ground that he was not well without explaining the absence of his client and the learned District Judge had dismissed the case refusing to grant a postponement then the judgment would be an *inter partes* judgment. In *Don Gamini Abeysundara* v *Malalage Gunapala*(9). The Attorney-at-Law moved for a date on the ground that he was not well and not because the plaintiff was absent. The learned District Judge dismissed the case as the plaintiff was absent. It was held that it was not an order made on default.

Per Gamini Amaratunge, J. "When an action is dismissed in the presence of a party's lawyer after refusing an application for a postponement it is not an order made for default. The order dismissing the action had been made *inter partes*. Such an order cannot be set aside under Section 87(3). The remedy for the plaintiff is a final appeal. Therefore the purported application made by the plaintiff was misconceived in law and the learned District Judge was correct in refusing the application of the plaintiff."

If the Attorney-at-Law had stated that he had no instructions and that, he did not appear, it would have been a different kettle of fish. (Vide. *Isek Fernando* v *Rita Fernando and others*(10)).

For the reasons adumbrated by me, whatever the stand point from which one looks at the issue as to the maintainability of this application for revision namely whether the impugned Judgment amounts to a dismissal of the action for non appearance of the plaintiff or a dismissal *inter partes* (default Judgment or an *inter partes* judgment) I hold that the petitioner in any event cannot maintain this application for revision.

I dismiss this application for revision with costs fixed at Rs. 7500.00.

A.W.A. SALAM, J. – I agree.

Application dismissed.

AIRPORT AND AVIATION SERVICES (SRI LANKA) LTD.

v

BUILDMART LANKA (PVT.) LTD.

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
SOMAWANSA, J.
RATNAYAKE, J.
SC 110/2007
SC HC LA 46/2007
HC A.R.B. 998/2006 & 1249/2007

Arbitration Act 11 of 1995 – Section 32 – Application under Section 32 to set aside award – Out of Time? What is the time period? – Computation of the 60 day period? – Is it from the date of award or date of receipt of award?

After several dates of hearing, the Tribunal pronounced its award on 31.5.1986. The appellant was not informed of this, and he was absent on this date. The appellant had received the award on **14.06.2006** and he filed an application in terms of section 32 in the High Court to set aside the award. The respondent had also filed an application to enforce the award.

The High Court dismissed the application of the appellant on the basis that it was not filed within 60 days from the date of pronouncement of the award.

Held:

Application for the purpose of setting aside an award by the High Court must be made within a time period of 60 days and the said period is taken into account **from the receipt** of the award by the party making such application to the High Court – and **not from the date of the award.**

APPEAL from an order of the High Court of Colombo with leave being granted.

Case referred to:

(1) *Southern Group Civil Construction Pvt. Ltd.* v *Ocean Lanka (Pvt.) Ltd.* SC 69/99 SCM 25.02.2002.

Gamini Marapana PC with *Navin Marapana* for respondent-petitioner-appellant.
Nihal Fernando PC with *Rudra Anthony* for claimant-respondent-respondent.

July 22, 2008.

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of Colombo dated 14.11.2007. By that judgment the High Court had made order dismissing the respondent-petitioner-appellant's application (hereinafter referred to as the appellant) made in terms of Section 32 of the Arbitration Act, No. 11 of 1995 on the sole ground that the application was out of time and allowed the application made by the claimant-respondent-respondent (hereinafter referred to as the respondent). The appellant sought Leave to Appeal from this Court, which was granted to consider the following question.

"Has the learned High Court Judge correctly interpreted the provisions of Section 32(1) of the Arbitration Act, No.11 of 1995?"

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

The respondent, on or about 04.09.2003 had initiated arbitration proceedings against the appellant claiming damages, *inter alia*, for breach of contract. After several dates of hearing, the Tribunal had pronounced its Award on 31.05.2006. The appellant was not informed of this date and the appellant has been absent and unrepresented on that day. On 14.06.2006, appellant had received by registered post the said Arbitration Award. The covering letter sent by the Arbitration Centre along with the said Award was dated 07.06.2006 and it appeared that the letter was posted on or about 07.06.2006.

Thereafter on 02.08.2006 the appellant filed an application in the High Court in terms of Section 32 of the Arbitration Act, No. 11 of 1995 (hereinafter referred to as the Arbitration Act) to set aside the aforesaid Award (Application No. HC/ARB 998/2006). The respondent also had made an application (Application No. HC/ARB 1249/2007) to execute the said Award in terms of Section 31 of the Arbitration Act. The appellant had filed objections to the application filed by the respondent bearing No. HC/ARB 1249/2007 and had

stated *inter alia* that since the appellant's application bearing No. HC/ARB 998/2006 was pending in Court, not to proceed with the application filed by the respondent.

Both applications were however, called in Open Court on 24.09.2007 and the learned Judge of the High Court consolidated both applications in terms of Section 35 of the Arbitration Act. On 14.11.2007, learned Judge of the High Court had made order dismissing the application filed by the appellant under Section 32 of the Arbitration Act on the sole ground that it was out of time and allowed the application filed by the respondent bearing No. HC/ARB 1249/2007.

Having stated the facts of this appeal, let me now turn to consider the question on which Leave to Appeal was granted by this Court.

Section 32 is contained in Part VII of the Arbitration Act, which deals with 'applications to Courts relating to Awards'. Section 32 refers to the applications for setting aside arbitral awards and Section 32(1) reads as follows:

> "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**. (emphasis added)"

It is therefore quite clear that even on a plain reading of the section an application for the purpose of setting aside an arbitral award by the High Court must be made within a time period of sixty days and the said period is taken into account from the **receipt of the award by the party making such application to the High Court**. This Court had referred to the required time period contained in Section 32(1) of the Arbitration Act and had clearly stated that an application to set aside an Arbitral Award has to be made within sixty (60) days of the **receipt of the Award in** *Southern Group Civil Construction (Pvt.) Ltd.* v *Ocean Lanka (Pvt.) Ltd*[1].

It is common ground that the Award in question was pronounced on 31.05.2006. It is also not disputed that the appellant, who was the respondent in the arbitral proceedings was neither present nor represented on that day. The proceedings of 31.05.2006 (X3), which clearly supports this position, reads thus:

"The respondent is absent and unrepresented.

Today a copy of the Award was handed over to Mr. K.L.H. Perera, Managing Director of the Claimant Company by us.

There was no appearance for the respondent Company. The Centre is directed to send a signed copy of the Award to the respondent by registered post. (emphasis added)"

The Chief Executive Officer of the ICLP Arbitration Centre had thereafter taken steps to comply with the order made by the panel of Arbitrators on 31.05.2006, and accordingly a letter under registered post was sent to the appellant dated 07.06.2006 (x2). The appellant had taken the position that it had received the said document only on 14.06.2006. In support of this contention, the appellant had attached a photo copy of the envelope in which the said award was forwarded to the appellant under registered post (X1).

Learned Judge of the High Court after considering the facts and circumstances of the application filed by the appellant (HC/ARB 998/2006) had taken the position that the appellant had instituted proceedings, beyond the 60 days stipulated by Section 32 of the Arbitration Act. He has clearly stated in his judgment that,

"මෙම බේරුම්කරණ නීති කෘතීන් සඳහා පෙත්සම්කරු සහභාගී වී ඇති බවට පෙත්සමේ 17, 18 සහ 19 ඡේදයන්හි සඳහන් වී ඇතත් පෙත්සම්කරු සඳහන් කලේ තමාට දැන්වීමකින් තොරව 2006.05.31 වෙනි දිනැති බේරුම්කරණ ප්‍රදානය ප්‍රකාශයට පත් කළ බවත් තමාට එය දැන ගැනීමට ලැබුනේ 2006.06.14 වෙනි දිනදී බවත්ය. පෙත්සම්කරු විසින් බේරුම්කරණ ප්‍රදානය අවලංගු කරවා ගැනීම සඳහා වූ ඉල්ලීම මෙම අධිකරණය වෙත ඉදිරිපත් කර ඇත්තේ 2006.08.20 වෙනි දිනදීය. බේරුම්කරණ ප්‍රදානය 2006.05.31 වෙනි දින ප්‍රකාශයට පත් කර ඇති බැවින් තීරක ප්‍රදානය අවලංගු කරවා ගැනීම සඳහා වූ ඉල්ලීම දින 60 කට පසුව ඉදිරිපත් කර ඇති බව මේ අනුව පැහැදිලිව පෙනී යයි. බේරුම්කරණ පණතේ 32 වෙනි වගන්තිය අනුව තීරක ප්‍රදානයක් අවලංගු කරවා ගැනීම සඳහා වූ ඉල්ලීමක්. එකී ප්‍රදානය ප්‍රකාශ කළ දින සිට දින 60 ක කාල සීමාවක් තුළ ඉදිරිපත් කළ යුතු වෙයි." (emphasis added)

It is common ground that the petitioner instituted proceedings in the High Court of Colombo on 02.08.2006 (Application No. HC/ARB 998/2006). As stated earlier, it is also common ground that the Tribunal had pronounced its Award only on 31.05.2006 and the letter sent by the Arbitration Centre along with the said Award was dated 07.06.2006. According to the appellant, he had received the said Award on 14.06.2006. Section 32 of the Arbitration Act clearly states

that the application for setting aside the arbitral award has to be filed 'within sixty days of the receipt of the award.' The emphasis, it is to be noted in this clause, is on the 'receipt of the award' and hence, the date which is important for a matter initiated in terms of Section 32 of the Arbitration Act, is not the date that the Award was 'pronounced, but the date such Award was received by the party, who is relying on Section 32 of the Arbitration Act.

On an examination of the judgment of the High Court it is thus apparent that the High Court had gone on the basis that an application in terms of Section 32 should be filed within 60 days from the date of the pronouncement of the Award.

In these circumstances, when one considers the aforementioned facts and circumstances, it is absolutely clear that the appellant's application dated 02.08.2006 in case No. HC/ARB 998/2006 was filed clearly within the time frame stipulated by Section 32 of the Arbitration Act.

It is therefore evident that learned Judge of the High Court had erred in holding that the appellant's application filed in the High Court of Colombo, viz., HC/ARB 998/2006 was out of time.

On a consideration of all the material placed before this Court I accordingly answer the question on which Leave to Appeal was granted in the negative.

Accordingly, for the reasons aforesaid, this appeal is allowed and the judgment of the learned Judge of the High Court of Colombo dated 14.11.2007 is set aside.

This matter is referred back to the High Court of Colombo for inquiry *de novo.*

I make no order as to costs.

SOMAWANSA, J. – I agree.

RATNAYAKE, J. – I agree.

Appeal allowed.

Matter referred back to the High Court for inquiry de novo.

JEEVANI INVESTMENTS (PVT) LTD.
v
WIJESENA PERERA

SUPREME COURT
JAYASINGHE, J.
AMARATUNGA, J.
MARSOOF, PC, J.
SC 108/2006
SC SPL LA 240/2005
CA 886/94 (F)
DC COLOMBO 15513/L
JULY 19, 2008

Civil Procedure Code – section 24, section 27(1), section 27(2) – Administration of Justice Law 44 of 1973 – section 326(1) – Who could file a relisting application? – Is it only the registered attorney who has authority?

Held:

(1) In applications commenced in the Court of Appeal such as Relisting applications, applications for Leave to appeal notwithstanding lapse of time, Leave to appeal applications, Revision applications, a party is entitled to appoint a registered attorney other than the registered attorney in the original court – on record.

Held further:

(2) A final appeal commences with the filing of a notice of appeal and the petition of appeal in the original court by the registered attorney on record, appeal proceedings in the Court of Appeal are a continuation of the proceeding commenced in the original court.

APPEAL from a judgment of the Court of Appeal.

Cases referred to:

(1) *Letchemanan* v *Christian* 4 NLR 323.
(2) *Seelawathie* v *Jayasinghe* 1985 2 Sri LR 286.
(3) *Romanis* v *Revena* (1881) 4 SCC 61.
(4) *Wasu* v *Helanahamy* (1881) 4 SCC 48.
(5) *Fernando* v *Fernando* 1997 3 SLR 1.
(6) *Saravanapavan* v *Kandasamydurai* 1984 1 Sri LR 268.
(7) *Bank of Ceylon* v *Ramasamy* CALA 79/80 DC Chavakachcheri 5447 CAM 24.3.81.
(8) *Gunasekera* v *Zoysa* 52 NLR 357.

Asoka Fernando with *Manik Gamage* for appellant.
Sanath Jayatilleke for respondent.

February 28, 2008

NIHAL JAYASINGHE, J.

Jeewani Investments Ltd. of Alawwa, which was the 3rd defendant in DC Colombo case No. 15513/L, being dissatisfied with the judgment of the District Court of Colombo – filed appeal No. CA 886/94(f) in the Court of Appeal. This appeal was pending in the Court of Appeal from 1994 and subsequently the 3rd defendant-appellant (hereinafter called the appellant) came to know that the Court of Appeal, on 18.11.1996 without notice to the appellant, had rejected the said appeal in terms of the Supreme Court (Court of Appeal – Appellate Procedure Copies of Records) Rules of 1978 for the appellants failure to deposit fees for the preparation of the copies of the record. The appellant thereafter filed an application dated 19.11.2003 in the Court of Appeal moving to have the order of 18.11.1996 set aside and for an order for re-listing the appeal for hearing.

The 2nd defendant-respondent objected to the appellant's re-listing application on the ground that the application has been filed by an attorney-at-law other than the registered attorney-at-law on record for the appellant's appeal. The appellant's registered attorney-at-law in D.C. Colombo case No. 15513/L was Wijesinghe Associates. The relisting application dated 19.11.2003 has been filed by attorney-at-law K.D. Epitawela, upto the that time, the proxy granted by the appellant to Wijesinghe Associates remained unrevoked in the District Court record. This is the undisputed factual situation.

In the Court of Appeal, the position of the appellant with regard to the preliminary objection that the re-listing application has been filed by an attorney other than the registered attorney for the appellant and as such the application was not properly constituted and bad in law, was that the re-listing application was a distinct and a separate application from the appeal of the appellant. The Court of Appeal having considered the submissions of both parties and the provisions of section 27(1) and (2) of the Civil Procedure Code and the cases of *Letchemanan* v *Christian*[1] and *Seelawathie* v *Jayasinghe*[2], held that the objection taken up by the respondent that the filing of the relisting application through an attorney-at-law other than the registered attorney-at-law on record in the original court is not permissible in law and that such an application is not a proper application on which a court could act is a

valid legal objection. Accordingly the Court of Appeal rejected the appellant's relisting application.

This Court has granted special leave to appeal against the judgment of the Court of Appeal. The question to be decided in this appeal is whether an attorney-at-law who is not the registered attorney-at-law on record in the original court can file a relisting application in the Court of Appeal and whether such an application filed in that manner is a valid application in law. Both parties have made oral submissions on this question of law and also have filed written submissions.

> Section 24 of the Civil Procedure Code enacts that, "Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party to the action or appeal in such court, may be made or done by the party in person or by his recognised agent or by a registered attorney duly appointed by the party or such agent to act on behalf of such party."

Section 27(1) of the Code provides that the appointment of a registered attorney to make an appearance or application, or to do any act as aforesaid, shall be in writing signed by the client and shall be filed in Court. Section 27(2) provides that such written instrument when so filed -

> "shall be in force until revoked with the leave of the court and after notice to the registered attorney by a writing signed by the client and filed in court, or until the client dies, or until the registered attorney dies, is removed, or suspended or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client."

It is a well settled rule, as far back as from 1881 (even before the present Civil Procedure Code was enacted in 1889) that a proctor, other than the proctor on record for a party, cannot act on behalf of the party and the acts done by a proctor other than the proctor on record are invalid.

Romanis v *Revena*(3), *Wasu* v *Helanahamy*(4). Even after the enactment of the Civil Procedure Code, this rule has been consistently followed. When there is a registered attorney on record, even the party himself cannot act on his own behalf and that he must act through his registered attorney. See *Fernando* v *Fernando*(5), and the cases cited

therein. The learned counsel for the respondent, relying on the long line of decisions referred to in his written submissions, argued that it is not open for an attorney-at-law other than the registered attorney on record to file a relisting application and that an application filed in that manner is invalid.

On the other hand, the learned counsel for the appellant argued that a relisting application is separate and distinct from an appeal which is a continuation of the action or proceedings commenced in the original court. The learned counsel contended that with the rejection of the appeal the proceedings of the case came to an end and what was left was the execution of the decree, which is a matter to be pursued in the original court. He contended that a relisting application is an incidental application, commenced in the Court of Appeal seeking the indulgence of the Court of Appeal and as such it is permissible for an attorney-at-law who is not the registered attorney on record in the original court to file such an application. In support of his contention he cited the judgment of a Divisional Bench of the Court of Appeal in *Saravanapavan* v *Kandasamydurai*[6].

In that case, the question of law referred for the decision of the Divisional Bench was whether in a leave to appeal application filed in the Court of Appeal in terms of section 754(2) read with section 756(2) of the Civil Procedure Code, a proxy filed by an attorney-at-law who is not the petitioner appellant's attorney in the original court can be a valid proxy and as such constitute a valid leave to appeal application.

Seneviratna, J. (P/CA), (who later graced the Bench of this Court), with the agreement of the other two judges held that in a leave to appeal application which originates in the Court of Appeal the proxy can be filed either by the registered attorney in the original court or by any other attorney-at-law. The reasoning of Seneviratna, J. was that unlike a final appeal, the proceedings in a leave to appeal application originate in the Court of Appeal and as such a party can appoint a registered attorney other than the registered attorney in the original court for the purpose of a leave to appeal application made in the Court of Appeal.

In the course of his judgment, Seneviratna, J. referred to the decision of the Court of Appeal in *Bank of Ceylon* v *Ramasamy*[7], where the Court of Appeal came to a similar conclusion upon an interpretation of the relevant parts of sections 24 and 27(1) of the Civil Procedure Code.

Section 24 of the Civil Procedure Code enacts that "**Any appearance, application, or act in or to any court** ....., may be made or done by the party in person, or ..... by a registered attorney duly appointed by the party" (emphasis mine).

Section 27(1) of the Civil Procedure Code provides that,

"The appointment of a registered attorney to make any appearance or application, or do any act as aforesaid shall be in writing signed by the client and shall be filed in Court."

When the relevant parts of the two provisions quoted above are read together, it is clear that any application to any Court may be made by a registered attorney duly appointed by the party in writing and that such writing shall be filed in Court. A leave to appeal application, though it is connected to proceedings pending in an original court, is not an application commenced in the original Court but commenced in the Court of Appeal and sections 24 and 27(1) of the Civil Procedure Code enable a party to appoint a registered attorney for the purpose of such application. There is no requirement that the registered attorney so appointed shall be the same registered attorney on record for the proceedings in the original court. Unlike a leave to appeal application a final appeal commences with the filing of the notice of appeal and the petition of appeal in the original court by the registered attorney on record and the original court thereafter transmits the record to the Court of Appeal and appeal proceedings in the Court of Appeal are a continuation of the proceedings commenced in the original court.

In support of his view that in a leave to appeal application which originates in the Court of Appeal a party may appoint a registered attorney who is not the registered attorney in the original court, Seneviratna, J. referred also to the practice of the Court of Appeal commencing from the date i.e. 1.1.1974 on which date the Administration of Justice Law No. 44 of 1973 came into operation. Section 326(1) of the AJL brought in a new provision relating to leave to appeal applications. The Civil Procedure Code of 1889 did not have provision similar to section 326(1) of the AJL. Section 754(2) of the Civil Procedure Code presently in force is similar to section 326(1) of the AJL (with a slight modification) Seneviratna, J. held that from 1.1.1974 on which date the AJL came into operation it has become a usual and inveterate practice for the Court of Appeal to permit another attorney-at-

law to file proxy in a leave to appeal application and this practice has become a *cursus curiae* of the Court of Appeal.

The test adopted by Seneviratna, J. to examine the validity of the proxy (the court in which the proceedings commence) is a good guide which does not involve any breach of the law – that is a breach of the provisions of the Civil Procedure Code. Although this Court is not bound by a decision of the Court of Appeal I treat Seneviratna, J.'s decision with utmost respect and am persuaded to adopt it with agreement.

Some applications though they have a connection with proceedings in an original court, commence in the Court of Appeal. The former Supreme Court in *Gunasekera* v *de Zoysa*[8] has held that a revision application in a civil case can be initiated by a proctor other than the proctor whose proxy was filed in the original court. For the reasons set out above I hold that in other applications commenced in the Court of Appeal such as relisting applications and applications for leave to appeal notwithstanding lapse of time, which have a bearing on the proceedings taken in an original court, a party is entitled to appoint a registered attorney other than the registered attorney in the original court. I therefore answer the question of law submitted to this Court in the affirmative and accordingly set aside the judgment of the Court of Appeal dated 20.9.2005 rejecting the appellant's relisting application.

Having considered the material placed before this Court, I am of the view that it would be in the interest of justice to set aside and vacate the order made by the Court of Appeal on 18.11.1996 rejecting the 3rd defendant appellant's appeal. The order of the Court of Appeal dated 18.11.1996 is hereby set aside and the relisting application is allowed. The Court of Appeal is hereby directed to hear and decide the 3rd defendant-appellant's appeal on the merits.

AMARATUNGA, J. – I agree.

MARSOOF, (P/C) J. – I agree.

Appeal allowed.

Relisting application allowed.

COLOMBO INTERNATIONAL NAUTICAL & ENGINEERING COLLEGE (PVT.) LIMITED (CINTEC)
v
KADUWELA PRADESHIYA SABHA, KADUWELA AND THREE OTHERS

SUPREME COURT
RAJA FERNANDO, J.
SALEEM MARSOOF, J. AND
ANDREW SOMAWANSA, J.
SC APPEAL NO. 37/2007
31ST JANUARY, 2008

Civil Procedure Code – Prosecution for Contempt of Court for violation of a Court Order – Sections 792-800.

The petitioner filed an application in the Court of Appeal to punish the 5th to 23rd respondents for Contempt of Court for the violation of the interim order dated 28th July, 2006 issued by the Court of Appeal.

On the 29th January 2007, the notice returnable date, the 5th to 23rd respondents pleaded not guilty to the contempt charges. Nevertheless, the Court of Appeal, instead of fixing the matter for inquiry had summarily dismissed the application for Contempt of Court on the ground that the 5th to 23rd respondents were not parties to the original application and therefore not bound by the said order dated 28th July, 2006.

The Supreme Court granted Special Leave to Appeal against the order of the Court of Appeal dated 23rd May 2007, dismissing the application of the petitioner on the following grounds -

(a) Has the Court of Appeal grievously erred in law in failing to fix the matter for inquiry in view of the fact that the same court has duly issued summons against the 5th to 23rd respondents as a matter of law.

(b) Has the Court of Appeal grievously erred in law in failing to fix the matter for inquiry in view of the fact that the said 5th to 23rd respondents-respondents pleaded not guilty to the charge of Contempt of Court.

(c) Has His Lordship of the Court of Appeal misdirected himself in law when he held that since the 5th to 23rd respondents-respondents were not parties to the original application and they were not bound by the said order.

Held:

An order against a Pradeshiya Sabha is to be complied with by all members who constitute the Pradeshiya Sabha and it makes no sense that the members of the Pradeshiya Sabha can violate the order of Court even though they constitute the Pradeshiya Sabha and they are persons carrying out the duties/obligations/functions of the Sabha.

Per Fernando, J.

Any person who knowingly violates a Court order even if such a person was not a party to the original action where the order is made, is liable for contempt of court. If not all that a party has to do is to get the court order violated by a third party and get the other party to plead that such party was not in the original action.

Per Fernando, J.

"It will be incorrect to say that as summons/warrant has been issued on a person the Court must necessarily proceed to trial, even it is patently clear that for some reason the prosecution cannot succeed. For instance if the Court finds that it has no jurisdiction or that summons/warrant has been issued on the wrong person. Similarly, it will also be incorrect, that only parties to the action which the order is made are liable for the violations of the Court order."

APPEAL from an order of the Court of Appeal.

M.A. Sumanthiran with *Viran Corea* and *Suresh Fernando* for petitioner.

A. Kasthuriarachchi with *A Udeshika Abeysiri* for 5th to 7th and 9th to 23rd respondents.

Cur.adv.vult.

11th September, 2008

RAJA FERNANDO, J.

The petitioner-petitioner-petitioner (hereinafter called and referred to as the "petitioner") instituted action on 26th June, 2006 against the 1st to 4th respondents-respondents-respondents (hereinafter sometimes referred to as the 1st to 4th respondents) in the Court of Appeal seeking *inter alia* interim relief against the 1st and/or 2nd respondent from taking any action to remove the barricade and security Post the petitioner was erecting on the access road to the petitioner's premises.

On 6th July 2006 the Court of Appeal issued an interim Order directing the 1st and 2nd respondents "...Not to remove the barricade constructed by the petitioner along the access road to the petitioner's premises in the petitioner's land until 27th July 2006.

On 21st July while the interim order was in force two members of the 3rd respondent together with some villagers had entered the petitioner's premises and forcibly removed the barricade put up by the petitioner.

The petitioner had promptly made a complaint to the Police and the Police had summoned the villagers to the Police station and read over and explained the said order issued by court.

Apart from complaining to the Police the petitioner has brought this to the notice of the Court of Appeal by petition on 25th July, 2006.

On 28th July 2006 when the matter came up before the Court of Appeal for extension of the interim order, court had allowed the petitioner to re-erect the barricade at the same place and further granted order which reads as follows: ".... Court issues an interim order directing the 1st, 2nd and 3rd respondents not to remove the barricade....."

On 23rd August 2006 when the petitioner commenced to re-erect the said barricade accompanied by the Athurugiriya Police the 5th and 6th respondents both members of the 1st respondents-respondent (Kaduwela Pradeshiya sabha) together with the 7th to 23 respondents had entered the petitioner's premises and forcibly obstructed the re-erection of the barricade.

According to the petitioner the Athurugiriya Police officers who were present at the scene had explained to the respondents who were causing the obstruction including the 5th and 6th respondents the order of court and requested them to comply with the Order of court.

The petitioner has lodged a complaint with the Athurugiriya police about this incident the same day.

The petitioner has on 17th November, 2006 moved Court to punish the 5th to 23rd respondents for contempt of Court for the violation of the interim order dated 28th July, 2006 issued by court.

On 6th December, 2006, having heard counsel for the petitioner in support the court had issued summons on the 5th to 23rd respondents returnable 29th January 2007.

On 29th January 2007, the notice returnable date the 5th to 23rd respondents pleading not guilty the learned Judges of the Court of Appeal had instead of fixing the matter for inquiry have summarily

dismissed the application for Contempt of Court on the basis that the 5th to the 23rd respondents were not parties to the original application and therefore not bound by the said order dated 28th July 2006.

This Court on 23rd May, 2007, has granted Special Leave to Appeal against the order of the Court of Appeal dated 29th January, 2007, dismissing the application of the petitioner on the following questions:-

(a) Has the Court of Appeal grievously erred in law in failing to fix the matter for inquiry in view of the fact that the same court has duly issued summons against the 5th to 23rd respondents as a matter of law.

(b) Has the Court of Appeal grievously erred in law in failing to fix the matter for inquiry in view of the fact that the said 5th to 23rd respondents-respondents pleaded not guilty to the charge of contempt of law.

(c) Has his Lordship the Court of Appeal misdirected himself in law when he held that since the 5th to 23rd respondents-respondents were not parties to the original application they were not bound by the said order.

It is the submission of the petitioner that the procedure governing prosecutions for Contempt of Court is contained in Chapter LXV of the Civil Procedure Code (sections 792-800) and that according to such provisions once summons/warrants issued on an accused for contempt the next step is to fix the matter for hearing and the Court of Appeal was in error when it dismissed the charges on the summons returnable date without proceeding to hearing. The petitioner draws specific attention to section 796 of the Civil Procedure Code which reads "on the day appointed by the court for the hearing of the charge or on any subsequent day to which the hearing may have been adjourned ..... the court shall commence hearing by asking the accused person whether or not he admits the truth of the charge ....."

The respondents argue that the charge of contempt was based on the alleged violation of the directive of the Court of Appeal to which the respondents were not parties and as such the respondents cannot be charged for contempt in this instance as there was no directive on any of the respondents personally by the Court.

It will be incorrect to say that as summons/warrant has been issued on a person the court must necessarily proceed to trial, even when it is patently clear that for some reason the prosecution cannot succeed. For instance if the court finds that it has no jurisdiction or that summons/warrant has been issued on the wrong persons. Similarly it will also be incorrect, that only parties to the action which the order is made are liable for the violation of the court order.

The order of the court was directed at the 1st and 2nd respondents not to remove the barricades constructed by the petitioner along the access road to the petitioner's premises in the petitioner's land until 27.7.2006.

The 1st respondent was the Kaduwela Pradeshiya Sabha and the 2nd respondent was A.F. Buddhadasa, Chairman, Kaduwela Pradeshiya Sabha.

The Kaduwela Pradeshiya Sabha being an inanimate person, the direction is necessarily on the persons working in the Pradeshiya Sabha. If not the order against the Pradeshiya Sabha will have no meaning.

It is the position of the petitioner that on 21.7.2006 while the interim order was in force 2 members of the 1st respondent – the Kaduwela Pradeshiya Sabha – together with some villagers have come and forcibly removed the barricade erected by the petitioner.

On the 25th of July 2006 the petitioner has brought the violation to the notice of court and the court has again issued an interim order directing the 1st, 2nd and 3rd respondents not to remove the barricade. While the said interim order was in force on 23rd August, 2006, the 5th and 6th respondents both members of the 1st respondent Kaduwela Pradeshiya Sabha together with several villagers (7th-23rd respondents) have forcibly obstructed the re-erection of the barricade.

The first matter for consideration is whether the 5th and 6th respondents being members of the Pradeshiya Sabha are liable for Contempt of Court as they were not parties to the original application where order was made.

As stated earlier in this judgment an order against the Pradeshiya Sabha is to be complied with by all members who constitute the Pradeshiya sabha and it makes no sense that the members of the

Pradeshiya Sabha can violate the order of court even though they constitute the Pradeshiya Sabha and they are persons, carrying out the duties/obligations/functions of the Sabha.

Therefore, the argument of the 5th and 6th respondents that they are not parties to the order of the court which was against the 3rd respondent Kaduwela Pradeshiya Sabha is untenable.

The next matter to be considered is whether the 5th and 6th respondents were in fact aware of an order of the Court.

This is a matter that will have to be decided on the evidence at the hearing.

Let me next consider the case against the 6th to 28th respondents villagers who along with the 5th and 6th respondents were involved in the obstruction.

It may be possible that all the villagers who participated in the obstruction were aware of an order of court until they were informed by the Police unlike the 5th and 6th respondents who were in fact members of the Kaduwela Pradeshiya Sabha against whom the order was in operation.

Therefore it is the view of this Court that, *prima facie* the charge against the 6th to 23rd respondents who were the villagers who may not have knowledge of a court order could be prosecuted for Contempt of Court.

The basis of the order of the Court of Appeal in discharging all respondents that only persons who are parties to the order of the court that is violated is wrong. If any person who knowingly violates a court order even if such a person was not a party to the original action where the order is made is liable for Contempt of Court. If not all that a party has to do is get the court order violated by a third party and get the other party to plead that such party was not in the original action. This would lead to a mockery of Justice.

For the above reasons we set aside the order of the Court of Appeal dated 29/01/2007 where all respondents-respondents were discharged from the Contempt of Court proceedings.

Having considered all the circumstances of this case and giving the benefit of the doubt to the 7th to 23rd respondents who were the villagers who may not have been aware of the order of the Court we discharge the 7th to 23rd respondents from the Contempt of Court

proceedings and send back the record to the Court of Appeal to proceed to trial against the 5th and 6th respondents who were members of the 1st respondent Kaduwela Pradeshiya Sabha on the charge of Contempt of Court for the violation of the Court Order of 28/7/2006.

Registrar is directed to send a copy of this order with the original record to the Court of Appeal to proceed with the Contempt of Court inquiry against the 5th and 6th respondents.

SALEEM MARSOOF, J. - I agree.

SOMAWANSA, J. - I agree.

VALLIBEL LANKA (PVT) LIMITED
v
DIRECTOR-GENERAL OF CUSTOMS AND THREE OTHERS

SUPREME COURT
SARATH N. SILVA, C.J.
AMARATUNGA, J. AND
K. SRIPAVAN, J.
S.C. APPEAL 26/2008
29 AUGUST, 2008

Customs Ordinance – Forfeiture of a vessel under sections 47 and 107 for non-payment of GST and NSL.

The petitioner sought a *Writ of Certiorari* in the Court of Appeal to quash the order of the 3rd respondent that the petitioner was liable to pay GST and NSL on the purchase price of the vessel named "MV Induruwa Valley". The Court of Appeal dismissed the petitioner's writ application. The Supreme Court granted Special Leave to Appeal and leave was granted to the petitioner on the following questions:

(1) Did the Court of Appeal fall into substantial error by holding that the vessel "M.V. Induruwa Valley" had been imported into Sri Lanka and that the provisions of the Customs Ordinance pertaining to recovery and sanctions could be legitimately invoked in the case of an alleged default in payment of Goods and Services Tax and National Security Levy?

(2) Did the Court of Appeal err by failing to consider that unlike in the case of certain other specific fiscal statues, that in the case of Goods and Services Act No. 34 of 1996 as amended by Act No. 11 of 1998, it is only the charging levying and collection of GST that can be made as if it were a customs duty, whilst recovery of tax in default on the other hand is purely within the jurisdiction of the Commissioner-General of Inland Revenue?

(3) Did the Court of Appeal fall into substantial error in law by classifying a ship/vessel as being a "good" in terms of the Customs Ordinance and also by holding that such a ship/vessel could be imported within the meaning of the provisions of the Customs Ordinance?

(4) Did the Court of Appeal err in law when holding that the petitioner had failed to declare the vessel to the customs on arrival and had consequently failed to pay GST and NSL at the time when there was no such requirement in law?

Held:

(1) In terms of section 16 of the Customs Ordinance the precise time at which importation of any goods shall be deemed to be the time at which ship importing such goods had actually come within the limits of the port.

(2) A vessel arriving in the ordinary course of navigation carrying goods on board does not fall within the definition of an "imported good" in terms of section 16 read with section 47.

Per Sripavan, J.

"I am unable to find any provision in the Customs Ordinance which contemplates or makes provisions for a sailing vessel as being a "good" within the meaning of section 16 of the Customs Ordinance."

(3) The Court cannot give a wider interpretation to Section16, merely because some financial loss may in certain circumstances be caused to the State. Considerations of hardships, injustice or anomalies do not play an useful role in construing fiscal statues. One must have regard to the strict letter of the law and cannot import provisions in the Customs Ordinance so as to supply any assumed deficiency.

(4) When the GST Act makes general provisions in respect of certain matters and makes specific provision with respect to "recovery" the latter must prevail over the general. The special jurisdiction with regard to "recovery" must be exercised by the Commissioner General of Inland Revenue and not by the Director General of Customs.

(5) When an administrative body exercises the power, it shall not act mala-fide or frivolously or vexatiously but shall act in good faith and for the achievement of the objects the enactment had in view.

(6) It is the established rule in the interpretation of statues that levy taxes and duties, not to extend the provisions of the statute by implication, beyond the clear import of the language used or to enlarge their operation in order to embrace matters not specifically pointed out.

In case of doubt, the provisions are construed most strongly against the State and in favour of the citizen.

(7) The intention to impose duties and/or taxes on imported goods must be shown by clear and unambiguous language and cannot be inferred by ambiguous words.

(8) The defence Levy Act No. 52 of 1991 as amended by Act No. 25 of 1994 in Section 5A(2) makes clear provision that the Defence Levy be deemed to be customs duty payable under the Customs Ordinance and the provisions of Customs Ordinance shall apply to the collection and recovery of any such amount. Accordingly, the 3rd respondent has the power to recover Defence Levy, if any under the provisions of the Customs Ordinance without forfeiting the vessel.

Per Sripavan

"In carrying out its task of enforcing the law, the Court has to insist on powers being exercised truly for the purpose indicated by the Parliament and not for any ulterior purpose."

APPEAL from the judgment of the Court of Appeal.

Sanjeewa Jayawardena with *R. Amarasooriya* for the petitioner.

Mrs. F. Jameel, D.S.G. for the respondents.

Cur.adv.vult

August 27, 2008

SRIPAVAN, J.

The petitioner is a company duly incorporated under the laws of Sri Lanka and engaged in the business of, *inter-alia*, international and national transportation by sea. The petitioner purchased a sea-going vessel from Japan and brought same into the Sri Lankan territorial waters in or around April 1999. The vessel was registered under the Sri Lankan flag and named "MV Induruwa Valley". The respondents did not dispute that the said vessel is engaged in transporting essential cargo to the Northern Province. The petitioner alleges that on or around 2nd March 2001, officers of the Department of Customs acting in terms of an authority given under Section 128 of the Customs Ordinance (P4) entered the premises of the petitioner on the basis that there were uncustomed goods and/or goods the importation of which were restricted under Schedule "B" of the Customs Ordinance. The Executive Director of the petitioner was thereafter summoned for an inquiry before the third respondent on 4th April 2001 and 24th May 2001 as evidenced by the documents marked P5 and P6 respectively. After the conclusion of the inquiry the third respondent made the following impugned order.

> *"I have considered the evidence and the documents produced before me and also the verbal submission made by Mr. S.N. Godwin, Executive Director, M/s. Vallibel Lanka (Pvt)*

Ltd. today on behalf of M/s. Vallibel Lanka (Pvt) Ltd. Since it has been proved that the GST nd the NSL has not been paid, I consider that the vessel is liable for forfeiture under Sections 47 and 107 of the Customs Ordinance (Chapter 235). However due to the reason, that the vessel is carrying essential cargo to to the North I release the vessel on a mitigated penalty of Rs. 7.5 Million (Rs. 7,500,000.00) under Sections 129, 163 and 47 of the Customs Ordinance."

The petitioner sought a *writ of certiorari* in the Court of Appeal to quash the said order of the third respondent that the petitioner was liable to pay GST and NSL on the purchase price of the said vessel. The writ application was dismissed by the Court of Appeal on 2nd November 2007. Being aggrieved with the judgment of the Court of Appeal marked P15, the petitioner sought special leave to appeal and leave was granted mainly on the following questions.

1. Did the Court of Appeal fall into substantial error by holding that the vessel "MV Induruwa Valley" had been imported into Sri Lanka and that the provisions of the Customs Ordinance pertaining to recovery and sanctions could be legitimately invoked in the case of an alleged default in payment of Goods and Services Tax and National Security Levy?
2. Did the Court of Appeal err by failing to consider that unlike in the case of certain other specific fiscal statutes, that in the case of Goods and Services Act No. 34 of 1996 as amended by Act No. 11 of 1988, it is only the charging levying and collection of GST that can be made as if it were a customs duty, whilst recovery of tax in default on the other hand is purely within the jurisdiction of the Commissioner General of Inland Revenue?
3. Did the Court of Appeal fall into substantial error in law by classifying a ship/vessel as being a "good" in terms of the Customs Ordinance and also by holding that such a ship/vessel could be imported within the meaning of the provisions of the Customs Ordinance?
4. Did the Court of Appeal err in Law when holding that the petitioner had failed to declare the vessel to the customs on arrival and had consequently failed to pay GST and NSL at the time when there was no such requirement in law?

The first respondent in paragraphs 9 & 11 of the affidavit dated 15th October 2001 filed in the Court of Appeal states that the importation of

the said vessel took place as contemplated in Section 16 of the Customs Ordinance when it was brought into the Sri Lankan territorial waters and the failure to declare same was an offense under section 47. The court therefore has to examine section16 of the Customs Ordinance in order to ascertain the time and mode of importation of the said vessel into the limits of the port. In terms of the said section the precise time at which importation of any goods shall be deemed to be the time at which **the ship importing such goods** had actually come within the limits of the port. (emphasis added). The pleadings do not show the time at which the ship importing "MV Induruwa Valley" had actually come within the limits of the port. I am unable to find any provision in the Customs Ordinance which contemplates or makes provision for a sailing vessel as being a "good" with the meaning of section 16. The provision relied on by the third respondent, namely, section 47 of the Customs Ordinance obligates an importer to deliver a bill of entry in respect of "goods" imported in a ship. section 107 too speaks of goods, packages or parcels taken or passed out of any ship. In carrying out its task of enforcing the law, the court has to insist on powers being exercised truly for the purpose indicated by Parliament and not for any ulterior purpose. The court is solicitous that when an administrative body exercises the power, it shall not act mala-fide or frivolously or vexatiously but shall act in good faith and for the achievement of the objects the enactment had in view. I am therefore unable to hold that a vessel arriving in the ordinary course of navigation carrying goods on board falls within the definition of an "imported good" in terms of section 16 read with section 47.

It is the established rule in the interpretation of statutes levying taxes and duties, not to extend the provisions of the statute by implication, beyond the clear import of the language used or to enlarge their operation in order to embrace matters not specifically pointed out. In case of doubt, the provisions are construed most strongly against the state and in favour of the citizen. Thus, the intention to impose duties and/or taxes on imported goods must be shown by clear and unambiguous language and cannot be inferred by ambiguous words. The court cannot give a wider interpretation to section 16 as claimed by the learned DSG merely because some financial loss may in certain circumstances be caused to the state. Considerations of hardship, injustice or anomalies do not play any useful role in construing fiscal statutes. One must have regard to the strict letter of the law and cannot

import provisions in the Customs Ordinance so as to supply any assumed deficiency. For the foregoing reasons too, I hold the vessel in question was not "imported" into Sri Lanka within the meaning of the Customs Ordinance.

Learned DSG strenuously contended that the GST Act as amended by Act No. 26 of 2000 draws a clear distinction between imported goods and other goods and puts the imported goods directly in a different category and vests the administration of the said Act on imported goods in the Director General of Customs. It is on this basis counsel argued that the intention of the legislature was that the GST on imported goods be brought under the regime of the Customs Ordinance. In view of the findings that "MV Induruwa Valley" was not imported into Sri Lanka, the application of Act No. 26 of 2000 does not arise. In any event, it is noted that in terms of the said Act, the charging, levying and collection of GST could be made as if it were a Customs duty whilst the recovery of tax in default on the other hand is vested with the Commissioner General of Inland Revenue by virtue of sections 39 to 49 in Chapter VIII of the GST Act No. 34 of 1996 as amended. Thus, when the GST Act makes general provisions in respect of certain matters and makes specific provision with respect to "recovery" the latter must prevail over the general. The special jurisdiction with regard to "Recovery" must therefore be exercised by the Commissioner General of Inland Revenue and not by the Director General of Customs.

The Defence Levy Act No. 52 of 1991 as amended by Act No. 25 of 1994 in section 5A (2) makes clear provision that the Defence Levy be deemed to be customs duty payable under the Customs Ordinance and **the provisions of Customs Ordinance** shall apply to the collection and recovery of any such amount (emphasis added). Therefore the third respondent has the power to recover Defence Levy, If any, under the provisions of the Customs Ordinance without forfeiting the vessel.

For the reasons set out above, the order of the Court of Appeal dated 2nd November 2007 marked P15 is set aside and a *writ of certiorari* is issued quashing the order made by the third respondent on 24th May 2001 in Customs case No. PCAB/2001/19 marked P7 and the letter dated 18th June 2001 marked P9 containing the communication of the said order to the Chairman/Managing Director of the petitioner company.

I make no order as to costs.

SARATH N. SILVA C.J. - I agree.

AMARATUNGA, J. - I agree.