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 9 & 10

PAGES 225 - 280

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

Price : Rs. 40.00

DIGEST

CIVIL PROCEDURE CODE – Section 85 (4) – What is the consequence of serving an invalid ex-parte decree – Do the provisions of the Civil Procedure Code apply to the decree when it was not an ex-parte decree – Section 86 – When there is no valid ex-parte decree served on the defendant is there a duty cast upon him to proceed under Section 86.

Edman Abeywickrema v Dr. Upali Athauda and Another 255

CONSTITUTION – Articles 4(d), 17, 113(A) and 126 – To claim exemption of the time limit of one month for filing an application for violation of Fundamental Rights – Executive or administrative liability – Action taken to implement a valid judicial order – Civil Procedure Code – Sections 188, 225, 320, 323, 351, 362 – Application for execution of a decree – Human Rights Commission Act No. 21 of 1996 – Section 13(1) – The period of time to be excluded in computing the period of one month – The protection available to an officer executing process issued by Court and the limits of such protection – lex non cogit ad impossibilia – Applicability – Judicature Act 2 of 1978 – Amended by Act 16 of 1989 – Section 52 – Penal Code – Sections 70, 71.

Ranaweera and Others v Sub-Inspector Wilson Siriwardena and Others 260

CONSTITUTION ARTICLE 13(3), ARTICLE 138 – Right of a person charged with an offence to be heard, in person or by an Attorney-at-Law – Fair trial – Section 196(ee) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act No. 11 of 1988 – Section 161, Section 236, Section 436 – Obligation on the trial Judge to inquire from the accused whether he is to be tried by a jury? – Illegality or irregularity? – Judicature Act – No. 2 of 1978 – Section 11.

The Attorney-General v Segulebbe Latheef and Another 225

JUDICATURE ACT NO. 2 OF 1978 – Sections 40(1) and 42(3) – Rule issued to show cause as to why the respondent should not be suspended from practice or removed from the office of Attorney-at-Law. – Supreme Court (Conduct and etiquette for attorney-at-law) Rules 1988 – Rules 15,79,81.

In the matterof a Rule - against an Attorney-at-Law 275
(Continued in Parts 11 and 12)

KANDYAN LAW DECLARATION AND AMENDMENT ORDINANCE OF NO. 39 OF 1938 - Section 10(1), Section 27 – Its applicability in respect of persons dying after the commencement of the Ordinance in deciding question of heirship – Section 10(1) applicability of the provisions of the Ordinance to determine character of property – No retrospective application under the Ordinance unless expressly provided.

Babbuwa and Others v Premadasa and Others 243

RENT (AMENDMENT) ACT NO. 26 OF 2002 – Section 22(3),8(a)– Benefits conferred on the landlord to get the decree executed without waiting until the Commissioner of National Housing provides alternative accommodation – Section 22(1)b and Section 22(1) C were repealed and new subsections were substituted in their places – Civil Procedure Code – Section 221, Section 320, Section 323, Section 337(1) – Time bar prescribed to the application for the Writ of Ejectment – maxim "lex non cogit ad impossibilia."

Mohamed Azar v Idroos 232

THE ATTORNEY-GENERAL
v
SEGULEBBE LATHEEF AND ANOTHER

SUPREME COURT.
J.A.N. DE SILVA, J.
BALAPATABENDI, J., AND
RATNAYAKE, J.
S.C. APPEAL NO. 79A/2007, 24/2008 AND 25/2008
23 JULY 2008 AND 19 AUGUST 2008

Constitution Article 13(3), Article 138 – Right of a person charged with an offence to be heard, in person or by an Attorney-at-Law – Fair trial – Section 196(ee) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act No. 11 of 1988 – Section 161, Section 236, Section 436 – Obligation on the trial Judge to inquire from the accused whether he is to be tried by a jury? – Illegality or irregularity? – Judicature Act – No. 2 of 1978 – Section 11.

The Supreme Court granted special leave to appeal on the following question of law in case No. SC/79/2007.

> *"Did the Court of Appeal err in law by holding that section 195(ee) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act, No. 11 of 1988 envisages a mandatory statutory obligation and failure to comply with the said section 195(ee) vitiates the conviction."*

Subsequent to the granting of leave in No. SC/79/2007, in other separate cases Viz; SC/24/2008 and SC/25/2008 the Attorney-General raised the same question of law and the Supreme Court granted leave. All these cases were taken up together for argument.

In all these cases the accused-appellants raised the preliminary objection that the trial judges failed to inform the accused of the right to be tried by a jury in terms of the law and such failure is fatal to the conviction as it was a violation of a legal right afforded to them.

Held:

(1) The Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a fair trial by a competent Court.

Per J.A.N. de Silva, J.

"The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied."

(2) Like the concept of fairness, a fair trial is also not capable of a clear definition.

The right to a fair trial amongst other things includes the following:-

1. *The equality of all persons before the court.*
2. *A fair and public hearing by a competent independent and impartial court/tribunal established by law.*
3. *Presumption of innocence until guilt is proven according to law.*
4. *The right of an accused person to be informed or promptly and in detail in a language he understands of the nature and cause of the charge against him.*
5. *The right of an accused to have time and facilities for preparation for the trial.*
6. *The right to have a counsel and to communicate with him.*
7. *The right of an accused to be tried without much delay.*
8. *The right of an accused to be tried in his presence and to defend himself or through counsel.*
9. *The accused has a right to be informed of his rights.*
10. *If the accused is in indigent circumstances to provide legal assistance without any charge from the accused.*
11. *The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him.*
12. *If the accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter.*
13. *The right of an accused not to be compelled to testify against himself or to confess guilty.*

(3) Section 195(ee) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act, No. 11 of 1988 imposed a duty on the trial judge to inquire from the accused at the time of serving the indictment whether or not the accused elects to be tried by a jury. It is left to the discretion of the accused to decide as to who should try him. The judge must also inform that the accused has a legal right to that effect.

Non observance of this procedure is an illegality and not a mere irregularity.

Case referred to:

(1) *Attorney-General* v *Thennakoon Arachchige Sunil Ratnasiri* (CA 134/70 C.A.M.19.07.1999).

APPEAL from the judgment of the Court of Appeal.

Sarath Jayamanne D.S.G. with *Gihan Kulatunga*, S.S.C. for the Attorney-General.

Ranjith Abeysuriya, P.C. with *Miss. Thanuja Rodrigo* for the respondents in S.C. Appeals in 79A/2007 and 25/2008.

Cur.adv.vult.

September 12, 2008

J.A.N. de Silva, J.

On the 29th of September my lord the Chief Justice sitting with two other judges of the Supreme Court granted special leave to appeal on the following questions of law in case number SC/79/2007.

> *"Did the Court of Appeal err in law by holding that section 195(ee) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act, No. 11 of 1988 envisages a mandatory statutory obligation and failure to comply with the said section 195(ee) vitiates the conviction".*

Subsequent to the granting of leave in case No. SC/79/2007, in two other separate cases viz SC/24/2008 and SC/25/2008 the Hon. Attorney-General raised the same question of law and the Supreme Court granted leave. Hence all three cases are taken up together and will be disposed of in this judgment.

In all these cases, in the course of hearing of the appeals in the Court of Appeal the accused appellants raised preliminary objections that the trial judge failed to inform the accused of the right to be tried by a jury in terms of the law and such a failure is fatal to the conviction as it was a violation of a legal right afforded to them. The Court of Appeal having referred to several decisions of the Court of Appeal, upheld this objection.

At the commencement of the argument the learned Deputy Solicitor-General conceded the fact that the relevant court records do not reflect any where that the jury option had been given to the accused. His contention was that since the accused were represented by counsel at the trial no substantial prejudice had been caused to the accused, the proviso to Article 138 of the Constitution and section 436 of the Code of Criminal Procedure should apply to cure the defect.

The learned Deputy Solicitor-General further submitted that even if section 195(ee) is considered to be a mandatory requirement the

failure to comply with the same does not deprive the High Court Judge of jurisdiction to hear and determine the case as this is a technical defect of a procedural nature. In support of this contention he relied upon a judgment of Justice F.N.D. Jayasuriya in *AG* v *Thennakoon Arachchige Sunil Ratnasiri*(1).

Our Constitution does not expressly recognize the right of access to legal advice and assistance to an accused person under arrest.

However, the Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a "fair trial" by a competent court. This right is recognised obviously for the reason that a criminal trial (subject to an appeal) is the final stage of a proceeding at the end of which a person may have to suffer penalties of one sort or another if found guilty.

The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied. The right to a fair trial was formally recognised in International law in 1948 in the United Nations Declaration of Human Rights. Since 1948 the right to a fair trial has been incorporated into many national, regional and international instruments.

Like the concept of fairness, a fair trial is also not capable of a clear definition, but there are certain aspects or qualities of a fair trial that could be easily identified.

The right to a fair trial amongst other things includes the following:-

1. *The equality of all persons before the court.*
2. *A fair and public hearing by a competent, independent and impartial court/tribunal established by law.*
3. *Presumption of innocence until guilt is proven according to law.*
4. *The right of an accused person to be informed or promptly and in detail in a language he understands of the nature and cause of the charge against him.*
5. *The right of an accused to have time and facilities for preparation for the trial.*
6. *The right to have a counsel and to communicate with him.*
7. *The right of an accused to be tried without much delay.*

8. *The right of an accused to be tried in his presence and to defend himself or through counsel.*
9. *The accused has a right to be informed of his rights.*
10. *If the accused is in indigent circumstances to provide legal assistance without any charge from the accused.*
11. *The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him.*
12. *If the accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter.*
13. *The right of an accused not to be compelled to testify against himself or to confess guilty.*

Apart from the rights mentioned above there is another remarkable right given to the accused in most jurisdictions. **That is the right to trial by jury.** Some writers say this system was derived from the Celtic tradition based on the Roman Law. There are others who have expressed the view that the jury system may be traced as a gradual and natural sequence from the modes of trial in use amongst the Anglo-Saxon and Anglo-Normans that is before and after the conquest. Greek and Roman history show that trial by jury flourished when the people regained and re-asserted liberties. In England King John was compelled to grant the great Charter known as *Magna Carta.* One of the clauses of which was "that no freeman was to be imprisoned, outlawed, punished or molested except by the judgment of his equals or by the law of the land."

In France the jury system of trial in criminal cases was established in 1791 and it was retained in the Code of Napoleon promulgated in 1905.

In Germany, in the year 1798 the jury system was introduced in the provinces of Rine and Bavaria and extended to the whole country in 1849. In Belgium it was introduced in 1830 when the country was separated from Holland. In Denmark juries are compulsory in criminal cases. The system of trial by jury prevails in Spain only in criminal cases. In the USA too, English principles have been adopted with rare variation and trial by jury is now part of the constitution in most of states.

When the British established their empire in the east they introduced the English Criminal Justice System to the colonies. The jury trials were framed on the English model. When Sri Lanka came under British rule the then Governor Frederick North through the Charter of Justice of 1801 established a Supreme Court of Judicature composed of a Chief Justice and a Puisne Justice. The Supreme Court was given criminal jurisdiction over serious crimes. Criminal jurisdiction of lesser offences was exercised by magistrates, justices of peace and fiscal counts.

In Sri Lanka (Ceylon as it was known then) trial by jury or jury system was introduced during the time of Governor Thomas Maitland by a Charter of Justice in 1810. This was done mainly to get the assistance of local inhabitants to the Supreme Court Judges who were alien to the native society.

Generally a trial before the Supreme Court was preceded by a non summary proceeding or a preliminary inquiry in the Magistrate's Court. This system prevailed in Sri Lanka until the independence and thereafter under the Criminal Procedure Code. Section 216 of the old Criminal Procedure Code reads thus:

> *"All trials before the Supreme Court shall be by jury or a commissioner of assize, provided always that the Chief Justice may in his discretion order that any trial shall be a trial at bar and thereupon the said trial shall be in held in Colombo by jury before three judges."*

With the introduction of Administration of Justice Law No. 44 of 1973 there was a change in the court structure and there came into existence a new court called the "High Court" for each zone (section 116). The original jurisdiction so far exercised by the Supreme Court was transferred to the High Court; Section 193 states thus:

> *"Subject to the provisions of the law all trials before the High Court shall be by jury before a judge."*

The Code of Criminal Procedure Act was enacted in 1979. There was no substantial change in the system until an amendment to section 161 was introduced in 1988. The new section reads as follows.

> *"Subject to the provisions of this code or any other law all prosecution on indictment in the High Court shall be tried*

by a judge of that court provided that in any case at least one of the offences falls within the list of offences setout in the Second Schedule to the Judicature Act, No. 2 of 1978 trial shall be by jury before a judge, if and only if the accused elects to be tried by a jury".

Section 11 of the Judicature Act, No. 2 of 1978 was also amended by the Judicature (Amendment) Act, No. 16 of 1989 to fall in line with the amendment to the Code of Criminal Procedure Act amendment in 1988.

Mr. Ranjith Abeysuriya P.C. (who appeared for the accused was kind enough to point out that both these amendments have been brought into operation on the same day i.e. on the 28th of November 1991).

This amendment necessitated an introduction of a further amendment i.e. section 195 (ee) imposing a duty on the trial judge to inquire from the accused at the time of serving the indictment whether or not the accused elects to be tried by a jury. This is in recognition of the basic right of an accused to be tried by his peers. It is left to the discretion of the accused to decide as to who should try him.

As pointed out earlier for nearly two hundred long years the jury system has been in existence in Sri Lanka with whatever the faults it had. I do not make an endeavour to discuss the merits and the demerits of the jury system. As long as it is in the statute book that the accused can elect to be tried by a jury, the trial judge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must also inform that the accused has a legal right to that effect. Non observance of this procedure is an illegality and not a mere irregularity.

For the above reasons all three State appeals are dismissed. I direct that the case records of all three cases to be sent back to the original High Courts to comply with law and conclude the trials early.

BALAPATABENDI, J. - I agree.

RATNAYAKE, J. - I agree

Appeals dismissed.

Cases sent back to the High Courts.

MOHAMED AZAR
v
IDROOS

SUPREME COURT.
GAMINI AMARATUNGA, J.
S. MARSOOF, J. AND
ANDREW SOMAWANSA, J.
S.C. APPEAL NO. 114/2007
C.A. L.A. 51/2006
D.C. GAMPOLA NO. 914/81 L.
FEBRUARY 02, 2008

Rent (Amendment) Act No. 26 of 2002 – Section 22(3),8(a)– Benefits conferred on the landlord to get the decree executed without waiting until the Commissioner of National Housing provides alternative accommodation – Section 22(1)b and Section 22(1) C were repealed and new subsections were substituted in their places – Civil Procedure Code – Section 221, Section 320, Section 323, Section 337(1) – Time bar prescribed to the application for the Writ of Ejectment – maxim "lex non cogit ad impossibilia."

The plaintiff filed action under section 22(1) (bb) of the Rent Act, for the ejectment of the tenant (defendant) on the ground that such premises are reasonably required for occupation as a residence for the plaintiff (landlord). Judgment was entered of consent in favour of the plaintiff and the decree was accordingly entered directing the ejectment of the defendant. In view of Section 22(1)C of the Rent Act the decree entered in favour of the plaintiff contained a condition that the plaintiff shall have no right to obtain a writ for the delivery of possession to the plaintiff until alternative accommodation is provided to the tenant (the defendant) by the Commissioner of National Housing.

The Commissioner of National Housing allocated a house to the tenant (the defendant), but the tenant who was not satisfied with the house allocated to him, filed a Writ application No. C.A. 65/1986 in the Court of Appeal seeking a *Writ of Certiorari* to quash the notification of the Commissioner of National Housing informing the tenant of the allocation of the house to him. The Court of Appeal held that the house offered by the Commissioner of National Housing was not in law an alternate accommodation contemplated in section 22(C) of the Rent Act and accordingly issued a *Writ of Certiorari* quashing the notification sent by the Commissioner of National Housing.

After the death of the original plaintiff, the present petitioner, a heir of the original plaintiff complied with the requirements set out in Section 22(3)8(a), as the

Commissioner of National Housing failed to provide alternate accommodation to the tenant, the petitioner sought writ of ejectment – which was refused by the District Court. The Court of Appeal refused leave to appeal from the said order.

The Supreme Court has granted leave to appeal against the said order of the Court of Appeal.

The two questions of law considered by the Supreme Court are as follows:

(1) *Has the Court of Appeal erred in law in reaching the conclusion that section 337(1) of the Civil Procedure Code is a bar to the application for the Writ of Ejectment made by the petitioner-appellant?*

(2) *Did the Court of Appeal and the District Court fail to consider the purpose and the effect of the Rent (Amendment) Act No. 26 of 2002 in so far as it was relevant to the consent decree entered in favour of the plaintiff?*

Held:

(1) The amendments made to section 22 of the Rent Act by the amending Act No. 26 of 2002 provided a new mechanism for the landlord to get the decree entered in his favour executed through court without indefinitely waiting until the Commissioner of National Housing provided alternative accommodation to the tenant.

(2) In order to extend the benefit conferred on the landlord by the amending Act No. 26 of 2002, who had already obtained decrees for the ejectment of their tenants, a new provision was added at the end of section 22(3)(8).

(3) The time bar prescribed by section 337(1) commences to operate only from the date on which the judgment creditor becomes entitled to execute the writ and as such it has no application to a case where the judgment creditor is prevented by a Rule of law from executing the writ entered in his favour.

The time bar will apply in cases where the judgment creditor after becoming entitled to obtain the writ has slept over his rights for ten years.

Per Gamini Amaratunga, J. -

"It would indeed be unjust and inconsistent with the purpose of section 337(1) to apply the time bar in a situation where the decree has become incapable of execution due to a rule of law."

Held further:

(4) After the new section 22(1) C was introduced by the amending Act No. 26 of 2002, the judgment creditor became entitled to deposit ten years rent of the premises or Rs. 150,000/- which ever is higher with the Commissioner of National Housing and apply for the writ one year after the date of such deposit.

(5) The Rent (Amendment) Act No. 26 of 2002 repealed section 22(1)(C) and enacted new provisions in its place and made it applicable to decrees already entered at the time repealed section 22(1)(C) was in force. The

object of this amendment was to remedy the mischief resulting from the pre-condition contained in section 22(1)(C).

(6) When a judgment-creditor has made an application for the execution of the decree, the Court to which that application has been made has to satisfy itself that the judgment-creditor is entitled to obtain execution of the decree.

Cases referred to:

(1) *Mowjood* v *Pussadeniya* (1987) 2 SLR 287.

(2) *Jayasekera* v *Herath* Vol. III BASL Journal (1999) Vol. VIII part 7 1999 SLR 56.

APPEAL from the judgment of the Court of Appeal.

M. Farook Thahir with *A.L.N. Mohamed* for the substituted plaintiff-petitioner-appellant.

L.A. Paranavithana for the defendant-respondent-respondent.

Cur.adv. vult.

February 2, 2008

GAMINI AMARATUNGA, J.

The original plaintiff Hayathu BeeBee alias Sithy Nazeera filed action in the District Court of Gampola for the ejectment of her tenant (defendant respondent) from the residential premises and the land more fully described in the schedule to the plaint. The plaintiff brought her action under section 22(1)(bb) of the Rent Act as amended by Rent (Amendment) Act No. 10 of 1977. In terms of the said section 22(1)(bb) a landlord of any premises the standard rent of which did not exceed one hundred rupees for a month, has the right to institute action for the ejectment of the tenant of such premises on the ground that such premises are reasonably required for occupation as a residence by such landlord or a member of his family.

On 1st March 1982, judgment was entered of consent in favour of the plaintiff. Decree was accordingly entered directing the ejectment of the defendant and all those claiming under him from the property in suit and for the delivery of vacant possession to the plaintiff. Section 22(1c) of the Rent Act contained a special provision with regard to execution of decrees entered in respect of premises referred to in section 22(1)(bb). Section 22(1c) of the Rent Act at that time was as follows:

"22(1c) Where a decree for the ejectment of the tenant of any premises referred to in paragraph (bb) of sub section (1) is entered by any court on the ground that such premises are reasonably required for occupation as a residence for the landlord or any member of the family of such landlord, no writ in execution of such decree shall be issued by such court until after the Commissioner of National Housing has notified to such court that he is able to provide alternative accommodation for such tenant." (emphasis added).

In view of the above statutory provision, the consent decree entered in favour of the plaintiff contained the condition that the plaintiff shall have no right to obtain a writ for the delivery of possession of the premises to her until alternative accommodation is provided to the defendant (the tenant) by the Commissioner of National Housing.

On 17.12.1985, the Commissioner of National Housing allocated a house in the Ranpokunawatta housing scheme to the defendant tenant, but the latter, who was not satisfied with the Commissioner's offer, filed Writ Application No. CA 65/1986 in the Court of Appeal seeking a *Writ of Certiorari* to quash the notification sent by the Commissioner to him informing him of the allocation of the Ranpokunawatta house to him. The Court of Appeal, following the decision of the Supreme Court in *Mowjood* v *Pussedeniya*[1], held that the house offered by the Commissioner of National Housing was not in law alternative accommodation contemplated in section 22 (1c) of the Rent Act and accordingly issued a *Writ of Certiorari* quashing the notification sent by the Commissioner allocating the Ranpokunawatta house to the defendant.

The plaintiff died in 1998, leaving the present petitioner appellant Mohamed Azar and six others as her intestate heirs. Due to the inability/failure of the Commissioner of National Housing to provide alternative accommodation to the defendant tenant, the plaintiff was unable, upto the time of her death, to obtain a writ to eject the defendant in terms of the decree entered in her favour.

The Rent (Amendment) Act No. 26 of 2002, which came into operation on 24.10.2002, amended the existing provisions of

section 22 of the Rent Act relating to the procedure for filing of actions by landlords for the recovery of premises on the basis of reasonable requirement and the execution of decrees entered in such actions, and substituted therefor new provisions in respect of those matters. The Amending Act repealed section 22(1)(b) and substituted a new subsection in its place. After the amendment, the relevant part of section 22(1) reads as follows.

> *"22(1) Notwithstanding any thing in any other law, no action or proceedings for the ejectment of the tenant of any premises the standard rent (determined under section 4) of which for a month does not exceed one hundred rupees shall be instituted in or entertained by any court, unless where-*
>
> *(a) the rent of such premises has been in arrears for three months or more after it has become due; or*
>
> *(b) such premises are in the opinion of the Court, reasonably required for occupation as a residence for the landlord or any member of the family of the landlord, or for the purpose of the trade, business, profession, vocation or employment of the landlord, and such landlord has deposited, prior to the institution of such action or proceedings a sum equivalent to ten years' rent or rupees one hundred and fifty thousand, whichever is higher, with the Commissioner for National Housing and has caused notice of such action or proceedings to be served on the Commissioner;"*

The amending Act repealed section 22(1)(bb) of the Rent Act. The steps to be taken by the Commissioner on receipt of the deposit and the notice of action are set out in section 22 (1A), but those provisions are not relevant to the present purpose.

Section 22(1c) which related to execution of decrees was repealed and the following new subsection was substituted in its place.

> *"22(1c) Where a decree for the ejectment of the tenant of any premises is entered by any court on the ground that such premises are reasonably required for occupation*

as a residence for the landlord or any member of the family of such landlord or for the purposes of the trade, business, profession, vocation or employment of the landlord and -

(a) Where the Commissioner of National Housing has under subsection (1A) notified court that he is able to provide alternate accommodation for such tenant; or

(b) Where the Commissioner of National Housing has failed to notify to court of the availability of alternate accommodation under the section (1A) for over a period of one year from the date of decree of ejectment and the court is satisfied on application made by the landlord stating that -

(i) the sum of money required to be deposited by him with the Commissioner for National Housing under paragraph (b) of sub section (1) has been deposited;

(ii) the Commissioner for National Housing has failed to notify court of the availability of alternate accommodation under subsection (1A); and

(iii) a period of one year has elapsed since the date on which the decree was entered and he is entitled to obtain a writ of execution.

the Court shall issue a writ of execution of the decree to the Fiscal of the court ...."

The amendments made to section 22 of the Rent Act by the amending Act No. 26 of 2002 provided a new mechanism for the landlord to get the decree entered in his favour executed through court without indefinitely waiting until the Commissioner of National Housing provided alternative accommodation to the tenant.

In order to extend the benefit conferred on the landlords by the amending Act No. 26 of 2002 to the landlords who had already obtained decrees for the ejectment of their tenants, a new provision was added at the end of section 22(3)(8). The new provision is as follows:

" the amendment made to the principle enactment by sub section (1) of this section shall mutatis mutandis apply to decrees entered prior to the date of commencement of this Act subject to:

(a) the requirement that the landlord of such premises shall deposit the required sum with the Commissioner of National Housing, ***within two months*** *of the date of coming into operation of this Act.*

(b) the requirement that the Commissioner of National Housing shall, where decree has already been entered, provided alternative accommodation to the tenant of such premises; and

(c) the condition that the period of ***one year*** *will commence with effect from the date on which the required amount is deposited with the Commissioner of National Housing.*

The present petitioner Mohamed Azar, one of the intestate heirs of the deceased plaintiff, had deposited a sum of Rs. 150,000/- with the Commissioner of National Housing on 23.12.2002, within two months of the date on which the amending Act came into operation i.e. 24.10.2002. Thus he has complied with the requirement set out in section 22(3)(8)(a) quoted above. Even after one year from the date of depositing (23.12.2002) a sum of Rs. 150,000/- with the Commissioner of National Housing by the present petitioner appellant Mohamed Azar, who had got himself substituted in place of the deceased plaintiff, the Commissioner of National Housing had failed to provide alternative accommodation to the defendant respondent tenant. Thereafter, the petitioner appellant, after one year from the date of depositing Rs. 150,000/- with the Commissioner of National Housing, has made an application, as he is lawfully entitled to do under the provisions of the amending Act, to obtain a writ of ejectment against the defendant-respondent.

After the defendant respondent filed his objections to the petitioner appellant's application for the writ of ejectment, the learned District Judge, by his order dated 23.01.2006, refused the application for the writ of ejectment. The learned District Judge had given two reasons for dismissing the application for the writ.

(1) The application for the writ has been made twenty one years after the date on which the decree had been entered and as such the application is barred by section 337(1) of the Civil Procedure Code which provides that no application to execute a decree shall be granted after the expiration of ten years from the date of the decree.

(2) Since the consent decree contained the condition that the plaintiff shall have no right to obtain a writ for the delivery of possession of the premises to her until alternative accommodation is provided to the defendant tenant by the Commissioner of National Housing, the provisions of the amending Act No. 26 of 2002, in the absence of specific provision to that effect, do not have the effect of varying or removing that condition and as such the plaintiff is not entitled to obtain the writ until that condition is fulfilled.

The petitioner appellant filed a leave to appeal application against the order of the learned District Judge. The Court of Appeal by its order dated 12.3.2007 refused leave to appeal and dismissed the application. The Court of Appeal was of the view that since ten years had passed from the date of the decree, the petitioner's application was barred by section 337(1) of the Civil Procedure Code.The Court of Appeal has not dealt with the other reason given by the learned District Judge that the amending Act No. 26 of 2002 did not have the effect of varying or removing the condition contained in the consent decree.

This Court has granted leave to appeal against the order of the Court of Appeal. Two questions of law arise for decision in this appeal.

(1) Has the Court of Appeal erred in law in reaching the conclusion that section 337(1) of the Civil Procedure Code is a bar to the application for the writ of ejectment made by the petitioner appellant?

(2) Did the Court of Appeal and the District Court fail to consider the purpose and the effect of the rent (Amendment) Act No. 26 of 2002 in so far as it was relevant to the consent decree entered in favour of the (deceased) plaintiff?

The relevant part of section 337(1) considered by the Court of Appeal is as follows.

> *337(1) "No application ..... to execute a decree shall be granted after the expiration of ten years from -*
>
> *(a) the date of the decree ....."*

In this case when the consent decree was entered on 1.3.1982 on the basis of the reasonable requirement of the landlord, section 22(1c) of the Rent Act, which related to such decrees contained the specific provision that "*no writ of execution of such decree shall be issued by such court until after the Commissioner of National Housing has notified to such court that he is able to provide alternative accommodation for such tenant.*" Thus the law prevented the court from issuing a writ until the condition set out in the section is fulfilled. So long as this legal prohibition remained in force, the judgment-creditor had no right to obtain the writ of ejectment. In 1985 when the Commissioner of National Housing allocated a house in the Ranpokunawatta housing scheme to the tenant judgment debtor as alternative accommodation, the latter obtained a *writ of certiorari* from the Court of Appeal quashing such allocation. After that no alternative accommodation was provided to the tenant by the Commissioner until Act No. 26 of 2002 repealed Section 22(1c) of the Rent Act and substituted a new subsection therefor. As such the legal prohibition to issue the writ and the corresponding, disability of the judgment creditor to apply for the writ continued for twenty years until 2002. When a judgement creditor has made an application for the writ, the Court to which that application has been made has to satisfy itself that "the judgment creditor is entitled to obtain execution of the decree." (see sections 225, 320 and 323 of the Civil Procedure Code). Since the legal impossibility of the judgment creditor to obtain the writ continued for twenty years, the judgment creditor was not entitled to obtain execution of the decree and accordingly he cannot be faulted for not applying for the writ within ten years from the date of the decree. *Lex non cogit ad impossibilia.* The law does not compel the performance of what is impossible.

After new section 22(1c) inserted by the amending Act No. 26 of 2002, the judgment creditor became entitled to deposit ten years rent of the premises or Rs. 150,000/- whichever is higher with the

Commissioner of National Housing and apply for the writ one year after the date of such deposit. Thus the substituted plaintiff petitioner appellant became entitled to execute the decree only on 24.12.2003, being the date one year after the deposit of Rs. 150,000/- with the Commissioner. The limit of 10 years contemplated in section 337(1) commenced to run only from 24.12.2003. The time bar prescribed by section 337(1) commences to operate only from the date on which the judgment creditor becomes entitled to execute the writ, and as such it has no application to a case where the judgment creditor is prevented by a rule of law from executing the writ entered in his favour. The time bar will apply in cases where the judgment creditor after becoming entitled to obtain the writ has slept over his rights for ten years.

In *Jayasekera* v *Herath*[2] the Court of Appeal has held that the period of ten years begins to run only from the date on which the judgment creditor becomes entitled to make an application for the writ. I am in respectful agreement with the decision of the Court of Appeal. It would indeed be unjust and inconsistent with the purpose of section 337(1) to apply the time bar in a situation where the decree has become incapable of execution due to a rule of law which prevents its execution. The learned District Judge and the learned Judges of the Court of Appeal were in error when they held that the petitioner appellant's application made on 18.5.2004 to obtain the writ was barred by section 337(1) of the Civil Procedure Code. I accordingly answer the first question of law in the affirmative.

The second question of law is based on the second reason given by the learned District Judge for dismissing the application for the writ of ejectment. In his order, the learned District Judge has stated that the amending Act No. 26 of 2006 did not have the effect of varying the condition in the consent decree that the plaintiff shall have no right to obtain the writ of ejectment until the Commissioner of National Housing is able to provide alternative accommodation to the defendant tenant. This condition had been included in the consent decree in view of the specific provision contained in section 22(1c) of the Rent Act (Quoted at the beginning of this judgment).

In view of the broad interpretation given to the term 'alternative accommodation' by the Supreme Court in *Mowjood* v *Pussedeniya (supra)*, the Commissioner of National Housing was unable to provide

alternative accommodation to many tenants against whom decree had been entered on the basis of the reasonable requirement of the premises by the landlord. In view of the precondition contained in section 22(1c) of the Rent Act, many landlords who had obtained decrees in their favour were unable to enjoy the fruits of their litigation. Their decrees were deduced to mere pieces of paper devoid of the substantive benefits which flow from decrees entered by Courts. The Rent (Amendment) Act No. 26 of 2002 repealed section 22(1c), enacted a new provision in its place and made it applicable to decrees already entered at the time the repealed section 22(1c) was in force. The object of this amendment was to remedy the mischief resulting from the precondition contained in section 22(1c). When the Legislature has removed that precondition and extended the benefit of such removal to those who had already obtained decrees in their favour, there is no justification in law and equity to tie down the decree holders to a condition which they were legally obliged under the existing law to agree to. The mechanical approach adopted by the learned District Judge would result in negating the object sought to be achieved by the amendments made to section 22(1c) and section 22(3)(8) by the amending Act No. 26 of 2002.

The Court of Appeal has not dealt with the second reason given by the learned District Judge for dismissing the substituted plaintiff petitioner appellant's application for the writ of ejectment.

For the reasons set out above, I answer the second question of law in the affirmative and set aside the order of the Court of Appeal dated 12.3.2007 and the order of the learned District Judge of Gampola dated 23.01.2006 and allow the substituted plaintiff petitioner appellant's application for ejectment of the defendant respondent respondent S.H.M. Idroos from the premises relevant to this case. I direct the learned District Judge to issue the writ of ejectment forthwith. The parties shall bear their costs in relation to execution proceedings.

The order of the Court of Appeal dated 12-3-2007 set aside.

MARSOOF, J. – I agree.

SOMAWANSA, J. – I agree.

Appeal allowed.

BABBUWA AND OTHERS
v
PREMADASA AND OTHERS

SUPREME COURT.
DR. SHIRANI BANDARANAYAKE, J.
ANDREW SOMAWANSA, J.
SC (APPEAL) NO. 57A/2006
SC (SPL) L.A. NO. 343/2003
C.A. NO. 139/90(F)
D.C. RATNAPURA NO. 1172/P
SEPTEMBER 4, 2008

Kandyan Law Declaration and Amendment Ordinance of No. 39 of 1938 Section 10(1), Section 27 – Its applicability in respect of persons dying after the commencement of the Ordinance in deciding question of heirship – Section 10(1) applicability of the provisions of the Ordinance to determine character of property – No retrospective application under the Ordinance unless expressly provided.

This is an appeal from the judgment of the Court of Appeal dealing with questions arising under the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938. The appellants and the respondents agreed at the hearing that this appeal could be argued on the following questions:

(1) Have their Lordships of the Court of Appeal erred in holding that the provisions of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, applied in respect of persons dying after the commencement of the said Ordinance in deciding questions of heirship, but did not apply in determining the nature and character of the inheritance?

(2) Have their Lordships of the Court of Appeal erred in holding that the definition of *paraveni* in section 10(1) of the said Ordinance did not apply to the property in question at the time of the death of Podimenike referred therein?

Held:

(1) Section 10 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 clearly indicates that the proviso or the provisions of Section 10(1) do not have retrospective application regarding *paraveni* property. Section 27 of the Ordinance clearly states that the Ordinance shall not have retrospective effect unless expressly so provided in the Ordinance.

(2) For the property in dispute to be categorized as *paraveni* property it has to be identified under one of the three categories specified in Section 10(1) a, b, and c, subject to the conditions stipulated in the proviso to Section 10 of the Ordinance.

Held further:

(3) Acquired property consists of property obtained in other ways such as by accession, dowry, gift, prescription, purchase, occupation by operation of law or by royal favour.

(4) The Kandyan Law Declaration and Amendment Ordinance came into effect in January 1939 and if any person dies after the said Ordinance had come into effect, the provisions of said Ordinance would be applicable in deciding the succession of that person's acquired property.

Cases referred to:

(1) *Ausadahamy* v *Tikiri Banda* (1950) 52 NLR 314.

(2) *Dingiri Banda* v *Madduma Banda* (1914) 17 NLR 201.

(3) *Ukkuwa* v *Banduwa* (1916) 19 NLR 63.

APPEAL from the Judgment of the Court of Appeal.

Navin Marapona for respondents-appellants-Appellants.

D.S. Wijesinghe, PC with *Kaushalya Molligoda* for 1st and 2nd plaintiffs-respondents-respondents.

L.C. Seneviratne, PC with *U.H.K. Amunugama* and *S. Gunasekera* for 7th to 10th defendants-respondents-respondents.

Cur.adv.vult

February 2, 2008

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 05.11.2003. By that judgment the Court of Appeal dismissed the appeal of the 11th, 12th and 14th defendants-appellants-appellants (hereinafter referred to as appellants) and affirmed the order of the learned District Judge, who had held, by his order dated 05.03.1990, that Ukkinda, Suratha and Malmada were the original owners of the land and therefore 1st and 2nd plaintiff-respondents-respondents (hereafter referred to as respondents) were entitled to 1/3 share in the land sought to be partitioned, which was owned by one of the original owners, viz., Ukkinda. The appellants appealed

to this Court for the appellants and the learned President's Counsel for the respondents agreed at the hearing that this appeal could be argued on the basis of the following questions:

(1) Have their Lordships of the Court of Appeal erred in holding that the provisions of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, applied in respect of persons dying after the commencement of the said Ordinance in deciding questions of heirship, but did not apply in determining the nature and character of the inheritance?

(2) Have their Lordships of the Court of Appeal erred in holding that the definition of paraveni property in section 10(1) of the Ordinance did not apply to the property in question at the time of the death of Podimenike referred to therein?

The facts of this appeal as submitted by the learned Counsel for the appellants and the respondents, *albeit* brief, are as follows:

The respondents had instituted this partition action in the District Court of Ratnapura and sought to partition the land known as "Indikade Kumbura" described morefully in the schedule to the plaint filed by them. The appellants and the 1st to 10th defendants-respondents (hereinafter referred to as the defendants) had filed their statements of claim and admittedly there had been several different pedigrees and diverse claims to shares by the parties to be considered by the learned District Judge.

After trial, learned District Judge had held that, three (3) persons, viz., Ukkinda, Malmada and Suratha, named in the plaint were the original owners of the land that was sought to be partitioned and that they owned the corpus in equal (1/3) shares. The respondents were therefore declared entitled to 1/3 share of Ukkinda.

The appellants, aggrieved by the said judgment of the learned District Judge of Ratnapura in the said partition action, preferred an appeal to the Court of Appeal challenging the decision of the 1/3 share of Ukkinda. All parties had accepted the finding of the learned District Judge on the three (3) original owners and the shares credited to them and the only matter, which came up for

consideration in the Court of Appeal was whether the 1/3 share of Ukkinda had devolved on the appellants or the respondents. Since the shares allocated to the other defendants were not in issue, learned President's Counsel for the 7th defendant, Mr. L.C. Seneviratne, was requested to assist the Court of Appeal as *amicus*. The learned President's Counsel for the 7th defendant, had clearly taken up the position that the said 1/3 share of Ukkinda devolved on the respondents.

It was common ground that the following facts were not in dispute between the parties:

(1) 1/3 share of Ukkinda was conveyed to Gamasagam Gamaethige Malhamy on Deed No. 619 dated 02.11.1882 (P1);
(2) the said Gamasagam Gamaethige Malhamy conveyed his rights to his daughter Gamasam Gamaethige Ranmenike on Deed No. 27497 dated 18.01.1897 (P2);
(3) the said Ranmenike was married to one Imihamilage Haramanis Appuhamy;
(4) the said Ranmenike died leaving Podimenike;
(5) that on Ranmenike's death, the said property devolved on her daughter Imihamilage Podimenike, and
(6) the said Podimenike died intestate and issueless on 01.01.1944.

Accordingly it was not disputed that the main issue that has to be considered was whether upon the death of Podimenike, her title devolved on her father,viz., Imihamilage Haramanis Appuhamy, as claimed by the respondents or her maternal uncle, viz., Gamasam Gamaethige Appuhamy, as claimed by the appellants. In order to examine the said question, it was necessary to ascertain whether the property was *paraveni* property or *acquired* property of Podimenike at the time of her death. This issue is of importance as if the property in question was *paraveni,* after her death the property would have vested in her maternal uncle and if it was *acquired* property it would have vested in her father.

Learned Counsel for the appellants contended that the property in question was the maternal *paraveni* property of the said Podimenike and therefore the appellants were entitled to succeed in this appeal.

Learned Counsel for the appellants further contented that the learned trial Judge, although was correct in applying the proviso to section 10 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 (hereinafter referred to as the Ordinance), had erred in applying a wrong definition, in describing *paraveni* property.

The contention of the learned Counsel for the appellant was that the said Podimenike had died in 1941 after the Ordinance came into force and therefore the provisions of the said Ordinance must be applied in its totality. According to the learned Counsel, the nature of the property in question must be determined solely by applying the definition in section 10(b) of the said Ordinance, which would clearly show that the property in dispute must be regarded as Podimenike's maternal *paraveni* property.

On a consideration of the submissions of the learned Counsel for the appellants and the learned President's Counsel for the respondents, it is evident that the only question that has to be examined was that whether the property in dispute could be described and recognised as *paraveni* property as contended by the learned Counsel for the appellants or whether it belongs to the category of *acquired* property as contended by the learned President's Counsel for the respondents.

It is common ground that Podimenike died on 01.11.1944 (11V7) intestate and left no surviving spouse or issue and that the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 came into force on 01.01.1939. The said Ordinance was enacted to declare and amend the Kandyan Law in certain respects, deals with the inheritance of immovable and movable property. Section 10 of the said Ordinance which is contained under the inheritance of immovable property, specifically deals with the question of *paraveni* property and states as follows:

> "10(1) The expressions "*paraveni* property" or "ancestral property" or "inherited property" and equivalent expressions shall mean immovable property to which a deceased person was entitled -
>
> (a) by succession to any other person who has died intestate, or

(b) under a deed of gift executed by a donor to whose estate or a share thereof the deceased would have been entitled to succeed if the donor had died intestate immediately prior to the execution of the deed; or

(c) under the last will of a testator to whose estate or a share thereof the deceased would have been entitled to succeed had the testator died intestate;

Provided, however, that if the deceased shall not have left him surviving any child or descendant, property which had been the acquired property of the person from whom it passed to the deceased shall be deemed acquired property of the deceased.

Section 10(3) of the said Ordinance, which refers to the *acquired* property clearly states that,

> *"Except as in this section provided, all property of a deceased person shall be deemed to be acquired property."*

It is therefore apparent that for the property in dispute to be categorized as paraveni property, it has to be identified under one of the three (3) categories specified in Section 10(1) a,b, and c, subject to the conditions stipulated in the proviso to Section10 of the Ordinance.

As stated earlier, it is important to note that, Podimenike died leaving no surviving spouse and issueless, which is a fact admitted by the appellants as well as the respondents. Consequently, the proviso to section 10 of the Ordinance comes into effect and thus it becomes relevant and necessary to ascertain whether the property in question was acquired property or not in the hands of **Ranmenike** from whom it was passed to the deceased Podimenike.

The aforementioned position that the proviso to Section 10 of the said Ordinance is applicable to the property in dispute is also admitted by both parties. Accordingly it is common ground that it is

necessary to examine whether the property in dispute was the *acquired* property of Ranmenike or whether it was her *paraveni* property.

The contention of the learned Counsel for the appellants was that Ranmenike had got the property in question by way of a deed of gift (P2) from her father namely, Malhamy Muhandiram. Since it was given under a deed or gift, learned Counsel for the appellants, strenuously contented that, the provisions of section 10(1) (b) of the said Ordinance shall be applicable and accordingly the said property must be considered as *paraveni* property of Ranmenike. The position taken by the learned Counsel for the appellants is that, although, Podimenike's mother, Ranmenike had deceased prior to the introduction of the Ordinance, the provisions laid under the said Ordinance should be applicable to ascertain the category of property that is in dispute.

The contention of the learned President's Counsel for the respondents was that the law as it stood on the date the property in dispute became vested in Ranmenike should apply, and therefore the law, which was in force prior to the Ordinance came into being should be applicable when dealing with the aforementioned question.

In fact the case law dealing with *paraveni* property supports the contention of the learned President's Counsel for the respondents and *Ausadahamy* v *Tikiri Banda*(1) is a decision in point. The learned Counsel for the appellants however, submitted that the case of *Ausadahamy (supra)* has been wrongly decided and that the line of reasoning in that case did not accurately take into account the fact that the definitions in the 1938 Ordinance had to be applied uniformly to all questions, which arose for decision after its enactment. The contention of the learned Counsel for the appellants was that in all disputed questions arising after the 1938 Ordinance, the only definition of *paraveni* property that could be applied was the definition in the Kandyan Law Declaration and Amendment Ordinance.

The said Ordinance as stated earlier, defines the expression, *paraveni* property in section 10 and a careful examination of the

said provision, clearly indicates that the proviso or the provisions of section 10(1) do not have retrospective application regarding *paraveni* property. In fact section 27 of the said Ordinance clearly stated that the Ordinance shall not have retrospective effect unless expressly so provided in the Ordinance. Section 27, thus reads that,

> *"The provisions of this Ordinance shall not have, and shall not be deemed or construed to have, any retrospective effect except in such cases where express provision is made to the contrary."*

Section 10(1) of the Ordinance, as could be clearly seen, has not made any express provision to have retrospective application of its provisions. It was this position that was highlighted in the decision of *Ausadahamy* v *Tikiri Banda (supra),* where Nagalingam, J. referred to section 27 of the Ordinance and had clearly stated that,

> "The words used are very emphatic and admit of no ambiguity. No retrospective effect should be given to the provisions of the Ordinance unless it could be shown that express provision is made that retrospective effect should be given. And to put the matter beyond any argument, the Legislature has taken pains to say that not only are the provisions not to have, but that they shall *not be deemed to or construed to have retrospective effect."*

Having said that Nagalingam, J. had observed that neither in section 10 nor in any other part of the Ordinance are there words from which it could be said that express provision has been made for retrospective effect, being given to the provisions of section 10 of the Ordinance.

Moreover Nagalingam, J. had also considered the aspect of the Ordinance, being a declaratory one,. Considering the said aspect it was stated that,

> "It is however, said that the Ordinance being a declaratory one, retrospective effect should be given to its provisions – *Attorney-General* v *Theobold.* The rule too is subject to qualification. In the words of Lord Watson in *Young* v *Adams,*

> *It may be true that the enactments are declaratory in form; but it does not necessarily follow that they are therefore retrospective and were meant to apply to acts which had been completed or to interests which had vested before they became law."*

The Kandyan Law Declaration and Amendment Ordnance cannot be regarded entirely as an enactment, which is declaratory as it deals with amendments as well. The cumulative effect of all the aforementioned aspects is that the provisions of the said Ordinance cannot be applied retrospectively unless there is express provision to that effect.

It is therefore quite evident that their Lordships of the then Supreme Court in *Ausadahamy* v *Tikiri Banda (supra)* had not erred when it stated that,

> *"Now, neither in section 10 nor in any other part of the Ordinance are there words from which it could be said that express provision has been made for retrospective effect being given to the provisions of section 10; therefore, even a construction of the section so on to give it retrospective effect is completely barred."*

Accordingly, since there is no possibility for the application of the provisions of the Kandyan Law Declaration and Amendment Ordinance to determine the character of the property of Ranmenike, it is evident that it would be necessary to apply the Kandyan Law to decide the nature of her property.

Under Kandyan Law, the property could be classified into different groups, but the classifications of chief importance are those which divide things into movables and immovables, inherited and acquired. The distinction between inherited and acquired property is of considerable importance. Inherited property or as it was known in the Kandyan regions – *paraveni* property – belongs to several kinds. Referring to these different kinds of property, H.W. Thambiah, (Principles of Ceylon Law, H.W. Cave and Company, 1972, pg. 160) states that,

> "Inherited property by virtue of paternity is of two kinds. It may consist of property inherited from the father or from the estate of any other relation (*piya uruma*); or it may consist of the right of a father to succeed to the estate of the deceased child (*jataka uruma*).
>
> Property obtained by virtue of maternity is of two kinds; a person may inherit the property from his mother's estate or from the estate of any relation from the mother's estate or from the estate of any relation from the mother's side (*mau uruma*); or the mother may sometimes in certain instances succeed to the estate of a deceased child (*daru Uruma*)."

Acquired property on the other hand consists of property obtained in other ways such as by accession, dowry, gift, prescription, purchase, occupation, operation of law or by royal favour. Accordingly, as H.W. Thambiah (*supra*) has clearly pointed out, under Kandyan Law, property falls into three (3) general categories, viz., paternal *paraveni*, maternal *paraveni* and acquired property. The intestate succession therefore could vary depending on the nature of the property that had been inherited.

As referred to earlier, the question in this matter had arisen when the respondents instituted a partition action (No, 1172/P) in the District Court of Ratnapura and sought to partition the land called and known as "Indikade Kumbura", described morefully in the schedule to the plaint. It was common ground that Ukkinda, Malmada and Suratha were the original owners of the disputed land and that Ukkinda, being one of the original owners, was entitled to 1/3 share of the said land in dispute.

The 1/3 share of Ukkinda was conveyed to Gamasam Gamaethige Malhamy on Deed No. 619 dated 02.11.1882 (P1). The said Gamasam Gamaethige Malhamy conveyed his rights to his daughter Gamasam Gamaethige Ranmenike on Deed No. 27497 dated 18.01.1897 (P2). It is therefore to be noted that the said Malhamy did not inherit the said 1/3 share, but had purchased it at a Fiscal's Sale on a Fiscal's Conveyance No. 619 dated

02.11.1882. Accordingly it was the said acquired property that Malhamy had gifted to his daughter Ranmenike in 1897.

The question as to whether the property that has been gifted could be considered as acquired property was examined in *Dingiri Banda* v *Madduma Banda*(2) by Lascelles, C.J., and De Sampayo, A.J. In this matter, Ukkurala and Mutumenika had a daughter, Kirimenika (died in 1868), who was married in *binna* to plaintiff. Ukkurala gifted in 1888 along with Mutumenika his land to his grandson, Tikiri Banda, subject to the condition that he should render assistance, etc., to Ukkurala and Mutumenika. Tikiri Banda died leaving a son, Ran Banda, who died issueless in 1906. Mutumenika in 1907 (her husband being then dead) purported to gift the land to her brothers. De Sampayo, A.J. held that,

(a) Mutumenike's deed in favour of her brothers did not convey any title to them, as the land belonged to Ukkurala and not to Mutumenike;
(b) That on Ran Banda's death the property devolved on his paternal grandfather (Kirimenike's husband) and that;
(c) in the hands of Tikiri Banda himself the property was acquired, and not *paraveni* or ancestral property.

The decision in *Dingiri Banda* (*supra*) was followed in *Ukkuwa* v *Banduwa*(3), where Ennis and De Sampayo, J.J., held that property gifted to a person is acquired property of that person. Considering the question in issue, De Sampayo, J. stated that,

> "Property gifted to a person is 'acquired property' of that person. *Ukkurala* v *Tillekeratne* and *Kiri Menika* v *Mutu Menika*. The view taken in those cases appears to be in accordance with the principle; and I myself adopted it in *Dingiri Banda* v *Madduma Banda*, and held that, "acquired property" is opposed to *paraveni* or inherited property, and that property gifted to a son by the father was 'acquired property' of the son."

Discussing the types of property and what they include, FA. Hayley (A Treatise on the Laws and Customs of the Sinhalese, Navrang, New Delhi, 1993 pg. 220) has clearly stated that,

> *"Acquired property includes things obtained by personal effort, by gift in return for assistance rendered, by sale or exchange, by way of dowry, gift or royal favour."*

On consideration of the aforementioned it is evident that Ranmenike's property was acquired property, which was later inherited by her daughter, Podimenike. Accordingly the property inherited by Podimenike was also acquired property.

The next question which arises is that on whom the acquired property of Podimenike devolved on her death. If I may repeat, the Kandyan Law Declaration and Amendment Ordinance came into effect in January 1939 and Podimenike had died in 1944. Since at the time of Podimenike's death, the said Ordinance had come into effect, the provisions of the said Ordinance would be applicable in deciding the succession of Podimenike's acquired property.

As stated earlier, Podimenike had died intestate and issueless. She had no surviving brothers or sisters and only her father was among the living at the time of her death. Section 16 of the Kandyan Law Declaration and Amendment Ordinance deals with succession to person dying intestate leaving no surviving spouse or descendant. Considering the fact that it was only Podimenike's father who had survived her, provisions of Section 16(c) of the Ordinance should be applicable to the property and the said section reads thus:

> *"If there be no brother or sister or descendant of a deceased brother or sister, the parents in equal shares, or the surviving parent as the case may be, shall become entitled to the property;"*

Accordingly, Podimenike's father Haramanis Appu, being the only surviving parent, should be entitled to the 1/3 share of Podimenike, which was in dispute.

In the circumstances, the respondents, who had later bought the property from Haramanis Appu on P4, would be entitled to the said 1/3 share.

It is thus, apparent that the learned District Judge in his judgment had correctly held that it was Imihamilage Haramanis

Appuhamy, the father of Podimenike, who had inherited her title to the property in question upon her death and on that basis had held that the respondents were entitled to the 1/3 share of Ukkinda on the property being partitioned, which judgment was affirmed by the learned Judges of the Court of Appeal.

For the reasons aforesaid, I answer both questions of law, Nos. 1 and 2, on which Special Leave to appeal was granted, in the negative. The judgment of the Court of Appeal dated 05.11.2003 is accordingly affirmed and this appeal is dismissed.

I make no order as to costs.

DISSANAYAKE, J. – I agree.

SOMAWANSA, J. – I agree.

Appeal dismissed

EDMAN ABEYWICKREMA
v
DR. UPALI ATHAUDA AND ANOTHER

SUPREME COURT.
DR. SHIRANI BANDARANAYAKE, J.
SALEEM MARSOOF, J.AND
ANDREW SOMAWANSA, J.
S.C. APPEAL NO. 03/2005
S.C. SPL. L.A. 276/2004
C.A. 1259/96(F)
D.C. KANDY 20619/M.R.
JUNE 6, 2008

Civil Procedure Code – Section 85 (4) – What is the consequence of serving an invalid ex-parte decree – Do the provisions of the Civil Procedure Code apply to the decree when it was not an ex-parte decree – Section 86 – When there is no valid ex-parte decree served on the defendant is there a duty cast upon him to proceed under section 86.

As the appellant was absent and unrepresented, the case was fixed for *ex-parte* trial. Subsequently, the *ex-parte* trial was taken up and concluded and judgment was entered in favour of the respondents. Thereafter a purported *ex-parte* decree had been entered and the same was served on the appellant.

It reads as follows:-

"මෙම නඩුව මහනුවර අතිරේක දිසා විනිසුරු පී.බී. වරාවැව මැතිතුමා ඉදිරිපිට දී වර්ෂ 1994 ක්වූ ජනවාරි මස 12 වන දින පැමිණිල්ල වෙනුවෙන් නීතීඥ කිරිඇල්ල මහතාගේ උපදෙස් පිට නීතීඥ ප්‍රගත්කාර. විත්තිය වෙනුවෙන් නීතීඥ පෙරේරා මහතාද පෙනී සිටිය දී පහත සඳහන් පරිදි නඩුව පමථයකට පත් කිරීමට එකඟ බවට නියෝග කර තීන්දු කරනු ලැබේ."

Held:

(1) The decree served on the appellant on the face of it, is not an *ex-parte* decree but an *inter-partes* decree entered of consent and certainly not in accordance with the judgment and as such purging the appellant's default never arose. It does not cast any obligation on the appellant to comply with the provisions in section 86 of the Civil Procedure Code.

(2) Section 85(4) of the Civil Procedure Code provides for serving of an *ex-parte* decree entered in accordance with the judgment only.

(3) Section 85(1) of the Civil Procedure Code provides that the court should enter decree, though it is the practice for the Attorney-at-Law to draw up the decree and tender the same for judge's signature. The Judge is duty bound to satisfy himself of the correctness of the decree before he places his signature to it.

APPEAL from the judgment of the Court of Appeal.

Nihal Jayamanna, PC with *Dilhan de Silva* for the appellant.
P.A.D. Samarasekera, PC with *Rohan Sahabandu* for the respondents.

Cur.ad.vult.

February 28, 2008

ANDREW SOMAWANSA, J.

The defendant-appellant (thereinafter referred to as the appellant) was granted special leave to appeal on the questions of law as enumerated in paragraph 16 of his petition which reads as follows:

a) Was the *ex-parte* decree dated 31.10.1994 served on the defendant in fact a valid *ex-parte* decree?

b) Was the order of the learned District Judge dated 17.11.1994 correct when he acted on the basis that the said decree was an *ex-parte* decree?

c) Did the provisions of the Civil Procedure Code apply to the decree in view of the fact that it was not an *ex-parte* decree?

d) Could the defendant have moved under section 86 of the Civil Procedure Code when the only and valid *ex-parte* decree entered on 19.03.1996 was not served on the defendant?

When the matter was taken up for hearing counsel appearing for both parties made oral submissions and thereafter undertook to tender written submissions within two weeks. Though reminders were sent, no written submissions have been tendered by either party up to date.

The plaintiffs-respondents (hereinafter referred to as the respondents) instituted an action in the District Court of Kandy seeking a declaration of title to the land described in the schedule to the plaint, for ejectment of the appellant and damages. The appellant filed answer praying for a dismissal of the action and also stating that he has already disposed of his rights in the land in question.

It is common ground that the case was fixed for trial on 10.06.1992 on which date as the appellant was absent and unrepresented the case was fixed for *ex-parte* trial on 23.10.1992. On 06.10.1992 the appellant filed a petition and affidavit seeking to have the order for *ex-parte* trial vacated. Thereafter court granted a date for the appellant to support the aforesaid petition on which date too the appellant was absent and unrepresented and the case was re-fixed for *ex-parte* trial. Subsequently the *ex-parte* trial was taken up and concluded and judgment was entered in favour of the respondents. Thereafter a purported *ex-parte* decree had been entered and the same was served on the appellant on 31.10.1994. It is also common ground that the appellant within 14 days of receipt of the said purported *ex-parte* decree filed a motion seeking to set aside the *ex-parte* decree on the basis that it was not in conformity with the judgment and therefore was irregular. The learned District Judge by his order dated 17.11.1995 rejected the said application of the appellant on the basis that the appellant has not followed the correct procedure in making the application as laid down in section 86(3) of the Civil Procedure Code which requires that every application shall be made by petition supported by affidavit.

The purported *ex-parte* decree served on the appellant found on page 59 of the brief reads as follows:

"මෙම නඩුව මහතුවර අතිරේක දිසා විනිසුරු පී.බී. වරාවැට මැතිතුමා ඉදිරිපිට දී වර්ෂ 1994 ක්වූ ජනවාරි මස 12 වන දින පැමිණිල්ල වෙනුවෙන් නීතිඥ ටාරමෙන් කිරිඇල්ල මහත්මයාගේ උපදෙස් පිට නීතිඥ සංඝක්කාර, විත්තිය වෙනුවෙන් නීතිඥ ඩබ්. එන්. යූ. කේ. පෙරේරා මහතාද පෙනී සිටිය දී පහත සඳහන් පරිදි නඩුව සමථයකට පත් කිරීමට එකඟ බවට නියෝග කර තීන්දු කරනු ලැබේ."

It is apparent that on the face of the purported *ex-parte* decree served on the appellant it is not an *ex-parte* order but an *inter-partes* decree entered of consent and certainly not in accordance with the judgment.

It is also common ground that subsequently another decree prepared in accordance with the *ex-parte* judgment had been tendered by the Attorney-at-Law for the respondents and thus a second *ex-parte* decree had been entered on 19.03.1996. The aforesaid second *ex-parte* decree was served on the appellant on 13.05.1996 and the appellant filed petition and affidavit on 21.05.1996 seeking to have the *ex-parte* decree vacated. After inquiry the learned District Judge by his order dated 17.10.1996 refused the appellant's application on the basis that the date of receipt of the first *ex-parte* decree vis: 31.10.94 should be counted as the date of serving the *ex-parte* decree and as such the appellant's application dated 21.05.1996 is made nearly 1 1/2 years after the decree was served on him and therefore is time barred.

The appellant thereafter preferred an appeal from the said order to the Court of Appeal and the Court of Appeal by its judgment dated 30.09.2004 in CA1259/96 dismissed the said appeal of the appellant accepting the reasoning given by the learned District Judge in his order.

It is contended by counsel for the respondents that the whole purpose in serving the *ex-parte* decree on a party who was absent at the trial and on the day the judgment was pronounced was to bring it to his notice or knowledge that there is a decree of court entered against such a party. Therefore when the 1st *ex-parte* decree was served on the appellant on 31.10.1994 it was brought to the notice of the appellant that a decree has been entered in an action against the appellant namely in District Court Kandy case No. 20619/MR to which the appellant was a party. In fact the appellant had prior knowledge of the pending action against him for he had tendered his answer, moreover had made an application to have the first order for an *ex-parte* trial vacated. However having obtained a date to support the said application the appellant failed to appear on the date on which he was due to support his application.

In the circumstances he submitted that the appellant had sufficient knowledge of the *ex-parte* decree that would be entered against him

and the decree served on the appellant on 31.10.1994 though defective was sufficient service in compliance with the provisions contained in section 85(2) of the Civil Procedure Code. Though the aforesaid argument appears to be attractive still I am unable to agree with the learned President's Counsel for the reason that even if one were to accept the contention that serving an *ex-parte* decree was to give notice of the decree entered against such a party, the decree that was served on the appellant was defective and not in conformity with the law and as such was not a valid *ex-parte* decree for on the face of the purported *ex-parte* decree served on the appellant it was not an *ex-parte* decree but an *inter-partes* decree entered of consent when the appellant never consented to such a decree. On the other hand, as it appears on the face of the decree served on the appellant if the appellant consented there was no necessity to serve the same on the appellant.

Section 85(4) of the Civil Procedure Code provides for serving of an *ex-parte* decree entered in accordance with the judgment only. Though it is the practice for the Attorney-at-Law to draw up the decree and tender the same for the Judge's signature section 85(1) of the Civil Procedure Code provides that court should enter decree and he is duty bound to satisfy himself of the correctness of the decree, that it is in conformity with the judgment before he places his signature to it. I must say the learned District Judge who signed the defective decree has failed to discharge his responsibilities in a proper manner. Be that as it may, when he came to the conclusion that decree served on the appellant on 31.10.1994 was sufficient compliance with section 85(4) of the Civil Procedure Code he did misdirect himself in law for the decree so served on the appellant was not an *ex-parte* decree but a consent decree and as such purging the appellant's default never arose. Unfortunately this aspect of the matter was never appreciated by the learned District Judge nor did the Court of Appeal.

The learned District Judge further misdirected himself in law when he went on to say in his order dated 17.10.1996 that entering of a subsequent corrected *ex-parte* decree and the court making an order to serve the same was superfluous. In fact the learned District Judge failed to appreciate the fact that the first decree served on the appellant on 31.10.1994 was a consent decree and not an *ex-parte* decree. In any event, the aforesaid consent decree cannot be

construed an *ex-parte* decree. In the circumstances, the purported *ex-parte* decree served on the appellant on 31.10.1994 was certainly not a valid *ex-parte* decree and as such does not attract the provisions contained in section 86 of the Civil Procedure Code nor does it cast any obligation on the appellant to comply with the said provisions in section 86 of the Civil Procedure Code if he so desires to purge his default at the trial and proceed with his defence.

For the aforesaid reasons, I would answer the questions of law on which leave was granted in the negative. Accordingly I would allow the appeal and set aside the judgment of the Court of Appeal dated 30.09.2004 and the order of the learned District Judge dated 17.11.1995. The learned District Judge is also directed to make an order in accordance with the law in respect of the application made by the appellant in his petition and affidavit dated 21.05.1996. The appellant is entitled to costs incurred in this Court as well as in the Court of Appeal.

DR. SHIRANI BANDARANAYAKE, J. – I agree.
MARSOOF, J. – I agree.

Appeal allowed.

RANAWEERA AND OTHERS
v
SUB-INSPECTOR WILSON SIRIWARDENA AND OTHERS

SUPREME COURT
S.N. SILVA, C.J.
RAJA FERNANDO, J. AND
AMARATUNGA, J.
S.C. APPLICATION 654/2003
SEPTEMBER 6, 2005

Constitution – Articles 4(d), 17, 113(A) and 126 – To claim exemption of the time limit of one month for filing an application for violation of Fundamental Rights – Executive or administrative liability – Action taken to implement a valid judicial order – Civil Procedure Code – Sections 188, 225, 320, 323, 351, 362 – Application for execution of a decree – Human Rights Commission Act No. 21 of 1996 – Section 13(1) – The period of time to be excluded in computing the period of one month – The protection available to an officer executing process issued by Court and the limits of such protection – lex non cogit ad impossibilia –

Applicability – Judicature Act 2 of 1978 – Amended by Act 16 of 1989 – Section 52 – Penal Code – Sections 70, 71.

The petitioners have filed this Fundamental Rights Application alleging that the Fiscal in executing the writ of possession issued in D.C. Colombo Case No. 18542/1, acted in violation of their right to the equal protection of the law. The Supreme Court has granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution. When the application was taken up, the State Counsel raised the following objections to the petitioners' application:

(1) The matters in the petition do not constitute executive or administrative action contemplated in Article 126 of the Constitution.

(2) The petitioners' application had been filed out of time.

Held:

(1) The act of a Judge in directing to issue the Writ is not a judicial act but a ministerial act.

Per Gamini Amaratunga, J. -

"Where an application is made by a person entitled to obtain the writ, setting out the particulars specified in Section 224, there is no room for the Court to exercise any discretion or to form its own judgment. The Court is obliged to direct the Writ to issue,"

(2) Execution of a Writ is purely a ministerial act done with judicial sanction, but such sanction cannot elevate the Fiscal's acts to the status of judicial acts which do not fall within the phrase 'executive or administrative action' used in Article 126 of the Constitution.

Per Gamini Amaratunga, J. -

"The Fiscal is a State Officer appointed for the purpose of due execution of the powers and the performance of duties of Courts including the service of process and the execution of decree of Court."

(3) Fiscal in executing a Writ issued by a Court falls within the ambit of executive or administrative action within the meaning of Article 126 of the Constitution and the Supreme Court has jurisdiction to examine such acts under the fundamental rights jurisdiction of the Supreme Court.

(4) Under the Roman Dutch law, which is the Common Law of Sri Lanka, a Judge enjoys complete immunity from Civil Liability for the acts done in the exercise of his judicial functions. Since judicial acts do not fall within the ambit of Article 126 of the Constitution, a Judge is not liable for the violation of fundamental rights arising from a judicial act.

(5) The protection available to an officer executing process issued by Court and the limits of such protection are set out in Section 362 of the Civil Procedure Code. However, the latter part of Section 362 sets out the situations where such an officer may incur liability for acts done in executing process issued by Court.

(6) When the general law of the land does not confer full immunity for all acts done in executing process issued by Courts there is no justification to exclude all such acts from the purview of the fundamental rights jurisdiction of the Supreme Court. In exercising the fundamental rights jurisdiction, the Supreme Court is under a duty to act in compliance with the letter and the spirit of Article 4(d) of the Constitution.

Held further:

(7) The time limit of one month prescribed by Article 126 of the Constitution for filing an application for the alleged violation of fundamental rights is mandatory. However, the Supreme Court would entertain an application made outside the time limit of one month provided an adequate excuse for the delay could be adduced.

The principle *lex non cogit ad impossibilia* would be applicable to grant relief to such petitioner.

(8) In a fundamental rights application, the first opportunity available to a respondent to put forward any defence available to him including the plea of time is the stage at which he has to file his objections after the Court has granted leave to proceed.

(9) According to Section 13(1) of the Human Rights Commission Act, the mere act of making a complaint to the Rights Commission is not sufficient to suspend the running time relating to the time limit of one month prescribed by Article 126(2) of the Constitution. In terms of the said Section 13(1) the period of time to be excluded in computing the period of one month prescribed by Articles 126(2) of the Constitution is "the period within which the inquiry into such complaint is pending before the Commission".

Cases referred to:

(1) *Peter Leo Fernando* v *The Attorney-General*, 1985.
(2) *Farook* v *Raymond* 1996 1 SriLR 217.
(3) *Cannosa Investments Ltd.* v *Earnest Perera and others* 1991 2 SriLR 214 at 221.
(4) *Kumarasinghe* v *The AG*, S.C. F.R. 54/82, S.C. Minutes of 6.9.82.
(5) *Dayananda* v *Weerasinghe* 2 F.R.D. 292 1983 2 SriLR 85.
(6) *Dharmatilaka* v *Abeynayake* S.C. 156.86, S.C. Minutes of 15.12.88.
(7) *Perera* v *The University Grants Commission* 1978-79-80 1 SriLR 128 at 138.
(8) *Faiz* v *The Attorney-General* 1995 1 SriLR 372 at 381.
(9) *Badoordeen* v *Dingiri Banda* 33 NLR 289.
(10) *Edirisinghe* v *Navaratnam* 1985 1 SriLR 100.
(11) *Subasinghe* v *Inspector General of Police* SC Sp. 16/99 SCM 11.9.2000.

APPLICATION alleging infringement of fundamental rights.

A.P. Niles with *Lakshman Amarasinghe* and *Arosha de Silva* for the petitioners.
Sunil Cooray with *Muditha Premachandra* for the 6th respondent.

M. Gopallawa SC for the 1st to 5th and 8th respondents.
J.C. Boange for the 7th respondents.

Cur.adv.vult.

May 13, 2008

GAMINI AMARATUNGA, J.

The petitioners have filed this fundamental rights application alleging that the Fiscal of the District Court of Colombo, in executing the writ of possession issued in D.C. Colombo case No. 18542/L, acted in violation of their right to the equal protection of the law. This Court has granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

When the application was taken up for hearing, the learned State Counsel appearing for the 1st to the 5th and the 8th respondents raised the following preliminary objections to the petitioners' application.

(1) The matters averred in the petition do not constitute executive or administrative action contemplated in Article 126 of the Constitution.
(2) The petitioners' application has been filed out of time.

Since both objections relate to the special jurisdiction of this Court under Article 126 of the Constitution, the Court decided to deal with the preliminary objections before considering the petitioners' application on its merits. Both parties have thereafter filed their written submissions on the preliminary objections.

Briefly, the petitioners' case is as follows. The 1st petitioner is the wife and the 2nd and the 3rd petitioners are the sons of the judgment debtor (7th respondent) in D.C. Colombo case No. 18542/L. The petitioners were not parties to that action. In terms of the decree entered against the 7th respondent, the learned District Judge issued a writ of execution directing that possession of the relevant property be delivered to the judgment creditor (the 6th respondent). The 2nd respondent, the Additional Registrar of the District Court, Colombo, along with the 1st respondent police officer and the 3rd to 5th respondent court officers proceeded to the property described in the writ for the delivery of possession to the 6th respondent.

According to the petitioners, at the time the Fiscal came to the property the 7th respondent judgment debtor was not present in the property as he was living elsewhere due to a family dispute. The petitioners claim that when the Fiscal came to the property, the 1st petitioner informed the Fiscal that she and her sons were not parties to the District Court action and that they held and possessed the property on their own right and not on behalf of or under the 7th respondent judgment debtor and as such they were not bound by the decree or liable to be ejected under the writ. The petitioners state that when the 1st petitioner produced their title deeds in support of their claim, the Fiscal did not pay any attention to their deeds, but informed them that since the petitioners were the wife and the children of the judgment debtor she (the Fiscal) would proceed to execute the writ.

The petitioners allege that thereafter the Fiscal and the 2nd respondent police officer allowed the persons brought by the 6th respondent judgment creditor (referred to in the petition as thugs) to enter their premises and to throw out their belongings and demolish the two buildings situated in the property.

The contention of the petitioners is that when they made their claim before the Fiscal, the latter should have refrained from executing the writ until the petitioners got their claim examined and determined by the Court which issued the writ. The petitioners contend that the Fiscal's act in executing the writ then and there to dispossess them without giving an opportunity to get their claim examined by the Court, resulted in denying to them the equal protection under the law. They further allege that the 1st and 2nd respondents' acts in allowing outsiders to enter their premises and to cause damage to their property were arbitrary and unlawful. It is on the basis set out above that the petitioners seek to bring their case within Article 12(1) of the Constitution.

The position taken up by the Fiscal in her objections is that when she explained the contents of the writ to the 1st petitioner, she agreed to vacate the premises and with the help of the labourers brought by the judgment creditor removed her belongings allowing the Fiscal to deliver vacant possession to the 6th respondent. However since an examination of the merits of the respective cases of the petitioners and the respondents is not within the scope of the present exercise, I take, for the present purpose, the petitioners' version at its highest.

Accordingly the question to be decided by this Court in relation to the first preliminary objection is, whether the acts done by the Fiscal in executing a writ issued by a court of competent jurisdiction constitute executive or administrative action within the meaning of Articles 17 and 126 of the Constitution.

The First Preliminary Objection

In relation to the 1st preliminary objection, the learned State Counsel in his written submissions has taken up the position that "the action taken to implement a valid judicial order do not constitute executive or administrative action and cannot give rise to executive or administrative liability in the course of its implementation." The established legal position in relation to fundamental rights jurisdiction is that the acts of a judicial officer done in the exercise of his judicial discretion do not come within the ambit of executive or administrative action contemplated in Article 17 and 126 of the Constitution. *Peter Leo Fernando* v *The A.G.*(1), *Farook* v *Raymond*(2).

The proposition put forward by the learned State Counsel, if legally correct, has the effect of extending the doctrine of judicial immunity in the context of the fundamental rights jurisdiction to cover the acts done by ministerial officers in executing process and orders issued by judicial officers in the course of their judicial functions. It appears that the proposition of the learned State Counsel is based on an observation made by H.A.G. de Silva, J. in *Cannosa Investments Ltd.* v *Earnest Perera and others*(3). In that case the petitioner claimed relief against the police for acts done in the course of a search of their premises on the authority of a defective search warrant issued by a Magistrate without complying with the provisions of section 5 of the Gaming Ordinance. The petitioners challenged not only the validity of the search but also the validity of the search warrant issued by the Judge. H.A.G. de Silva, J. having referred to four previous decisions of this Court, has made the observation that "the Court in all those cases has not severed the liability of the ministerial officers as distinct from the judicial order to which the act was referable." at 221.

The cases referred to by H.A.G. de Silva, J. in his judgment are the cases of *Kumarasinghe* v *The A.G.*(4), *Dayananda* v *Weerasinghe*(5), *Dharmatilake v Abeynayake*(6) and *Peter Leo Fernando* v *AG (supra).*

In the first three cases the petitioners sought relief against their detentions in remand custody on the orders made by Magistrates on false or misleading police reports submitted to them. In *Peter Leo's* case the petitioner sought relief against his detention in the remand cell of the court for several hours on an order made by the Magistrate without complying with the imperative provisions of the Code of Criminal Procedure Act. In all those cases this Court has held that the judicial orders complained of by the petitioners were erroneous, due to improper exercise of judicial discretion, but relief was denied to the petitioners on the basis that deprivation of their personal liberty was directly referable to acts (*albeit erroneous*) which do not fall within the purview of Article 126 of the Constitution.

There is a fundamental difference between the present application and the case of *Cannosa Investments Ltd.* and the cases cited therein. In those cases the petitioners had challenged the validity of the relevant judicial acts as well as the ministerial acts which either preceded or followed the impugned judicial acts. In the present application the petitioners do not challenge the validity of the writ of execution or the legality of the learned Judge's act in issuing the writ. They simply base their case on the acts done by the Fiscal. Thus this case is different from the cases relied on by the learned State Counsel.

As far as I am aware, this Court, in the exercise of the Court's fundamental rights jurisdiction, has not previously examined the liability of a state officer for the acts done in executing valid process or orders issued by a court. In *Peter Leo Fernando's* case Ranasinghe, J. (as he then was) has expressed the view (obiter) that "The position of an officer of the State, who, in the course of carrying out an order made by a Judge in the exercise of his judicial functions,violates the Fundamental Rights of a person, is that he would be free from liability, if, in doing so he has acted in good faith, not knowing that the said order is invalid". This view is similar to the exception provided in section 71 of the Penal Code. However, Ranasinghe, J's *obiter dictum* is not relevant to the present application where there is no challenge to the validity or the legality of the writ.

Therefore it is necessary to examine in some detail the question of law which is presently before this Court. Although the validity or the legality of the writ is not a question to be decided in the present case, I propose to briefly consider whether the act of issuing a writ of

execution is a "judicial act" in the sense that term is applied in relation to the fundamental rights jurisdiction of this Court. In the context of the fundamental rights jurisdiction "judicial acts" are the acts of the Judges acting judicially. In *Farook* v *Raymond (supra)*, Amerasinghe, J. has explained this as follows.

> *"If the person making the order was not fulfilling the functions and duties proper to an officer appointed to administer the law, viz. to form and pronounce an independent opinion on a matter placed before him, he cannot be said to be acting "judicially". If he has been deprived by the law of the power of deciding and acting according to his own judgment, he cannot act "judicially"; discretion is an attribute, an inherent and essential characteristic, of judicial office; where discretion is ousted by law, the duties, functions and powers appurtenant to judicial office are also taken away".* (p229)

Black's Law Dictionary, 5th Edition, defines a judicial act as "an act which involves exercise of discretion or judgment." The right or the power to exercise discretion or to form an independent judgment necessarily connotes the power to select between two alternatives. If there is no room to exercise discretion or to form an independent judgment, an act, although it is done by a judicial officer, is not a judicial act in the sense the term is used in relation to fundamental rights jurisdiction. Certain acts done by Judges in the performance of their judicial functions do not fall into the category of judicial acts and are appropriately called ministerial acts. For example entering the decree under section 188 of the Civil Procedure Code is not a judicial act, but a ministerial act performed by a judge as one of his judicial functions.

Issuing a writ of execution is one of the functions of a Judge. But is it a judicial act? Sections 225, 320 and 323 of the Civil Procedure Code contain provisions regarding applications for execution of decrees. In terms of those sections, when an application is made for execution of a decree, the Court has to satisfy itself only on two matters, namely,

1. that the applicant is entitled to obtain execution of the decree. An applicant (judgment creditor) is entitled to obtain execution of the decree,

i. Where an appeal was not preferred against the decree during the appeallable period, or

ii. Where the decree has been confirmed in appeal, or

iii. Where the court has allowed execution of the decree pending appeal.

2. that the application contains the particulars specified in section 224 of the Code.

If the application satisfies those two requirements, then the aforesaid three sections provide that the Court "shall direct a writ of execution to issue to the Fiscal." Thus where an application is made by a person entitled to obtain the writ, setting out the particulars specified in section 224, there is no room for the court to exercise any discretion or to form its own judgment. The Court is obliged to direct the writ to issue. I therefore hold that the act of a Judge in directing to issue the writ is not a judicial act but a ministerial act.

The Duty of the Fiscal and the Character of his acts

Section 355 of the Civil Procedure Code which appears in Chapter 23 relating to service of process provides that "Writs ..... shall usually be directed to the Fiscal of the Court issuing the writ ....." Section 52 of the Judicature Act, No. 2 of 1978 provides that,

> *"There shall be appointed to the High Court and to each of the District Courts, Family Courts, Magistrate's Courts and Primary Courts established under this Act, a Registrar, a Fiscal and such other officers as may be necessary for the administration and for the due execution of the powers and the performance of the duties of such courts including the service of process and the execution of decrees of Court and other orders enforceable under any written law."*

According to Article 113A of the Constitution, the designation of Fiscals attached to Courts is Deputy Fiscal. (The Judicature (Amendment) Act No. 16 of 1989 which amended section 52 to make the formal change in the designation of the Fiscal has not been bought into operation.)

Section 357 of the Civil Procedure Code provides that,

"It shall be the duty of every Fiscal, upon receiving any writ ..... directed to him by any Court, by himself or by his officers to execute such writ ..... conveyed to him ..... according to the exigency of the writ....."

The words "exigency of the writ" mean the requirements of the writ. The writ is the mandate given to the Fiscal by Court and his duty is to execute it according to its terms. It simply is a matter of acting in obedience to the instructions contained in the legal mandate and there is no occasion to exercise his discretion according to his own judgment with regard to the propriety of the act. Thus execution of a writ is purely a ministerial act done with judicial sanction, but such sanction cannot elevate the Fiscal's acts to the status of judicial acts which do not fall within the phrase 'executive or administrative action' used in Article 126 of the Constitution.

The Fiscal is a State Officer appointed for the purpose of due execution of the powers and the performance of duties of courts including the service of process and the execution of decrees of court. He performs duties which are essentially executive in character. "The expression "executive or administrative action" embraces executive action for the State or its agencies or instrumentalities exercising governmental functions. It refers to exertion of State power in all its forms" per Sharvananda, J. (as he then was) in *Perera* v *The University Grants Commission*(7). In *Faiz* v the *Attorney-General*(8) Fernando, J. said that "Executive" is appropriate in a Constitution, and sufficient to include the (official) acts of all public officers, high and low and to exclude the acts which are plainly legislative or judicial ..... The need for including "administrative" is because there are residual acts which do not fit neatly into this three-fold classification." Acts falling within the phrase "executive or administrative action" are not confined only to acts of the Executive branch of the Government. The phrase is wide enough to embrace in appropriate circumstances, the acts done by ministerial officers in relation to the activities which fall within the sphere of the functions of the judiciary.

For the reasons set out above I hold that the acts done by the Fiscal in executing a writ issued by a court fall within the ambit of executive or administrative action within the meaning of Article 126 of the Constitution, and that this Court has jurisdiction to examine such acts under the fundamental rights jurisdiction of this Court. This

conclusion is sufficient to give a ruling on the first preliminary objection, but I wish to go a step further to set out additional reasons for the conclusion I have reached.

Under the Roman Dutch Law, which is the Common Law of Sri Lanka, a Judge enjoys complete immunity from civil liability for the acts done in the exercise of his judicial functions. "No action lies against a judge for acts done or words spoken in honest exercise of his judicial office." *R.W. Lee. An Introduction to Roman Dutch Law 5th Edition page 341.* Section 70 of the Penal Code extends the same protection against liability. Since judicial acts do not fall within the ambit of Article 126 of the Constitution, a Judge is not liable for the violation of fundamental rights arising from a judicial act.

However, the officers who execute writs, process or orders issued by Courts do not enjoy such complete immunity. The protection available to them against criminal and civil liability is limited. In terms of Section 71 of the Penal Code, protection from criminal liability in respect of acts done pursuant to a judgment or an order of a Court is available only if the officer in good faith believed that the judgment or order of the Court was valid. See also the obiter dictum of Ranasinghe, J. in *Peter Leo Fernando* v *The Attorney-General* quoted earlier. Such an officer who acts contrary to law may incur criminal liability. In *Badoordeen* v *Dingiri Banda*(9), a process server, who, in violation of section 365 of the Civil Procedure Code, arrested a person on civil process between the period of sunset and sunrise was convicted under section 333 of the Penal Code.

The protection available to an officer executing process issued by court and the limits of such protection are set out in section 362 of the Civil Procedure Code. The relevant part of section 362 is as follows:

> *"every person charged under ..... the duty of executing any such process shall be protected thereby from civil liability for loss or damage caused by, or in the course of, or immediately consequential upon, the execution of such process by him or in the case of the Fiscal by his officers,except when the loss or damage for which the claim is made is attributable to any fraud, gross negligence or gross irregularity of proceeding, or gross want of ordinary diligence or abuse of authority on the part of the person executing such process." (emphasis added)*

Thus the latter part of section 362 quoted above sets out the situation where such an officer may incur liability for acts done in executing process issued by a court.

When the general law of the land does not confer full immunity for all the acts done in executing process issued by courts, there is no justification to exclude all such acts from the purview of the fundamental rights jurisdiction of this Court. In exercising the fundamental rights jurisdiction this Court is under a duty to act in compliance with the letter and the spirit of Article 4(d) of the Constitution.

I therefore overrule the first preliminary objection and hold that the matters averred in the petition constitute executive or administrative action, within the meaning of Article 126 of the Constitution and this Court has jurisdiction to entertain, hear and decide the petitioners' application.

The Second Preliminary Objection

The second preliminary objection is that the petitioners' application has been filed out of time. The acts resulting in the alleged infringement of the petitioners' fundamental rights had taken place on 23.09.2003. The petition has been filed in this Court on 5.12.2003, after the expiry of the time limit of one month prescribed by Article 126 for filing an application for relief to be obtained under the Article.

In their petition the petitioners have stated that they had made a complaint to the Human Rights Commission on 22.10.2003, which is within one month from the date of the acts resulting in the alleged violation of the petitioners' fundamental rights. The petitioners have produced the receipt dated 22.10.2003 issued by the Human Rights Commission acknowledging the receipt of their complaint.

The time of one month prescribed by Article 126 of the Constitution for filing an application for the alleged violation of fundamental rights is mandatory. Yet in a fit case, the Court would entertain an application made outside the time limit of one month provided an adequate excuse for the delay could be adduced. For instance if a petitioner had been held *incommunicado,* the principle *lex non cogit ad impossibilia* would be applicable to grant relief to such a petitioner. Vide *Edirisuriya* v *Navaratnam*(10). In the present case the petitioners never suffered from any such disability and the petitioners have not sought exemption from the time bar for any adequate excuse pleaded by

them in their petition. The time bar is a plea available to a respondent of a fundamental rights application to resist the application filed against him. A time bar or prescription which affects jurisdiction of Court must be specifically pleaded in the very first opportunity and if it is not so pleaded, the Court is entitled to proceed on the basis that the respondent has waived his right to raise the defence of time bar in defence of the claim raised against him.

In a fundamental rights application, the first opportunity available to a respondent to put forward any defence available to him including the plea of time bar is the stage at which he has to file his objections after the Court has granted leave to proceed. The 2nd respondent the Additional Registrar/Fiscal of the District Court Colombo, as well as the 6th respondent judgment creditor, a private individual, have raised the plea of time bar in the very first opportunity available to them. In paragraph 7 of the 2nd respondent's affidavit dated 17.4.2004 she has raised the plea of time bar in the following specific words.

> *"I am advised to state that the petitioners' application has been filed out of time and respectfully move that Your Lordships Court be pleased to dismiss the same in limine."*

The 6th respondent judgment creditor too has raised the defence of time bar in her statement of objections dated the 7th day of March 2004. Paragraph 7 of the said objections reads as follows.

> "Without prejudice to the aforesaid the 6th respondent states that this application is clearly time barred and should be dismissed *in limine.*

The averments quoted from the objections of the 2nd and the 6th respondents indicate that at the very first opportunity, the 2nd and 6th respondents have raised the plea of time bar as an absolute bar to the claim of the petitioners for relief against them.

In view of the foregoing it appears that the 2nd preliminary objection raised by the learned State Counsel on 6.9.2005 was a re-agitation of the plea of time bar raised by the 2nd respondent in her affidavit dated 17.4.2004. Thus the petitioners had notice of the plea of time bar before the learned State Counsel again highlighted it on 6.9.2005.

In the written submissions tendered in answer to the learned State Counsel's preliminary objections, the petitioners have sought to invoke the aid of section 13(1) of the Human Rights Commission Act No. 21 of 1996 to circumvent the time bar set out in Article 126 of the

Constitution. The said section 13(1) reads as follows.

> *"Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of the Article 126(2) of the Constitution."*

It is very clear from the section quoted above that the mere act of making a complaint to the Human Rights Commission is not sufficient to suspend the running of time relating to the time limit of one month prescribed by Article126(2) of the Constitution. In terms of the said section 13(1), the period of time to be excluded in computing the period of one month prescribed by Article 126(2) of the Constitution is "the period within which the inquiry into such complaint is pending before the Commission."

Section 14 of the Human Rights Commission Act (in so far as it is relevant to the present purpose) reads as follows.

> *"The Commission may ..... on a complaint made to it by an aggrieved person investigate an allegation of an infringement or imminent infringement of a fundamental right of any person ....."*

Thus the Human Rights Commission is not legally obliged to hold an investigation into every complaint received by it regarding the alleged violation of a fundamental right. Therefore a party seeking to utilize section 13(1) of the Human Rights Commission Act to contend that "the period within which the inquiry into such complaint is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court" is obliged to place material before this Court to show that an inquiry into his complaint is pending before the Human Rights Commission.

This is the view taken by this Court in the case of *Subasinghe* v *the Inspector General of Police.*(11) In that case the petitioner sought to invoke section 13(1) of the Human Rights Commission Act to claim exemption from the time limit set out in Article 126 of the Constitution. In that case My Lord the Chief Justice has held that the petitioner has

to adduce some evidence to show that there has been an inquiry pending before the Human Rights Commission into his complaint. In the absence of any such material placed before Court by the petitioner, the objection relating to the time bar was upheld.

The learned State Counsel in his written submissions has specifically cited the case referred to above and attached a copy of the judgment to his written submission. The learned State Counsel thereby put the petitioners on notice that they have to place material before this Court to show that the Human Rights Commission has held an inquiry into their complaint or that an inquiry is still pending before the Commission. However, the petitioners have not adduced any material before this Court to show that an inquiry into their complaint has been held by the Commission or that an inquiry is still pending before the Commission.

The petitioners in their petition to this Court have also stated that they have made an application to the District Court under section 328 of the Civil Procedure Code seeking to get them restored to possession of the property from which they claim that they have been wrongfully evicted by the Fiscal. The learned State Counsel in his written submissions has stated that the District Court of Colombo, having inquired into the application made by the petitioners under section 328 of the Civil Procedure Code, has dismissed the application holding that the Fiscal had rightly evicted them from the property described in the writ. The petitioners have not challenged or contradicted this position.

In view of the failure of the petitioners to place any material before this Court to show that an inquiry into their complaint has been held by the Human Rights Commission or that an inquiry is still pending, I hold that the petitioners are not entitled to rely on section 13(1) of the Human Rights Commission Act to seek exemption from the time limit set out in Article 126(2) of the Constitution. I accordingly uphold the second preliminary objection raised by the learned State Counsel and dismiss the petitioners' application without costs.

S.N. SILVA, CJ. – I agree.

RAJA FERNANDO, J. – I agree.

1st preliminary objection dismissed.
2nd preliminary objection upheld.
Application dismissed.

IN THE MATTER OF A RULE AGAINST AN ATTORNEY-AT-LAW

SUPREME COURT
SARATH N. SILVA, C.J.
AMARATUNGA, J. AND
SALEEM MARSOOF, J.
S.C. RULE NO. 01/2006(D)
JUNE 6, 2008

Judicature Act No. 2 of 1978 – Sections 40(1) and 42(3) – Rule issued to show cause as to why the respondent should not be suspended from practice or removed from the office of Attorney-at-Law. – Supreme Court (Conduct and etiquette for attorney-at-law) Rules 1988 – Rules 15,79,81.

The respondent's conduct within Court was observed as being in disobedience and defiance of the directions made by Court and was rude, intemperate, insolent and contemptuous, did not express any regret as to the impugned conduct to the Bench before which he appeared. The respondent upon the Rule being served took up a preliminary objection that there is no list of witnesses or documents annexed to the Rule and raised further three preliminary objection as well.

Held:

(1) Section 40(1) of the Judicature Act empowers the Supreme Court to admit and enroll as an Attorney-at-Law a person of "good repute and of competent knowledge and ability". These elements of good repute and of competent knowledge and ability should thereafter permeate the conduct of such person so long as his name remains in the Roll of Attorney-at-Law.

(2) When a person is enrolled as an Attorney-at-law by the Supreme Court, such person acquires a professional status which he cannot shed by purporting to file applications and appearing in person.

(3) The power of the Supreme Court to investigate charges against the members of the legal profession are not fettered by rigid rules and it is open to the Supreme Court to adopt a procedure which is fair and just in the circumstances.

(4) Section 42(3) of the Judicature Act only requires that a notice be served with a copy of the charges and an opportunity be afforded to show cause. The Rule that has been issued and the procedure adopted is fully compliant with this requirement.

Per Sarath N. Silva, C.J.

"The contents of the Rule of which the Respondent was given ample notice, the repeated opportunities to offer an explanation and the right to be represented by a Counsel, in my view establish that the procedure adopted is fair and reasonable."

(5) An objection to the participation of a Judge as a member of the Bench should be only on firm foundation. Any frivolous objection that is taken would only impede the due administration of justice, which may even amount to contempt of Court.

Per Sarath N. Silva, C.J.

"The impugned conduct of

(i) disobedience of orders of Court;

(ii) contemptuous disregard of the request of Court to clarify questions of law and the rude response that if the Judges wanted any clarification of the law, they could look it up themselves;

(iii) the use of intemperate language and making of gesticulations to bring the proceedings of this Court to ridicule and contempt.

constitute in my view unprecedented acts of discourtesy."

"It was open to the very bench that was hearing S.C.(F.R.) 108/06 to take appropriate action against the Respondent."

Cases referred to:

(1) *Attorney-General* v *Ellawala* 29 NLR 13.
(2) *Daniel* v *Chandradeva* (1994) 2 SLR 1.
(3) S.C. (F.R.) 232/2006.

Buvenaka Aluvihare, D.S.G. for the Attorney-General.
H.L.de Silva, P.C., with *Maureen Seneviratne*, P.C., *Aravinda Athurupana* and *U.S. Marikkar* for the respondent.
Daya Perera, P.C., and *Mohan Peiris*, P.C. for the BASL.

Cur.adv.vult.

June 6, 2008

SARATH N. SILVA, C.J.

The respondent having been admitted and enrolled by this Court as an Attorney-at-Law in terms of Section 40 of the Judicature Act No. 2 of 1979, was issued with a Rule in terms of Section 42(3) of the said Act to show cause as to why he should not be suspended from practice or removed from the office of Attorney-at-Law.

The impugned conduct of the respondent set out comprehensively in the Rule itself as follows:

"WHEREAS you filed S..C. Application No. 108/2006(FR) describing yourself as a practicing Attorney-at-Law of the Court and supported the application for Leave to proceed on 31.03.2006.

AND WHEREAS in your submissions you:

1. *Continued to read each and every averment in the Petition despite a specific direction given, that the Bench was possessed of the contents of the Petition and that you should not unduly take the time of Court by reading each and every paragraph but that you should make your submissions relating to the specific matters of law and fact, relevant to the matters in issue. Despite the said direction you in disobedience and defiance of the said direction continued to read the said paragraphs in the Petition, in disobedience of the specific orders of Court;*
2. *That in the course of the said proceedings when the Bench required you to address Court on certain issues for the purpose of clarification of questions of law that arose for consideration, you rudely and insolently refused to answer any questions despite repeated requests and you contemptuously told Their Lordships that they could look it up themselves, if they so desired.*
3. *That you used intemperate language and made gesticulations to bring the proceedings of Court into ridicule and contempt. That thereby, you engaged in conduct prejudicial to the administration of Justice; failed to assist in the proper administration of justice and.or permitted your personal feelings to influence your conduct before Court in breach of Rules 50 and 54 of the Supreme Court (Conduct and Etiquette for Attorneys-at-Law) Rules 1988 amounting to misconduct and malpractice as an Attorney-at-Law.*

AND WHEREAS, such conduct on your part warrants proceeding against you for suspension or removal from the office of Attorney-at-Law under Section 42(2) of the Judicature Act No. 2 of 1978."

It is manifest from the Rule itself that it has been issued directly in relation to the respondent's conduct within Court when he supported application bearing No. S.C.F.R. 108/06. The Rule is

based on the note made by the Presiding Judge of the Bench that heard the said application on 31.3.2006 and was issued as it is the practice in similar matters, after circulation amongst all Judges of the Court.

It has to be noted at the outset that the respondent whose conduct was observed as being in disobedience and defiance of the directions made by Court and was rude, intemperate, insolent and contemptuous, did not express any regret as to the impugned conduct to the Bench before which he appeared.

Instead of offering any explanation, regret or apology in respect of the impugned conduct, the respondent, upon the Rule being served took up a preliminary objection that there is no list of witnesses or documents annexed to the Rule and pursued this objection by seeking to obtain the note made by the Presiding Judge and the contents of the docket that was circulated amongst the Judges. The Court clearly pointed out that it is manifest from the Rule that the entirety of its content is of what took place in open Court and that the impugned conduct is based on the observation made by the Presiding Judge. Significantly. the Respondent who should have known what took place did not seek to file an affidavit after the Rule was issued, being the practice in other matters and to offer an explanation, apology or regret.

Instead, the respondent raised three preliminary objections. they are:

i) that the Court has no jurisdiction to issue the Rule in terms of section 42(2) of the Judicature Act for the suspension or removal of the Respondent as an Attorney-at-Law, since the respondent filed application No. 108/06, not as an Attorney-at-Law, but as an ordinary citizen of this country and that even if there is misconduct as alleged in the Rule he is not liable to be dealt with in that respect as an Attorney-at-Law.

ii) even assuming that he is liable to be dealt with in terms of section 42(2) of the Judicature Act, the Rule has not been issued in compliance with the procedure laid down in the applicable Rules of the Supreme Court, as specified in Rules 79 and 81,

iii) that in any event Justice Marsoof should not participate as a member of the Bench since he was also a member of the Bench in case No. S.C.F.R. 108/06 referred above.

I would now deal with these preliminary objections.

As regards the first objection, I note that although the respondent purported to file the Application S.C.(FR) 108/06 against the Attorney-General, Secretary to the President, Judges of this Court, the Speaker of Parliament, Prime Minister, Leader of the Opposition and Secretary to the Judicial Service Commission, in his personal capacity, in paragraph 1 of the petition in that application he has stated as follows:

1. "The petitioner is a citizen of Sri Lanka, aged 72 years and is presently practicing as an Attorney-at-Law of the Supreme Court of Sri Lanka."

In several paragraphs of the petition which runs into six pages the petitioner has made copious references to his role as an Attorney-at-Law. It is thus clear that the petitioner although purporting to appear in person has availed of his status as an Attorney-at-Law in presenting the application. It is a matter of common knowledge of which judicial notice can be taken that the petitioner has been continuously engaged in the practice of filing applications purporting to be in a personal capacity against numerous judicial and public officers. The case under reference could be considered a sample of his forays into Court purporting to act in the public interest. Be that as it may, **when a person is enrolled as an Attorney-at-Law by this Court in terms of section 40(1) of the Judicature Act, such person acquires a professional status which he cannot shed by purporting to file applications and appearing in person.**

The section empowers this Court to admit and enroll as an Attorney-at-Law a person of "good repute and of competent knowledge and ability". These elements of good repute and competent knowledge and ability should thereafter permeate the conduct of such person so long as his name remains in the Roll of Attorneys-at-Law.

The respondent cannot be permitted to shed his professional status as an Attorney-at-Law as and when he pleases, to make forays into this Court or into any other Court and to conduct himself in a manner that does not befit the professional status of an Attorney-at-Law. It is indeed disturbing that a person should elect to take shelter on an objection of this sort when a

clear imputation is made of malpractice and misconduct in the face of the Court. Accordingly, I would over-rule the first preliminary objection of the respondent.

The second objection raised by the respondent relates to the procedure that has been adopted. It is to be noted that by this objection he is reiterating the previous objection that there should be a list of witnesses and documents and that there should be an inquiry with the evidence of witnesses being adduced by the Attorney-General or Counsel representing him. As noted above it is plain on a reading of the Rule that the impugned conduct of the respondent, is what has been noted by the Presiding Judge. What the respondent seems to imply is that the Presiding Judge should be called as a witness and submitted for cross-examination by him. In my view even a suggestion of this nature is preposterous. In any event I wish to cite the Judgment of a Divisional Bench of this Court in the case of *Attorney-General* v *Ellawala*[1] – at 17 which reads as follows:

> *"The power of this Court to investigate charges against members of the legal profession is unfettered by rigid rules of procedure relating to the initiations of such proceedings or by any strict definition of or limitation as to the nature of material upon which alone such proceedings may be founded. Whenever in the Opinion of this Court an occasion has arisen to investigate a charge against an advocate or proctor which, if true, renders him liable to suspension, or removal from office it has the power to initiate proceedings for the investigation of the charge. It is essential, not only in the interests of the profession, but of the public, individual members of which are constrained daily to commit their most vital interests to members of the legal profession, that cases of misconduct, and especially of dishonourable conduct, which comes under or are brought to the notice of this Court should be fully investigated, and that their investigation should not be hampered or burked by mere technicalities. The rule issued in this case is well founded, and as we intimated to counsel at the hearing this preliminary objection must be rejected."*