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

[2013] 2 SRI L.R. - PART 2

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In the case of *Jamburegoda Gamage Lakshman Jinadasa Vs. Pilitthu Wasana Gallage Pathma Hemamali and others* [(2)], the Supreme Court re-iterated that an application for leave to appeal from the judgment of the High Court of the Province, would fall within Section C of Part I and not Section A of Part I of the Supreme Court Rules.

It is therefore incorrect to state that there are no rules made by the Supreme Court that would be applicable to applications for leave to appeal from the High Court of the Provinces, to the Supreme Court.

Since the preliminary objection is based on Rule 28(2) of the Supreme Court Rules, 1990, the said Rule is reproduced below for convenience.

> *28(2) "Every such appeal shall be upon a petition in that behalf lodged at the Registry by the appellant, containing a plain and concise statement of the facts and the grounds of objection to the order, judgment, decree or sentence appealed against, set forth in consecutively numbered paragraphs, and specifying the relief claimed. Such petition shall be type-written, printed or lithographed on suitable paper, with a margin on the left side, and shall contain the full title and number of the proceedings in the Court of Appeal or such other Court or tribunal, and the full title of the appeal. Such appeal shall be allotted a number by the Registrar." (emphasis added)*

Learned Counsel for the Defendant contended that the requirement of "full title" referred to in Rule 28(2) is unique only for Section C of Part I of the Supreme Court Rules, 1990 relating to " Other Appeals" and must be complied with. He argued that Rule 28(2) requires the "full title" of the Court below has to be mandatorily set out in the petition of appeal.

It is therefore evident that the words "full title" necessarily has to include all the persons cited as parties in the proceedings below. It is not disputed that before the District Court and the High Court there were three other parties apart from the Plaintiff and the Defendant. Admittedly, the petition of appeal does not contain the "full title" of the Court below and the failure to set out the "full title" is a fatal irregularity and this application be dismissed on that ground alone for non –compliance with the mandatory rule of this Court. Counsel also relied on Rule 28(5) of the Supreme Court Rules, 1990 which reads as follows:

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

It was submitted that if only Rule 28(5) were in existence, then the Plaintiff is not obliged to set out the "full title" and instead the Plaintiff had to only comply with the said Rule 28(5). Since this appeal falls within the category of "Other Appeals" the combined effect of both Rule 28(2) and Rule 28(5) is that the requirement of "full title" must be complied with and be supplemented by other parties required to be added under Rule 28(5).

In the case of *Ibrahim Vs. Nadarajah*[3], this Court held that the failure to comply with the requirements of Rules 4 and 28 of the Supreme Court Rules 1978 is necessarily fatal. Rule 4 of the Supreme Court Rules, 1978 reads thus:

"4. Every application Special leave to appeal shall name as respondent, in the case of a criminal cause or matter the party or parties whether complainant or accused in whose favour the judgment complained against was delivered or adversely to whom the application is preferred or whose interest may be adversely affected by the success of the appeal, and in the case of a civil cause or matter, the party or parties in whose favour the judgment complained against has been delivered or adversely to whom the application is preferred or whose interest may be adversely affected by the success of the appeal, and shall set out in full the address of such respondents."

One could therefore see that the wordings in Rule 4 of the Supreme Court Rules, 1978 are almost identical to Rule 28(5) of the Supreme Court Rules, 1990.

"Where there is non-compliance with a mandatory rule, serious consideration should be given for such non-compliance as such non-compliance would lead to serious erosion of well established Court procedures followed by our Courts throughout several decades." – *per* Dr. Shirani Bandaranayake, J. (as she then was) in the case of *Attanayake Vs. Commissioner General of Election & Others*[4].

The case of *De Silva vs. Wettamuny*[5] decided by the Court of Appeal and relied upon by the Learned Counsel for the Plaintiff is based on an objection of non-compliance of the provisions contained in Rule 3(d) of the Court of Appeal (Appellate Procedure) Rules 1990. The facts in De Silva's case are different from the facts of the application in hand, which deals with an application for leave to appeal from the High Court of the Province, to the Supreme

Court, the relevant applicable rules being the Supreme Court Rules 1990.

It is also observed that the Plaintiff in Paragraph (b) of the Prayer to the Petition seeks to set aside the judgment of the Court of Appeal when in fact no judgment was delivered by the Court of Appeal but by the High Court of the Central Province Holden in Kandy. In Paragraph 12(i) of the petition too the Plaintiff puts in issue the determination of the judgment by the Court of Appeal. The prayer to the petition does not contain a request for the grant of leave to appeal in the first instance in compliance with Section 5(a) of Act No. 54 of 2006. I must emphasize that when accepting any professional matter from a client, it shall be the duty of any Attorney-at Law to exercise his skill with due diligence in drafting the necessary papers with due regard to his duty to Court and to the client.

On a consideration of all the material placed before the Court and for the reasons set out above, I uphold that preliminary objection raised by the Learned Counsel for the Defendant and dismiss the Plaintiff's application for leave to appeal for non-compliance with Rule 28(2) of the Supreme Court Rules, 1990. The defects I have pointed out in the prayer to the petition too dis-entitles the Plaintiff to obtain any relief from this Court.

I make no order as to costs.

HETTIGE, P. C, J. – I agree.

DEP, P.C, J. – I agree.

Preliminary objection raised by the Defendant upheld.
Application dismissed.

ASVANKHAN VS. THE ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW, J AND
JAYATHILAKE, J
CA 113/2007
HC TRINCOMALEE HCT/18/2004
MARCH 15, 2013

Penal Code – Section 295 – Section 296 – Section 297 – Convicted of murder – Sentence of death passed – Can the Court convict an accused person for culpable homicide not amounting to murder if such defence was not taken by the accused person?

The accused – appellant was convicted of the murder of one K and sentenced to death. According to the medical evidence the Doctor had found only one stab injury which was on the abdomen. The depth of the injury was only 5 – 6 centimeters deep.

Held:

(1) Court has a duty to consider whether the accused should be convicted of culpable homicide not amounting to murder even if the accused does not raise such a defence provided such a defence is available in the prosecution evidence.

(2) On the totality of the evidence the accused – appellant who inflicted the injury had only the knowledge that his act was likely to cause death but he did not have any intention to cause death. In such circumstances the accused – appellant cannot be convicted of the offence of murder but should be convicted only of the offence of culpable homicide not amounting to murder.

APPEAL from the judgment of the High Court of Trincomalee.

Cases referred to:

1. *King vs. Albert Appuhamy* – 41 NLR 505
2. *King Vs. Bellanvithanage Edvis* – 41 NLR 345

N. G. Saabir Sawaad with *U.L.S. Marikkar* for accused - appellant.

Ayesha Junasena DSG for Attorney General.

March 15th, 2013

SISIRA DE ABREW, J.

Accused-appellant produced by the Prison Authorities is present in Court.

Heard both counsel in support of their respective cases.

The accused-appellant in this case was convicted of the murder of a man named Asadeen Kurkhan and was sentenced to death. Being aggrieved by the said conviction and the death sentence, he has appealed to this Court. The facts of this case may be briefly summarized as follows. On the day of the incident around 7.30 a.m. when the deceased person and a boy named Munas who was working under the deceased person were going on their bicycles towards the cattle shed of the deceased person, the accused-appellant joined them before they reached the cattle shed. Thereupon all three went near the cattle shed. When they reached near the cattle shed, Munas, on the direction of the deceased person, went further towards the cattle shed. A few seconds later when Munas turned back, he saw the deceased person lying fallen on the ground with a bleeding injury and the accused-appellant running away from the place where deceased was lying fallen. The deceased person died due to the stab injury caused by the accused-appellant. The post-mortem examination revealed that the deceased person had sustained an injury on the abdomen and the depth of the injury was 5 – 6 centimeters. The Doctor found only one stab injury. The case for the prosecution depended on the evidence of Munas. We have no reasons to doubt the credibility of Munas. In our view, Munas has spoken the truth.

Learned counsel appearing for the accused-appellant did not even challenge the credibility of witness, Munas. When we consider the evidence of Munas, we hold the view that the accused-appellant has inflicted an injury on the abdomen of the deceased person. The accused person did not even make a dock statement. When we consider the facts of this case, the question that must be decided is whether the accused-appellant is guilty of murder or culpable homicide not amounting to murder on the basis of knowledge. We regret to note that the learned trial Judge has not considered this aspect. Can the Court convict an accused person for culpable homicide not amounting to murder if such defence was not taken by the accused person but when the evidence of the prosecution reveals such a defence? Answer to this question is found in the judicial decision of *King Vs. Albert Appuhamy*[1]. Court of Criminal Appeal in the said case held thus: "Failure on the part of a prisoner or his counsel to take up a certain line of defence does not relieve the judge of the responsibility of putting to the jury such evidence if it arises on the evidence. *In King Vs. Bellanvithange Edvin*[2] Court of Criminal Appeal held thus "In a charge of murder it is the duty of the Judge to put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence on record, although such defence was not raised nor relied upon by the accused."

Applying the principles laid down in the above judicial decisions, we hold that Court has a duty to consider whether the accused should be convicted of culpable homicide not amounting to murder even if the accused does not raise such a defence provided such defence is available in the prosecution evidence We must not consider whether such defence was available in the prosecution case. We now advert to this question. According to the medical evidence, doctor found

only one stab injury which was on the abdomen. The depth of the injury was only 5 -6 centimeters deep.

When we consider all these matters, we are of the opinion that the accused-appellant who inflicted the injury had only the knowledge that his act was likely to cause death but he did not have any intention to cause death. If this is so, the accused-appellant cannot be convicted of the offence of murder but should be convicted only of the offence of culpable homicide not amounting to murder which is an offence under Section 297 of the Penal Code.

For the above reasons, we set aside the conviction of murder and the death sentence and substitute a conviction of culpable homicide not amounting to murder on the basis of knowledge that his act was likely to cause death but he did not have any intention to cause death. We sentence the accused-appellant to a term of 10 years rigorous imprisonment and to pay fine of Rs. 5000/- (Five Thousand) carrying a default sentence of six (06) months simple imprisonment. The sentence imposed by this Court shall be implemented from the date of this judgment.

Verdict altered.

JAYATHILAKE, J. – I agree.

Appeal allowed.

Conviction of murder set aside and the death sentence set aside. Conviction for culpable homicide not amounting to murder substituted; sentenced to 10 years rigorous imprisonment and a fine of Rs. 5000/-

ADIN V. THE OWNER, BERUWALA SKAGARAYA

COURT OF APPEAL
RAJARATNAM, J. AND
GUNASEKERA, J.
S.C. 9/74
CASE NO. D/WC/C 306417/72 D
OCTOBER 28, 1975

Workmen's Compensation Ordinance – Section 16(2) – Procedure for recovery of compensation - Discretion vested in the Tribunal to accept an application of a workman, notwithstanding that the notice required by subsection (1) has not been given or that the claim has not been instituted within due time as required by Section 16(1). – Sufficient Cause?

The applicant had received injuries on his spine, a fact which was within the knowledge of the Tribunal. The Tribunal also had material that the employer had promised the applicant some compensation. The applicant had waited 1 ½ year expecting that his employer would pay him compensation. After the 1 ½ year period from the date of the accident his brother had obtained forms to enable him to file the application for compensation. The Tribunal considered that even if the applicant cured the one year prescriptive period, the subsequent delay had to be taken into consideration.

Held:

(1) The provisions of the Workmen's Compensation Ordinance cast a burden and a responsibility on the Tribunal in cases where applications are not frivolous to relentlessly pursue the course of justice, so that the workman may obtain his compensation for injuries suffered by him arising from and in the course of his employment.

(2) "Sufficient Cause" in Section 16(2) of the Workmen's Compensation Ordinance means and includes not only legal causes, but also human causes and humanitarian causes.

Per Rajaratnam, J.

> "In the facts and circumstances of each particular case, a Tribunal should not bind its hands with legal chains and refuse to do justice in an appropriate case according to the letter and spirit of the provisions of the Workmen's Compensation Ordinance. The Tribunal must give every assistance and opportunity to assist a workman to pursue his application."

Per Rajaratnam, J –

> " It is our considered view, as we stated earlier, that Workmen's Compensation Tribunals must act in accordance with the full spirit of the provisions of the Ordinance."

APPEAL from the Workmen's Compensation Tribunal

Applicant – Appellant present in person

Employer – Respondent absent and unrepresented

Cur.adv.vult

October 28th, 1975

RAJARATNAM, J.

In this appeal we find that the workman-applicant-appellant has presented written submissions along with his appeal. He is present before us and we have heard him in respect of this appeal. We have perused the Order made by the Tribunal and we find that the discretion which was vested in the Tribunal to accept the application of the workman has not been exercised in the full spirit of the provisions of the Workmen's Compensation Ordinance.

This applicant had received certain injuries on his spine, a fact which was within the knowledge of the Tribunal, and further the Tribunal also had material that the employer

promised the applicant some compensation and that he had been put off several times. The Tribunal has observed that the applicant did not lead evidence to corroborate the fact that he had informed his brother and that the application forms were obtained from Colombo, thus occasioning a delay, and also to corroborate the position that he has been put off several times by his employer. The Tribunal had referred to the fact that the applicant had not called his brother to give evidence on this question. On the other hand the Tribunal went further and stated that even if it was prepared to believe that he had waited one and a half years as he was being put off by his employer, his own evidence was that after the one and a half year period from the date of the accident his brother had obtained forms to enable him to file the application for compensation. The Tribunal also made an observation that the applicant had not taken any steps during the subsequent one year, as he had filed the application only in May 1973, when in fact his one and a half year period had expired prior to his filing the application. The Tribunal considered that even if the applicant cured the one year prescriptive period, the subsequent delay had to be taken into consideration.

In all the circumstances of this case, on the material the Tribunal itself has made use of as referred to in its Order, we are of the considered view that the Tribunal has not properly exercised its jurisdiction in the spirit of the provisions of the Workmen's Compensation Ordinance. There was no material before the Tribunal that this application of the applicant was a frivolous application.

The provisions of the Ordinance cast a burden and a responsibility on the Tribunal in cases where applications

are not frivolous to relentlessly pursue the course of justice, so that the workman may obtain his compensation for injuries suffered by him arising from and in the course of his employment. The Tribunal stated in its order that in exercising its discretion "sufficient cause" has been interpreted by the Supreme Court as sufficient legal cause, and ignorance of the law has been put down as an insufficient cause if there is a delay in filing an application for compensation, with great respect we do not agree with this proposition. "Sufficient cause" means and includes not only legal causes, but also human causes and humanitarian causes.

In the facts and circumstances of each particular case, a Tribunal should not bind its hands with legal chains and refuse to do justice in an appropriate case according to the letter and spirit of the provision of the Workmen's Compensation Ordinance. The Tribunal must give every assistance and opportunity to assist a workman to pursue his application.

In this case the applicant has stated that the employer had put him off. The Tribunal did not have before it any denial on this matter. We can understand if the Tribunal arrived at its finding that it was not so. Having not arrived at this finding the Tribunal had stated that even if the employer had put off the applicant, it would not use its discretion in favour of the applicant because sufficient legal cause had not been shown.

It is our considered view, as we stated earlier, that Workmen's Compensation Tribunals must act in accordance with the full spirit of the provisions of the Ordinance. We therefore send the record back to The Tribunal to proceed with the

inquiry on the basis that sufficient cause has been shown. The proceedings in the inquiry will be before another Deputy Commissioner.

We order a sum of Rs. 105/- as costs to be paid by the employer – respondent to the applicant – appellant, which shall be paid in the course of this inquiry.

GUNASEKERA, J. – I agree.

Appeal allowed.

Record sent back with the direction that the inquiry be held before another Deputy Commissioner.

AZWER VS. SILVA AND OTHERS

COURT OF APPEAL
H. N. J. PERERA, J.
CA 261/99[F)
DC 16769/L
JULY 23, 2013

Rei Vindicatio action - Prescription Ordinance, Section 3 - What is possession? - Proof of possession - Payment of rates?

Held:

(1) In a rei vindicatio action the burden is on the plaintiff to establish title pleaded and relied on by him. The defendant need not prove anything.

'An important feature of the action Rei Vindicatio is that, it has to necessarily fail if the plaintiff cannot clearly establish his title.

(2) Mode of prescriptive possession – mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witness should speak to specific facts and the question of possession has to be decided thereupon by Court. The occupation of the premises must be such character as is incompatible with the title of the owner.

(3) Mere statements of a witness – I possessed the land – we possessed the land – I planted bushes and vegetables are not sufficient to entitle him to a decree under Section 3. Nor is the fact of payments of rates by itself proof of possession.

(4) There must be proof that the defendant's occupation of the premises was such character as is incompatible with the title of the plaintiffs.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:-

(1) *Wanigaratne vs. Juwanis Appuhamy* – 65 NLR 168

(2) *Leisa and another Vs. Simon and another* – 2002 – Sri LR 148

(3) *Pieris Vs. Savundahamy* – 54 NLR 207

(4) *Sirajudeen and others Vs. Abbas* – 1994 2 Sri LR 365

(5) *Hassan Vs. Romanishamy* - 66 CLW 112

G. G. Arulpragasam for plaintiff-appellant.

C. Witharana for defendant – respondent.

September 05th, 2013

H. N. J. PERERA, J.

This was an action filed by the Plaintiff-Appellant in the District Court of Colombo for a declaration of title and ejectment of the 1st, 2nd and 3rd Defendants-Respondents from the premises described in the schedule to the plaint and for damages. By judgment delivered on 25.03.1999, learned District Judge dismissed plaintiff's action.

The case of the plaintiff was that the original owner of the property in the schedule was one S. M. Saleem and the plaintiff derived title from him as pleaded in the plaint. The original owner of the said property, namely S. M. Saleem, rented out the premises to Stephen Silva, the deceased father of the 1st and 2nd Respondents and father-in-law of the 3rd Respondent. In 1975 S. M. Saleem died and by last will and probate obtained from the District Court the said property was duly conveyed by the Executrix to his son, S. M. Junaid, by deed marked P1. Although S. N. Junaid succeeded S. M. Saleem to the said property, Stephen Silva's widow failed to

attorn to him and did not pay rent. Subsequently legal action was instituted bearing No 6157/RE to eject Stephen Silva's widow but the action was dismissed for want of appearance by the plaintiff.

S. M. Junaid died intestate and subsequently on 30.03.1994 his heirs by deed of Gift No 173 gifted the said property to the Appellant. The Respondents filed answer and pleaded res-judicata and claimed prescriptive title to the land and premises in dispute.

In *D.A. Wanigaratne Vs. Juwanis Appuhamy*(1) it was held that in an action rei-vindicatio the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in court, prove that title against the defendant in the action. The defendant in a rei-vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title.

In *Leisa and Another V. Simon ant Another* (2), the plaintiff-appellants instituted action seeking declaration of title and ejectment of the defendants from the premises in question. The defendants claimed prescriptive rights. The plaintiff's action was dismissed. It was held that:

(1) The contest is between the right of dominium of the plaintiffs and the declaration of adverse possession amounting to prescription by the defendants.

(2) The moment title is proved the right to possess it, is presumed.

(3) For the court to have come to its decision as to whether the plaintiff had dominium, the proving of paper title is sufficient.

(4) Once paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them. In a declaration of title to the land the defendant was in possession of land, Dias, J held that the initial burden of proof rests upon the plaintiff to prove his title including identification of the boundaries. In *Peiris V. Savundahamy*[3], it was held that in a rei vindication action the burden is on the plaintiff to establish title pleaded and relied on by him. The defendant need not prove anything.

The action from which this appeal arises, being an action for the declaration of title which has been treated in by the District Court as a rei vindication action, the onus was clearly on the Appellant to prove how he derived title to the land described in the schedule to the plaint.

Although the Appellant classifies his action as one "declaration of title" and further pleads in his petition of appeal that the learned trial Judge had treated it as an action "rei vindicatio" this court observes that in the written submissions tendered on behalf of the Appellant in the District Courts in paragraph 3 it is stated thus:

"In the aforesaid circumstances the plaintiff who is the present owner of the valuable premises in suit instituted this Rei Vindicatio action against the defendants to recover the possession of the said valuable premises in suit." (page 84 appeal brief).

The learned District Judge has in his judgment dismissed the plaintiff's case stating that the devolution of title to the plaintiff – appellant was not proved. The appellant averred that the original owner of the property in the schedule was one S. M. Saleem and the plaintiff derived title from him as pleaded in the plaint. The learned District Judge held that the appellant had failed to discharge the burden of proving of his title. The learned District Judge had observed that the plaintiff has failed to prove to the satisfaction of court with regard to the manner in which the original owner S. M. Saleem acquired title to the property and how one Usoof Rabia Saleem acquired right to execute the document marked P1.

The plaintiff did not give evidence. Instead one M. I. M. Thabeer a relation of the appellant and M. A. Rumi, the notary who executed P2, gave evidence on behalf of the appellant. It was submitted on behalf of the Respondents that this witness Thabeer had little knowledge with regard to the subject matter of this action and much of his evidence were either hearsay or based on assumptions. It is the position of the counsel for the Respondent that the appellant has failed to place evidence in line with the title pleaded in the plaint which is mandatory in an action of this nature. The trial Judge has observed the unavailability of acceptable material to the satisfaction of court with regard to the manner in which the original owner Saleem acquired title to the property.

In this case the appellant is relying on Deeds marked P1 and P2 in establishing his title to the property in suit. To prove the Deed P1 the appellant summoned M. Kabeer, who was an attesting witness to the said deed and to prove the Deed of Gift from the heirs of S. M. Junaid to the appellant the Notary public who executed the Deed was summoned to give evidence and prove the said Deed. Although the said two deeds were marked subject to proof at the time of the closure

of the appellant's case no objections was taken and therefore the deeds marked P1 and P2 are admitted in law.

The learned District Judge has concluded that the appellant had failed to prove his title to the property to the satisfaction of court. He had held in his judgment that the plaintiff has failed to prove how the original owner Saleem acquired title to the property. It is very clear that the appellant has failed to place evidence in line with the title pleaded in the plaint which is mandatory in an action of this nature. An important feature of the action rei vindication is that it has to necessarily fail if the plaintiff cannot clearly establish his title. Our courts have always emphasized that the plaintiff who institutes a vindicatory action must prove title.

The only other point this court has to consider is whether the learned District Judge was right in the conclusion at which he arrived on the question of prescription. The learned District Judge also held that the defendants had failed to prove their claim of prescriptive title. The defendant respondents have not appealed against the said order.

In *Sirajudeen and Others Vs. Abbas* (4) it was held that:

"Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights."

As regards the mode of proof of prescriptive possession, mere general statement of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by

prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by court.

One of the essential elements of the plea of prescriptive title as provide for in the section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be such character as is incompatible with the title of the owner.

In *Hassan Vs. Romanishamy*(5) it was held that mere statements of a witness, "I possessed the land" or "We possessed the land" and "I planted plantain bushes and also vegetables", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payments of rates by itself proof of possession for the purposes of this section.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the plaintiff. There must be proof that the defendant's occupation of the premises was such character as is incompatible with the title of the plaintiffs. This court is of the view that the learned District Judge has properly addressed his mind to the important fact that the burden is definitely on the defendants to establish their plea of prescriptive title. In my view in the present case there is a significant absence of clear and specific evidence on such acts of possession as would entitle the defendants to a decree in favour in terms of section 3 of the Prescription Ordinance.

In the circumstances mentioned above, I dismiss the appeal of the Plaintiff-appellant. I make no order as to costs.

Appeal dismissed.

MASTER FEEDS LTD,. V. PEOPLE'S BANK

SUPREME COURT
AMARATUNGE, J.
EKANAYAKE, J. AND
PRIYASATH DEP., PC. J.
S. C. (CHC) NO. 11/2002
H.C. CIVIL 150/98(1)
AUGUST 29, 2011

Letters of Credit – Questions of fact – Question of law – Prescription

The plaintiff, a banking corporation, at the request of the Defendant issued three irrevocable letters of credit to the defendant to facilitate its imports. The Defendant collected the documents related to the letters of credit sent by the exporter's bank (seller's bank) from the Plaintiff Bank and got the goods released from the shipper. The Defendant having obtained the release of goods, failed and neglected to pay monies due to the Plaintiff Bank contrary to the terms and conditions of the agreements relating to the issuing of the letters of credit.

As the Defendant failed to pay the amounts due under the three letters of credit, the Plaintiff Bank instituted this action against the Defendant.

The Defendant in its answer admitted *inter alia* that he was a customer of the Plaintiff-Bank and was granted banking facilities. The Defendant also averred that the plaint does not disclose a cause of action and that the Plaintiff's action is prescribed.

At the stage of argument the Defendant restricted the submissions to the following two grounds.

(1) Whether the Plaintiff – Respondent has proved that it paid and disbursed monies under the said letters of credit to the beneficiaries to recover the same from the Defendant – Appellant.

(2) Whether the Plaintiff – Respondent is entitled to recover interest at the rate of 34% per annum as claimed.

Held:

(1) It is settled law that when issues are raised the pleadings will recede to the background and the trial judge is required to decide on the issues.

(2) The Defendant' s both grounds of appeal involve question of facts not raised as issues at the trial stage and for that reason it is precluded from raising at the appeal stage.

per Dep, P.C., J. –

> "The questions of facts raised at the argument stage was not raised as issues at the trial stage. The Learned High Court judge correctly decided the case on the issues raised at the trial."

APPEAL from the judgment of the Commercial High Court of the Western Province.

Cases referred to:

(1) Candappa Bastian Vs. Ponnambalampilai – (1993) 1 Sri L.R. 185

(2) 'The Tasmania' (1890) 15 App. Case No. 233

(3) Setha V. Weerakoon – 49 NLR 225

K. M. Basheer Ahamed with *U. M. Mawjooth* for the Defendant – Appellant

S. A. Parathalingam, PC., with *J. Bodhinagoda* for the Plaintiff - Respondent.

Cur.adv. vult.

April 05, 2013

PRIYASATH DEP. PC, J.

This appeal was filed by the Defendant against the judgment of the Commercial High Court of Western Province dated 22-03-2002 which gave judgment in favour of the Plaintiff as prayed for.

The Plaintiff is a banking corporation established under the People's Bank Act No. 29 of 1961. The defendant is a registered company and a customer of the Bank and in the course of its business imports goods and raw material. The Defendant being unable to finance its imports applied and obtained finance facilities from the Plaintiff Bank.

The Plaintiff at the request of the Defendant issued three irrevocable letters of credit to the defendant to facilitate its imports.

The first Letter of Credit dated 27-10-95 was issued under Documentary Credit No. Corp/95/00969 for US $ 30,600/-. (equivalent is Rs. 1,648,395/62) This Letter of Credit was issued to the Bank of Tokyo in favour of the beneficiary Sumitomo Corporation which is the exporter (seller). A deferred payment facility of 120 days was granted from the date of the Bill of Lading to the Defendant which expired on 17-01-96. The application for the irrevocable letter of Credit was marked as P1A and the Letter of Credit was marked as P2.

The defendant collected the documents related to the Letter of Credit sent by the exporter's bank (seller's Bank) from the Plaintiff Bank and got the goods released from the shipper. At the time of accepting the documents defendant did not pay the amount due under the Letter of Credit instead executed a Bill of Exchange for US $ 30,600/- payable to the Plaintiff Bank which was marked as P3. Plaintiff marked the memorandum pertaining to the payment to the beneficiary's bank as P3A and the Statement of Account as P4.

The second Letter of Credit dated 5-7-95 was issued under Documentary Credit No. Corp/95/00647 by the

Plaintiff for US $ 61,500/- (Rs. 3,297,301/34) This Letter of Credit was issued to the Rabo Bank Nederlands (Singapore Branch) in favourof the beneficiary Intra Business Pvt. Ltd which is the exporter (seller). A deferred payment facility of 90 days was granted to the Defendant from the date of the Bill of Lading which expired on 4-10-95. The application for the irrevocable Letter of Credit was marked as P5A and the Letter of Credit was marked as P6.

The defendant collected the documents related of the Letter of Credit sent by the Exporter's bank (seller's Bank) from the Plaintiff Bank and got the goods released from the shipper. At the time of accepting the documents defendant did not pay the amount due under the Letter of Credit instead executed a Bill of Exchange for US $ 61,106/- payable to the Plaintiff Bank which was marked as P7.

The third Letter of credit dated 4-9-95 for US $ 30,360/- (Rs. 1,634,886/=) was issued under Documentary Credit No: Corp/95/00821. This Letter of Credit was issued to the Bank of Tokyo in favour of the beneficiary. Sumitomo Corporation who was the exporter (seller). A deferred payment facility of 120 days was granted to the defendant from the date of the Bill of Lading which expired on 16-11-95. The application for the irrevocable Letter of Credit was marked as P10A and the Letter of Credit was marked as P11.

The defendant collected the documents related to the Letter of Credit sent by the exporter's bank (seller's Bank) from the Plaintiff Bank and got the goods released from the shipper. At the time of accepting the documents defendant did not pay the amount due under the Letter of Credit instead executed a Bill of Exchange for US $ 30,360/- payable to the Plaintiff Bank which was marked as P12.

The Defendant having collected the documents from the plaintiff and having obtained the release of the goods failed and neglected to pay monies due to the Plaintiff Bank contrary to time terms and conditions of the agreements relating to the issuing of Letters of Credit referred to above.

As the Defendant failed to pay the amounts due under three Letters of Credit, the Plaintiff Bank instituted this action against the Defendant. Plaint contains three causes of action based on these three Letters of Credit.

The Defendant in its answer admitted paragraphs 1, 2 and 5 of the Plaint. The Defendant admitted that it is a customer of the plaintiff bank and was granted banking facilities. The Defendant denied the rest of the averments in the Plaint. In its answer the Defendant averred that the Plaint does not disclose a cause of action and in any event the Plaintiff's action is prescribed. Further, it was stated that the Plaintiff's claim is inflated and excessive and includes taxes, levies and interest that the Plaintiff is not entitled to recover.

At the trial the defendant admitted the signatures on the documents annexed to the Plaint marked P1, P5 and P10 (the applications submitted by the Defendant to the Bank for the issuing of Letters of Credit) and P3, P8 and P12 (Bills of Exchange). At the trial Plaintiff raised issue numbers 1 – 13 and the defendant raised issue numbers 14-15.

The Defendant raised the following issues.

Issue No. 14

Does the Plaint disclose a cause of action against the defendant?

issue No. 15

Is the Plaintiff's claim prescribed?

Plaintiff led the evidence of Withanage Don Dayananda, Senior Manager of the Plaintiff Bank to establish its case. In his evidence he stated that the Defendant on three different dates submitted three formal applications in respect of each Letter of Credit which were marked as P1, P5 and P10. The Plaintiff Bank accepted the applications and issued Letters of Credit from the Bill of Lading in respect of Letters of Credit marked P2 and P11. In respect of Letter of Credit marked P5A a deferred payment facility of 90 days from the Bill of Lading was granted to the Defendant. The Defendant collected relevant documents from the Plaintiff Bank which was sent by the beneficiary's bank and got the goods released. At the time of collecting the documents the defendant did not pay the value of the goods to the Plaintiff and instead executed Bills of Exchange for the value of the goods. The Defendant after obtaining the goods did not pay the money due to the Bank. The Plaintiff Bank had paid the money due under the Letters of Credit to the beneficiary's bank and in proof submitted the bank memos marked P3a, P8a and P13 sent to the Defendant. As the defendant defaulted in paying the sum of money owing to the bank, the bank had charged the normal default interest from the Defendant from the date of expiry of the deferred payment dates. The bank produced Statement of Accounts in respect of each transaction marked P4, P9, and P14.

The Plaintiff closed its case reading in evidence P1 – P14. The Defendant failed to discredit the evidence of the sole witness for the Plaintiff and did not challenge the documents produced in courts marked P1 – P14.

The Defendant did not call evidence nor produce documents. The Defendant took up the position that the Plaint does not disclose a cause of action. The Plaint which contained 58 paragraphs includes three causes of action. Each cause of action was described in detail and contains all necessary particulars and also referred to the relevant documents which were subsequently produced and proved at the trial. Therefore, the learned High Court judge correctly answered this issue in the negative.

The Defendant's second issue was that the action is prescribed and for that reason Plaintiff could not maintain this action. The evidence revealed that the Defendant made requests in writing followed by formal applications to obtain Letters of Credit. The Application contains the terms and conditions under which the facilities were granted. The Defendant signed the relevant documents and Plaintiff accepted the applications and granted the facility. Each transaction is evidenced by a written document. As these agreements are in writing in terms of the Prescription Ordinance action could be filed within six years of the date of default. These transactions had taken place in 1995 and the action was instituted in 1998. The relevant portion of Section 6 of the Prescription Ordinance reads as follows:

"No action shall be maintainable . . . . upon any written promise. contract, bargain or agreement, ... unless such action shall be brought within six years from the date of the breach of such ..... written promise, contract, bargain, or agreement, of other written security....."

The plaintiff had filed this action well within time and the action is not prescribed. The learned High Court Judge correctly rejected the plea of prescription and answered the issue in the negative.

The Defendant had also taken up the position that the claims are inflated and excessive. The Defendant when applying for Letters of Credit accepted the terms and conditions in the application. The clause 4 of each application has the following condition.

> "We undertake to reimburse any amounts disbursed or paid by you or your branches/agents under the credit or hereunder whether in negotiating draft or otherwise interest commission and all charges. . . ."

The Plaintiff bank had produced Statements of Accounts marked P4, P9 and P14 giving the principal sum due under the Letters of Credit and the interest accruing from the date of default up to the time of institution of action. The Defendant when obtaining facilities agreed to pay the sum of money due under the Letters of Credit and the interests, BTT and the Defence levy.

The learned High Court Judge rejected the defence put forward by the defendant and answered the issues raised by the plaintiff in the affirmative and gave judgment in favour of the Plaintiff as prayed for.

Being aggrieved by the judgment of the High Court the Defendant preferred this appeal to the Supreme Court. The Petition of Appeal contains several grounds of appeal. However at the stage of the argument the defendant restricted the submissions to following two grounds:

1. Whether the Plaintiff- Respondent has proved that it paid and disbursed monies under the Letters of Credit to the beneficiaries to recover the same from the Defendant – Appellant