THE

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

[2013] 1 SRI L.R. - PART 9

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(f) Has the Court of Appeal failed to appreciate the limited burden of a Competent Authority in any inquiry held in terms of Section 9 of the State Lands (Recovery of Possession) Act?

(g) Assuming without conceding that there was any monthly tenancy countenanced by law, has the Court of Appeal substantially erred by failing to consider that in any event, if this were so, that prior to the institution of proceedings in the Magistrate's Court, there was ample evidence of the said "informal agreement" falling into abeyance as a result of the Respondent's repudiation and that even on this score, the Respondent was in unauthorized possession?

The State Lands (Recovery of Possession) Act (hereinafter referred to as the "Act") was initially enacted on 25.01.1979 in order to make provision for the recovery of possession of "State Lands" from persons in unauthorized possession or occupation of the said lands. Thus, it is obvious that the intention of the legislature was to obtain an order of ejectment from the Magistrate's Court when the occupation or possession was unauthorized.

Section 9 of the said Act reads thus:-

(1) At such inquiry the person on whom summons under section 6 has been served shall not be entitled to contest any of the matters stated in the application under section 5 except that such person may establish that he is in possession or occupation of the land upon a valid permit or other written authority of the State granted in accordance with any written law and that such permit or authority is in force and not revoked or otherwise rendered invalid.

(2) It shall not be competent, to the Magistrate's Court to call for any evidence from the competent authority in support of the application under section 5. (emphasis added)

Thus, one could see that a limitation has been placed on the scope and ambit of the inquiry before the Magistrate. The Magistrate can only satisfy himself whether a valid permit or any other written authority of the State has been granted to the person on whom summons has been served.

If the language of the enactment is clear and unambiguous, it would not be legitimate for the Courts to add words by implication into the language. It is a settled law of interpretation that the words are to be interpreted as they appear in the provision, simple and grammatical meaning is to be given to them, and nothing can be added or subtracted. The Courts must construe the words as they find it and cannot go outside the ambit of the section and speculate as to what the legislature intended. An interpretation of section 9 which defeats the intent and purpose for which it was enacted should be avoided.

His Lordship S. N. Silva, J. (as he then was) while examining the scope of the Act, in the case of *Ihalapathirana Vs. Bulankulame*[(1)], Director-General, U.D.A. made the following observations:-

The phrase "State Land" is defined in section 18 of the Act which as amended by Act No. 58 of 1981 includes "Land vested or owned by or under the control of", the U.D.A. It is conceded that the premises described in the quit notice "P3" is State Land within the meaning of this definition. It is also conceded that the Respondent is the appropriate Competent Authority in terms of the Act.

The phrase "unauthorized possession or occupation" is defined in section 18 of the Act as amended by Act No. 29 of 1983 to mean the following:

"every form of possession or occupation except possession or occupation upon a valid permit or other written authority of the State granted in accordance with any written law, and includes possession or occupation by encroachment upon State Land."

This definition is couched in wide terms so that, in every situation where a person is in possession or occupation of State Land, the possession or occupation is considered as unauthorised unless such possession or occupation is warranted by a permit or other written authority granted in accordance with any written Law. Therefore I am unable to accept the contention of the Counsel for the Petitioner that a land which is the subject matter of an agreement in the nature of the document marked "P1" comes outside the perspective of the State Lands (Recovery of Possession) Act.

The rights and liabilities under the agreement could be the subject matter of a civil action instituted by either the U.D.A. or the petitioner. The mere fact that such a civil action is possible does not have the effect of placing the land described in the notice marked "P3", outside the purview of the State Lands (Recovery of Possession) Act. Indeed, in all instances where a person is in unauthorised occupation or possession of State Land such person could be ejected from the land in an appropriate civil action. <u>The clear object of the State Lands (Recovery of Possession) Act is to secure possession of such land by an expeditious machinery without recourse to an ordinary civil action."</u> (Emphasis added)

Thus, it could be seen, that what was meant was to provide an expeditious method of recovery of "State Lands" without the State being forced to go through a very cumbersome process of a protracted civil action and consequent appeals.

Learned President's Counsel for the Petitioner argued that the entire issue revolves around Section 9 of the Act and the inability of the Respondent to establish the existence of a valid permit or other written authority of the State granted in accordance with any written law which is in force and has not been revoked or otherwise rendered invalid. (emphasis added).

Counsel submitted that by using the phrase "....... in accordance with any written law", the legislature has intentionally placed a premium on the mode and manner of any instrument of disposition by which, any land which is subject to the application of the said Act is alienated either on a temporary or permanent basis. The significance of the use of the words" . . . . in accordance with any written law" means that the alienation *per se*, ie, the manner and mode of the alienation itself must be one that is prescribed by law.

Learned President's Counsel drew the attention of Court to another significant use of the phrase" written law" as found in the Constitution itself. The 13th Amendment to the Constitution in Appendix II under the caption "Land and Land Settlement" provides as follows:-

> *"State Land shall continue to vest in the Republic and may be disposed of, in accordance with Article 33(d) and written law governing this matter". (emphasis added)*

The Constitution in Article 170, defines the phrase "written law" as follows:-

"Written law" means any law and subordinate legislation and includes statutes made by a Provincial Council, Orders, Proclamations, Rules, by – laws and Regulations made or issued by any body or person having power or authority under any law to make or issue the same."

This clearly shows that in alienating "State Lands" the President of the Republic is mandatorily required to do so in terms of the law. Assistance can be taken for purposes of interpretation of the phrase "written law" as found in the Constitution which is the Supreme Law of the land. Whether it is the Constitution or the Act, the Courts must adopt a construction that will ensure the smooth and harmonious working of the Constitution or the Act as the case may be, considering the cause which induced the legislature in enacting it.

In the aforesaid background, I now proceed to consider the observation made by the Court of Appeal in the impugned judgment dated 10-01-12. The said judgment noted, *inter alia*, as follows:-

"Having placed Morgan into possession of the State land, Ports Authority has clearly accepted by way of monthly rentals prior to initiating proceedings in the Magistrate's Court. By having acknowledged the receipt of monthly rentals, Ports Authority has in no uncertain terms issued written authority according to law to Morgan to be in possession of the subject matter as a tenant at common law until it is terminated according to law. The learned Counsel for the Ports Authority has submitted that a monthly tenancy or lease in terms of the common law is not accepted under section 9 and it is the availability of such

defences that prompted the Legislature to bring in such a specific and clearly defined phrase in section 9, in order to exclude such defences.

I am not attracted by the above submissions as being the correct proposition of law, for the reason that the payment of rents evident by the written receipts read together with X2 and X1 had in effect created a monthly tenancy by itself and constitute a written authority given to Morgan until such time the said authority is legally revoked." (emphasis added)

The document marked **X2** dated 17.7.89 contemplates

(a) the handing over of possession of the premises in question by the Field Officer.

(b) the payment of rent based on a valuation obtained by the Chief Valuer.

(c) the entering into a lease agreement containing the terms and conditions; and

(d) the payment of Rs. 3000/- and one month's rental in order to show the good faith.

X1 is a document dated 1.8.1989 by which possession of the premises in question was handed over to Morgan by an employee of the Ports Authority on the undertaking that Morgan would enter into a lawful agreement as soon as possible with the Ports Authority.

It is common ground that no legally valid lease agreement was entered into by the Respondent with the Ports Authority despite several reminders. The crucial question to be decided

is whether documents **X2** and **X1** constitute a written authority granted in accordance with any written law. Payments of monthly rentals and the acceptance of the same by the Ports Authority do not by any means amount to "written authority granted in accordance with any written law" The possession of the premises in question was handed over to Morgan subject to the condition that a lease agreement containing the terms and conditions of the Ports Authority pertaining to land leases would be entered into by the Respondent. However, the Respondent has failed to satisfy the said condition.

A monthly tenancy without a formal lease is not covered by Section 9 of the Act. It is also noted that the Respondent defaulted in the payment of rent and had commenced payment once the Quit Notice was issued.

Learned Counsel for the Respondent relied on the case of *Farook Vs. Urban Development Authority*[2]. The submission in this case was made on the basis that the occupation of the Petitioner was with the written authority marked P2 of the Respondent and that the letter marked P4 was not a termination of the authority granted but was merely a letter of demand with a threat of legal action. The Court noted that there was no termination of the authority granted by the document marked P2 whether on the basis that the premises in question was required since development activities have commenced or on the basis that the Petitioner has failed to pay the rent determined by the relevant local authority. The Court therefore held that the document P2 constitutes a permit granted to the Petitioner with the two conditions remained valid. The Court further observed that a termination of authority granted by P2 had to be specific and should be effective from a particular date.

The second case on which the learned Counsel for the Respondent placed reliance was the case of *Mohamed Vs. Land Reform Commission & Another*[3]. The issue was whether the Petitioner had a permanent lease over the land or whether he was given a temporary lease. The objections filed on behalf of the Land Reform Commission expressly admitted the averments in the petition that there was a lease in respect of the said land between the Petitioner and the Land Reform Commission and that the Land Reform Commission had in fact accepted the rents from the Petitioner.

The aforesaid two cases were decided on the basis that there was either a permit or a written authority granted to the Petitioners in accordance with the written law. In the instant application, no lease agreement was entered into between the Respondent and the Ports Authority in accordance with the written law. The two cases cited by the learned Counsel for the Respondent have no relevance to the issue in hand.

For the reasons stated above, I answer the questions on which special leave was granted as follows:-

(a) Yes.

(b) Document X1 cannot be classified as a lawful permit or any other written authority granted in accordance with any written law.

(c) Yes.

(d) Yes.

(e) "Monthly tenancy" does not suffice for the purposes of resisting an application under the State Lands (Recovery of Possession) Act unless a tenancy agreement in accordance with any written law, is in force.

(f) Yes.

(g) In view of the answer given to (d) above, the question of considering an informal agreement does not arise unless a legally enforceable agreement entered into in accordance with any written law, is in force.

Accordingly, I set aside the judgment of the Court of Appeal dated 10-01-12 and affirm the judgment of the High Court of Colombo and the Magistrate's Court of Colombo dated 26-09-06 and 14-01-04 respectively. Considering the considerable period of time the Respondent had been in unauthorized possession or occupation of the premises without a valid permit or any other written authority granted in accordance with any written law, I direct the Respondent to pay a sum of Rs. 250,000/- (Rupees Two Hundred and Fifty Thousand only) as costs to the Petitioner.

MOHAN PIERIS, P.C. C.J. – I agree.

RATNAYAKE, P.C. J. – I agree.

Appeal allowed.

FERNANDO VS. PERERA

SUPREME COURT
TILAKAWARDANE J.
DEP P.C. J.
EVA WANASUNDERA PC. J.
SC APPEAL 80/2010
SC HCCALA 261/09
WP/HCCA KAL-106/02 [F]
DC PANADURA 341/RE
JUNE 17, 2013

Rent Act No. 7 of 1972- Section 22 (1) [d] Deterioration?- What is structural alteration-Reparation of roof- improvement?- Decline in value- Does it come within deterioration – Duty of the tenant to take proper care- Expert Evidence.

The plaintiff-respondent sought the eviction of the tenant appellant from the premises in question on the ground that the condition of the premises had become deteriorated owing to acts committed by the appellant- Section 22(1) [d]. Judgment was entered in favour of the appellant in the District Court- the High Court set aside the said judgment. The Supreme Court granted leave to appeal on the issue whether the repairs made by the appellant tenant caused deterioration to the premises and whether replacement of Sinhala tiles with asbestos sheets caused deterioration of the premises.

Held:

(1) Expert evidence is a fundamental necessity upon which the question of whether the repairs amount to deterioration or improvement remains.

(2) The replacement of tiles with asbestos cement sheets and the reduction of the height of the walls by two feet amount to a structural alteration.

Per Eva Wanasundera. P.C. J

> "On face value, the repair appears to be in the form of an improvement because it involved the reparation of the roof, ... In the present case whether it was a useful repair is contested, as

the alteration, has in fact damaged the building with at least 2 ft of the wall being demolished to align the asbestos sheets, thereby changing the external appearance of the premises for the worse- this Court sees sufficient evidence of damage to ascertain the inapplicably of the above dicta".

(3) The act of making worse the premises has not been restricted to physical alteration only; value could be included in this definition for given the present status of the premises the value being reduced also contributies to making worse the premises in terms of its commercial worth should the respondent wish to lease the property to another or sell especially when accounting for the value it accrues as it ages. The respondent would have to incur further financial burden in order to restore the premises to its former state as presently, the premises appear unfinished and Court finds that the reduction of the value of the premises amounts to making worse the premises.

Per Eva Wanasundera. P.C. J

> "It is the duty of the tenant to take proper care of the leased property, to use it for the purpose for which it was let and for no other purpose and on the termination of the lease, to restore the property to the landlord in the same condition in which it was delivered to him reasonable wear and tear excepted".

APPEAL from the judgment of the High Court [Civil Appellate] Western Province.

Cases referred to:-

(1) *A.C.T. Construction Ltd vs. Customs Excise Commissioners* 1982- 1 All ER 84
(2) *Barakathulla vs. Hinniaappuhamy* - 1982 2 Sri LR463 (distinguished)
(3) *Musthapa Thamby Lebbe vs. Ruwanpathirane* 1982 2 Sri LR 463
(4) *De Zoysa vs. Victor de Silva* [1970] 73 NLR 576
(5) *Dr. Alwis vs. Wijewardene* - 1959 59 NLR 36
(6) *W.A.S. De Silva vs. L. Gooneratne* 1 MLR 6 Distinguished

Rohan Sahabandu, P.C. for defendant-respondent-appellant.

Ikram Mohamed P.C., with *M.S.A. Wadood* and *Milhan Ikram Mohamed* for plaintiff-appellant-respondent.

October 10, 2013

EVA WANASUNDERA. PC.J.

Leave to appeal was granted by this Court, in order to enable an Appeal against the judgment of the Western Province Civil Appellate High Court Holden in Kalutara dated 10.09.2009, on 04.08.2010 on the following questions of law as enumerated in paragraph 21 (a), (b) and (c) of the Petition dated 13.10.2009:

1. Has the repairs made by the Defendant caused deterioration to the premises in question which would come under the purview of Section 22(1)(d) of the Rent Act No. 7 of 1972 as amended?
2. Was the replacement of Sinhala tiles (half round tiles) with Asbestos sheets caused deterioration to the premises?
3. In the circumstances pleaded, is the Plaintiff entitled to reliefs prayed for?

The Plaintiff-Appellant-Respondent [hereafter referred to as the Respondent] instituted Action by Plaint dated 20.12.1995 in the District Court of Panadura, seeking the ejectment of the tenant, Defendent-Respondent-Petitioner [hereinafter referred to as the Petitioner] from premises formerly bearing Assessment No. 1/196 and presently bearing Assessment No. 354/, Galle Road, Main Street, Panadura on the ground that the condition of the premises had become deteriorated owing to acts committed by the Petitioner in terms of Section 22(1)(d) of the Rent Act No. O7 of 1972. Judgment was entered in favour of the Petitioner at the District Court and the said Appeal was transferred to the Western Province Civil Appellate High Court Holden in Kalutara where the

decision of the District Court was disaffirmed. Subsequently, an appeal lodged in the Supreme Court against the decision of the High Court.

The contentious issues of this case arise from the narrative which unfolded subsequent to the Respondent terminating the tenancy by giving the Petitioner Notice to Quit dated 22.09.1995 the above mentioned premises on or before 31.10.1995. This fulfils the pre-condition that the contract of tenancy must be terminated by a valid Notice as laid out in C.A. No. 30/79 (F) (1984).

The standard rent of the said premises does not exceed Rs. 100/- per mensem. The Respondent asserted that during the tenancy, the Petitioner had failed to maintain the premises adequately by removing part of the roof of the premises.

The relevant premises in question constitute one half of the twin houses, the other of which has already been demolished by the owner. The roof of the house in question was tiled with 'Sinhala ulu' i.e 'half round tiles'. Subsequent to heavy rains in October 1991, as alleged by the Petitioner, the walls were soaked and cracked and the main beam was about to fall off. The Petitioner then complained to the Respondent but she is asserted to have not taken action to restore the roof but recorded at the Grama Sevaka's office on 04.11.1991 that she will not be held responsible for the safety of the tenants should a future accident regarding the premises, materialize. Subsequently, the Petitioner herself took action to repair the roof with asbestos sheets. The Respondent filed action in the District Court praying for an ejectment order claiming that this repair caused a 'deterioration' of the premises under **Section 22(1)(d)** of the **Rent Act No. 07 of 1972** which reads as follows:

"Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any residential premises the standard rent (determined under Section 4) of which for a month exceeds one hundred rupees shall be instituted in or entertained by any Court, unless where- the tenant or any person residing or lodging with him or being his subtenant has, in the opinion of the Court been guilty of conduct which is a nuisance to adjoining occupiers or has been convicted of using the premises for an immoral or illegal purpose ***or the condition of the premises has, in the opinion of the Court, deteriorated owing to acts committed by or to the neglect or default of the tenant*** *or any such person."*

The Respondent adduced evidence of a Chartered Architect who inspected the premises. The District Court dismissed the Respondent's action holding that the Petitioner was compelled to make the repairs and that the question of whether such repairs amounted to deterioration or an improvement should be assessed from the point of view of an ordinary man and not from the point of view of an expert.

The High Court refers to this observation and comments, that '*to determine the issue of the state or nature of the premises which it was and the alterations that have been made to it, are matters for expert opinion and thus an ordinary prudent man cannot possess the expert knowledge to determine such issues'*.

This Court is of the opinion that the High Court was pragmatic when making the above observation and asserts that experts, evidence is a fundamental necessity upon which the question of whether repairs amount to deterioration or improvement remains.

In ascertaining this fact, the changes made to the original structure are pivotal in this case. The original status of the premises as well as its present state is dependent upon expert evidence and this Court relies on the Report dated 12.10.1997, marked "P1" in evidence, issued by the Chartered Architect by the name of M. Lalith De Silva who recorded that the original roof was a 'half round country tile roofing on a traditional timber structure'. He noted that at present, 'the heights of the walls had been reduced to reduce the roof slope to match the recently built corrugated asbestos cement sheet roofing' and that 'the height of the ridge has at least been lowered by two feet by the breaking of the original walls of the house'.

The issue that first arises is whether the above amounts to a structural alteration. The Court takes into account the view of *Neil J* in *A.C.T. Constructions Ltd. V Customs Excise Commissioners*[1] [as quoted in *Batakathulla v Hinniappuhamy*[2]] where he stated that an alteration with reference to a building is a *structural alteration*. In this light, the replacement of tiles with asbestos cement sheets and the reduction of the height of the walls by two feet undoubtedly amount to a structural alteration. This clarification prompts the fundamental issue of whether such a structural alteration amounts to an improvement or a deterioration of the premises.

In this regard, this Court quotes *Wille* in *"Landlord and Tenant in South Africa"*, 4th Edn (p. 265) where it is stated that:

> "*A necessary improvement is one which is necessary, for the protection or preservation of the leased property. The other forms of improvements are divided by authorities*

into useful improvements, namely, those which improve the property or add to its value and luxurious movements such as statutory."

On face value, the repair appears to be in the form of an improvement because it involved the reparation of the roof. However, this Court must also consider whether this repair actually fulfils the function of an improvement. For instance, in *Musthapa Thambe Lebbe v Ruwanpathirane* [3], the construction of a water-sealed latrine subsequent to the demolition of a bucket latrine was considered by the Court to be an improvement as it improved the condition of the premises. In *Barakathulla v Hinniappuhamy*, *(supra)* the replacement of a tiled roof with asbestos was considered a useful repair (therefore an improvement) because it 'has not otherwise damaged the building'. In the present case, whether it was a useful repair is contested as the alteration has, in fact, damaged the building with at least 2 feet of the wall being destroyed to align the asbestos sheets thereby changing the external appearance of the premises for the worse. Thus, this Court sees sufficient evidence of damage to ascertain the inapplicability of the above dicta.

Having established that these alterations do not amount to an improvement according to settled law, this Court takes into account the following elements of 'deterioration'. *Thamotheram J* in *De Zoysa v Victor De Silva*[4] noted that deterioration must amount to making worse the premises and this is confirmed by *Thambiah J* in *Musthapa Thamby Lebbe v Ruwanpathirane (supra)* where he noted that the acts complained of must cause some damage to the premises let and thereby worsen its condition to obtain an ejectment on the ground of deterioration of the premises as contemplated in

Section 22(1)(d) of the *Rent Act.* In *De Alwis v Wijewardena*[5], *Gunasekara J* held that *'substantial change for the worse'* amounted to deterioration. All these cases seek to affirm the view that a successful action of ejectment on this ground must encompass acts that cause damage to the premises and thereby worsen its condition.

In this regard, it is noteworthy that the Report of the Chartered Architect also observes that a fair quantity of valuable timber has disappeared thus reducing the value of the house and that the lowering of the roof slope by breaking the walls and changing the roof materials have distorted the architecture and character of the premises thereby making it appear 'unfinished'. It should be mentioned that though, traditionally, repairs done to an old house would usually make it 'newer' and thereby constitute an improvement, in this case, according to expert evidence, the repairs carried out have given the premises a 'disorganized' or disarranged appearance to the premises, the Chartered Architect asserted that the present asbestos arrangement constitute a health hazard as well.

The Petitioner also relied on the case of *W.A.S. de Silva v L. Goonaratne*[6] where the act of removal of round tiles from the roof of the premises and replacing them with galvanized sheets was held to not constitute 'wilful damage' as the 'act complained of has not changed the nature of character of the property let in any manner'. This Court makes a distinction between this case and the present one as visible physical changes have been made to the 'nature and character' of the property resulting in the reduced value of the property.

A point of contention pursued by the Petitioner is that the decline of the 'value' of the premises does not come within

the parameters of 'deterioration'. The Petitioner relied on *Musthapa Thamby Lebbe v Ruwanpathirane (supra),* that deterioration is the act of making worse the premises to support this contention, However, this Court notes that the act of making worse the premises has not been restricted to physical alterations only and further notes that 'value' could be included in this definition for, given the present status of the premises, the value being reduced also contributes to making worse the premises in terms of its commercial worth should the Respondent wish to lease the property to another or sell especially when accounting for the value it accrues as it ages. Further, the Respondent would have to incur further financial burden in order to restore the premises to its former state as presently, the premises appear 'unfinished' and therefore, this Court finds that the reduction of the value of the premises amounts to making worse as stated in *Musthapa Thamby Lebbe v Ruwanpathirane (supra).*

In the above case, the Court further notes a passage from **Wille's " Landlord and Tenant in South Africa" (4th Edn. P.288)** where it stated that:

> *"It is the duty of the tenant to take proper care of the leased property, to use it for the purpose for which it was let and for no other purpose, and, on the termination of the lease, to restore the property to the landlord in the same condition in' which it was delivered to him, reasonable wear and tear excepted. It follows that the tenant must not abandon or neglect the property, or misuse, injure: or alter it in any way, and a fortiori he may not destroy it, or appropriate the substances of the property."*

The Court draws attention to the need to avoid alteration and avoid the appropriation of the substance of the property.

The repairs have fundamentally altered the appearance of the premises and affected its value negatively, as confirmed by expert evidence, in contravention of the duties of a tenant. Furthermore, this Court relies on the expert evidence provided and notes 80% of the roof tiles which were displaced during the repairs should have been serviceable and these tiles, except for roughly 15, were absent.

This Court seeks to reaffirm the view that acts that improve the condition of the premises amount to useful improvements that enhance the value of the premises and distinguishes the present case as the alterations done have not resulted in an useful improvement but has changed the character of the premises and subsequently diminished its value as well.

This court also notes the contradictory statements made by the Petitioner, first in stating that the Respondent consented to repairs. The High Court judgment notes that during trial proceedings, the Respondent allegedly obtained the Petitioner's consent to carry out the necessary structural adjustments. Yet this was contrary to what was recorded in the abovementioned statement made to the Grama Sevaka. Furthermore, the Respondent, during cross-examination, admitted that there was no written evidence of consent being given and therefore, this Court cannot place reliance merely upon the word of the Respondent. Secondly, there is an issue of whether the wall has actually collapsed as claimed in the Plaint before the District Court [paragraph 6(2)]. There is no evidence that the wall had actually collapsed. The statement made by the Petitioner to the Grama Sevaka on 07.11.1991 marked 'V2' records that the heavy rains had soaked the walls and caused cracks and that the central beam of the roof was about to fall off and there is no acceptable evidence to

affirm a collapse. During cross-examination, the Petitioner indicated that there was no demolition of the wall but that the reduced height of the wall was due to it breaking. Given that the difference of height is only 2 feet and taking into account expert evidence where it was stated that the wall had to be broken in order to place the asbestos sheets during cross-examination, this does not support the Petitioner's contention that the wall actually collapsed thereby warranting reconstruction.

The necessity for such an improvement is also disputed as the Respondent's father has already made substantial renovations to the premises. Furthermore, small renovations in the form of cementing the cracks that had appeared were undertaken subsequent to the complaint by the Petitioner.

In these circumstances, I answer the questions of law in favour of the Plaintiff-Appellant-Respondent and dismiss the Appeal setting aside the judgment of the District Court of Panadura No. 341/RE and confirming the judgment of the High Court dated 10.09.2009. However, I order no costs.

THILAKAWARDANE, J. - I agree.

DEP, PC.J. - I agree.

Appeal dismissed.

SINGARASA VS. ATTORNEY GENERAL

SUPREME COURT
SARATH N. SILVA C.J.
JAYASINGHE, J.
UDALAGAMA, J.
DISSANAYAKE, J.
AMARATUNGA, J.
SC. SPL. L.A. 182/99
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HC COLOMBO 6825/94
DECEMBER 5, 2005
JANUARY 25, 2000
FEBRUARY 24, 2005

Prevention of Terrorism (Temp) Provision Act 48 of 1979 Revision/ Review of judgment of Supreme Court – Pursuant to a finding of the Human Rights Committee (HRC) Geneva – International Covenant on Civil and Political Rights Communication 1033/2000 under Optional Protocol – Legitimate expectation that findings of HRC will be enforced? – Accession to optional protocol 1997 incorporated with provisions of Constitution? – Monist Vs. Dualist theory – Were legislative or other measures taken by State party in accordance with its constitutional provisions – Validity, if not? – Does the covenant have an Internal effect? Binding? Judicial power exercised in terms of Article 4 [c]? – Conferment of Judicial power on HRC – Legality? – Article 4(1), 4(c), 4(e) 33, 33(F), 75, 76(1), 118.

Petitioner was indicted for trial before the High Court on five charges under the Emergency Regulations and Prevention of Terrorism [Temporary] Provisions Act 48 of 1979. After trial he was convicted of all 5 charges and sentenced to terms of 10 years R1 on each to run consecutively. Petitioner's appeal to the Court of Appeal was dismissed – subject to a reduction of sentence. Special leave to appeal application to the Supreme Court was dismissed on 28.1.2000. Petitioner thereafter filed the instant application on 16.8.2005 – for revision/review of the judgment delivered by the Supreme Court on 28.1.2000 and to set aside the conviction and sentence imposed by the High Court and affirmed by

the Court of Appeal on the basis of and pursuant to the findings of the Human Rights Committee – Geneva established under the International Covenant on Civil and Political Rights in communication 10033 of 2000 made under Optional Protocol to the Covenant.

Held:

(1) The Covenant contains certain rights as laid down in the Universal Declaration of Human Rights on which the Fundamental Rights contained in Articles 10-14 of the Constitution are based.

(2) The Covenant is based on the premise of legislative or other measures taken by each State party in accordance with its Constitutional processes.

(3) In Sri Lanka fundamental rights have been guaranteed in the Constitution of 1972 and in the present Constitution and enforced by the Supreme Court even prior to the ratification of the covenant in1980. The Government has not considered it necessary to make any amendments to the Constitution as to fundamental rights and the measures for their enforcement as contained in the Constitution presumably on the basis that these provisions are an adequate compliance with the requirements of Article 2 of the Covenant.

(4) The Sri Lankan Constitution is cast in a classic republican mould where sovereignty within and in respect of the territory constituting one country is reposed in the people. Sovereignty includes legislative, executive and judicial power exercised by the respective organs of State for and in trust for the people.

(5) Organs of Government do not have a plenary power that transcends the Constitution and the exercise of power is circumscribed by the Constitution and written law that derive its authority therefrom.

(6) The President, as Head of State is empowered to represent Sri Lanka and under Customary International Law enter into a treaty or accede to a covenant the contents of which are not inconsistent with the Constitution or written law.

(7) Judicial power forms part of the sovereignty of the people and could be exercised in terms of Article 4 (c) of the Constitution, only by Courts, Tribunals or institutions or recognized by the Constitution or by law.

Per Sarath N. Silva, C.J.

"The resulting position is that the petitioner cannot seek to vindicate and enforce his rights through the H.R.C. at Geneva, which is not reposed with judicial power under our Constitution. The Supreme Court being the highest and final Superior Court of record in terms of Article 18 of the Constitution cannot set aside or vary its order on the basis of the findings of the H.R.C. in Geneva; which is not reposed with any judicial power under or in terms of the Constitution".

(8) The framework of our Constitution adheres to the dualist theory, the sovereignty of the people of Sri Lanka and the limitation of the power of the President as contained in Article 4(1) read with Article 33 [f] in the discharge of functions for the Republic under customary international law. According to the Dualist theory International law and Municipal law are two separate and independent legal entities one National and the other International. In Monist theory International law and Municipal law constitute a single legal system.

(9) The President is not the repository of plenary executive power. The President exercises the executive power of the Republic and is empowered to act for the Republic under Customary International Law and enter into treatises and accede to international covenants – however in the light of specific limitation in Article 33 (f) such acts cannot be inconsistent with the provisions of the Constitution or Written Law. This limitation is imposed since the President is not the repository of the legitimate power of the people which power in terms of Article 4 [a] is exercised by Parliament and by the people at a referendum.

Per Sarath N. Silva. C.J.

"When the President in terms of Customary International Law acts for the Republic and enters into a treaty or accedes to a covenant the content of which is not inconsistent with the Constitution or the written law, the act of the President will bind the Republic *qua* state – but such a treaty or a covenant has to be implemented by the exercise of legislative power by Parliament and where found to be necessary by the people at a referendum to have internal effect and attribute rights and duties to individuals – This is in keeping with the dualist theory which underpins our Constitution.

(10) Where the President enters into a treaty or accedes to a covenant the content of which is inconsistent with the provisions of the Constitution or written law" it would be a transgression of the limitation in Article 33(f) and *ultra vires* – such acts of the President would not bind the Republic *qua* State.

(11) Covenant 1980 is based on the premise of legislative or other measures being taken by each State party in accordance with its Constitutional process to give effect to the rights recognized in Article 2 – Covenant. The act of the then President in 1980 in acceding to the covenant is not *perse* inconsistent with the provisions of the Constitution or written law – The accession to the covenant binds the Republic *qua* State but no legislative or other measures were taken to give effect to the rights recognized in the covenant in Article 2. The covenant does not have internal effect and the rights under the covenant are not rights under the law of Sri Lanka.

(12) Accession to the Optional Protocol 1997 by the then President and Declaration made under Article 1 is inconsistent with the provisions of the Constitution and is in excess of the power of the President as contained in Article 33 [f]. The accession and declaration does not bind the Republic *qua* State and has no legal effect within the Republic.

APPLICATION in Revision to review a Supreme Court judgment.

Cases referred to:-

(1) *Maccarthys Vs. Smith* 1979 3 All ER 325 at 328

(2) *Manuel Vs. A.G.* 1982 3 All ER 786 at 795

R.K.W. Goonesekera with *Savithri Goonesekere, Suriya Wickramasinghe, V. S. Ganeshalingam* and *Saliya Edirisinghe* for petitioner.

Yasantha Kodagoda DSG with *Harshika de Silva SC* for the Attorney General.

September 15, 2006

SARATH N. SILVA, C.J.

The Petitioner was indicted for trial before the High Court on five charges that he, between 1.5.90 and 31.12.1991 at Jaffna, Kankasanthurai and Elephant Pass together with Asoman, Oairaj, Somam, Pottu Amman, Dinesh, Susikumar and other unknown to the prosecution, conspired to overthrow the lawfully elected Government by means other than lawful and in order to accomplish the said conspiracy attacked the Army camps in Jaffna Fort, Palaly and in Kankesanthurai.

The charges were under the Emergency Regulation and the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, as amended.

After trial the High Court convicted the Petitioner on all five charges and sentenced him to terms of 10 years R.I., on each to run consecutively. The Petitioners appealed from the said conviction and sentence to the Court of Appeal. The appeal was argued on 23.6.1999 and 6.7.1999, subject to a reduction of sentence on each charge to 7 years R1 to run consecutively. The Petitioner sought Special Leave to Appeal from the judgment of the Court of Appeal and a Bench of this Court comprising of Mark Fernando, J. Wadugodapitiya, J., and Wijetunga J., having considered the submissions of counsel refused special leave to appeal on 28.1.2000.

The Petitioner has filed this application on 16.8.2005 for revision and/or review of the judgment of this Court delivered on 28.1.2000, and to set aside the conviction and

sentence imposed by the High Court and affirmed by the Court of Appeal respectively. The application is made on the basis of and pursuant to the findings of the Human Rights Committee at Geneva established under the International Covenant on Civil and Political Rights, in Communication No. 1033 of 2000 made under Optional Protocol to the Covenant.

It is appropriate at this stage to refer to the International Covenant on Civil and Political Rights (the Covenant) adopted by the General Assembly of the United Nations on 16.12.1966, to which Sri Lanka acceded on 11.6.1980. The Covenant contains certain rights as laid down in the Universal Declaration of Human Rights on which the fundamental rights contained in Articles 10 to 14 of the Constitution are based. Article 2 of the Covenant states as follows:

1. *"Each party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;*

2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."*

Thus it is seen that the Covenant is based on the premise of legislative or other measures being taken by each State Party "in accordance with its constitutional processes. . . . to give effect to the rights recognized in the . . . . Covenant". In Sri Lanka fundamental rights have been guaranteed in the Constitution of 1972 and in the present Constitution and enforced by this Court, even prior to ratification of the Covenant in 1980. The Government has not considered it necessary to make any amendment to the provisions in the Constitution as to fundamental rights and the measures for their enforcement as contained in the Constitution, presumably on the basis that these provisions are an adequate compliance with the requirements. of Article 2 of the Covenant referred to above.

The general premise of the Covenant as noted above is that individuals within the territory of a State Party would derive the benefit and the guarantee of rights as contained therein through the medium of the legal and constitutional processes that are adopted within such State Party. This premise of the Covenant is in keeping with the framework of our Constitution to which reference would be made presently, which is based on the perspective of municipal law and international law being two distinct systems or the dualist theory as generally described. The Classic distinction of the two theories characterized as monist and dualist is that in terms of the monist theory international law and municipal law constitute a single legal system. Therefore the generally recognized rules of international law constitute an integral part of the municipal law and produce direct legal effect without any further law being enacted within a country. According to the dualist theory international law and municipal law are two separate and independent legal systems, one national and the other international. The latter being

International law regulates relations between States based on customary law and treaty law. Whereas the former, national law, attributes rights and duties to individuals and legal persons deriving its force from the national Constitution.

The constitutional premise of the United Kingdom (U.K) adheres to the *dualist* theory. This was brought into sharp-focus when UK together with Demark and Ireland signed the Treaty of Accession to be a party of the European Community in 1972. Since membership of the Community presupposes a monist approach, which entails direct and immediate internal effect of "Community treaties" without the necessity of their transformation into municipal law, the U.K. Parliament enacted the European Communities Act in 1972.

Section 2 of the Act which in effect converts UK to a monist system in the area of European Community Law reads as follows:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies."

The Preliminary Note in Halsbury's Statutes exemplifies the distinction between a *dualist* and *monist* constitutional premise in relation to the contents of sections 1 and 2 of the European Communities Act 1972 as follows: