EKSITH FERNANDO

v.

MANAWADU AND OTHERS

(ST. THOMAS' COLLEGE CASES)

SUPREME COURT
DHEERARATNE, J.
WIJETUNGA, J. AND ISMAIL, J.
SC APPEAL NO. 55/99
CA APPLICATION NO 842/97 (Rev)
DC COLOMBO NO 4974/SPL
WITH
SC APPEAL NO 56/99
CA APPLICATION NO 915/97 (Rev)
DC COLOMBO NO 4949/SPL AND
SC APPEAL NO 57/99
CA APPLICATION NO 842/97 (Rev)
DC COLOMBO NO. 4974/SPL
23rd AND 24th NOVEMBER, 1999

Interpretation of statutes - "Generalia specialibus non derogant" - Qualifications for appointment to the post of Warden, St. Thomas' College - Applicability of Education Ordinance to STC - Ordinance No. 7 of 1930 - The right of plaintiff to sue-Section 5 of the Civil Procedure Code.

Two actions were filed in the District Court against St. Thomas' College Board of Governors and the Warden of STC seeking a declaration in each that the purported appointment of the 17th defendant (Eksith Fernando) as warden was irregular on the ground that 17th defendant, although a graduate, has absolutely no teaching experience as required by regulations made by the Minister under the Education Ordinance which was applicable to the STC. The rules provided that only a graduate with at least 10 years teaching experience was eligible to be appointed as the Principal of any school, which included a fee levying school as well. Admittedly the post of Warden is equivalent to that of a Principal. In each case, an interim injunction was prayed for preventing the 17th defendant from assuming duties as Warden.

The plaintiff in DC case No 4974 sued as the father of two students attending STC (parent's case) whilst the plaintiffs in DC Case No 4949 sued as old boys (old boys' case). The District Judge refused to issue the

injunctions sought in each case. On applications made to the Court of Appeal by way of revision which were consolidated, the Court of Appeal set aside the order of the trial Judge made in the parent's case and ordered the issue of an interim injunction as prayed for. As regards the old boys' case, the Court of Appeal held that the plaintiffs had no cause of action to sue. Three appeals were preferred from the judgment of the Court of Appeal. Of consent the appeals were consolidated and it was agreed by Counsel that the court decides on the merits of the legal issues involved.

Held :

1. The maxim "generalia specialibus non derogant" has no application to the instant case. The Education Ordinance is applicable to the STC and the appointment of the Warden should be in accordance with the qualifications specified in the regulations made by the Minister under the Education Ordinance.

Per Dheeraratne, J.

"I may mention here, in passing that in order to avoid needless delay and duplication of proceedings, situations like this should have ordinarly demanded a trial judge, either taking up the main trial expeditiously or taking up the interim injunction inquiry and the trial together. I am inclined to think that the burden of taking such a decision is with the trial Judge, but the Bar should actively co-operate with him, to reach that decision."

Per Dheeraratne, J.

"All what the (STC) Ordinance has sought to achieve was to grant a corporate personality to the STC Board, and to declare its powers and functions of internal management. No part of the functions or powers either of the State or the Minister of Education has been conceded, conferred upon or granted to the Board by the STC Ordinance, to make that a special enactment in the field of education."

2. The plaintiff in the parent's case has a cause of action within the meaning of section 5 of the Civil Procedure Code, on the basis of contract. An implied condition of such contract is for the Board of Governors to provide the plaintiff's two children with a Warden qualified in terms of the

regulations made by the Minister. The failure to do so amounts not only to "the refusal to fulfil an obligations" but also to "the neglect to perform a duty" within the meaning of section 5 of the Civil Procedure Code. He is, therefore, entitled to succeed.

3. The relationship between the old boys and the Board of Governors would not make the disputed appointment of the warden an infliction of a "wrong" on them to ground a cause of action to sue the Board of Governors. Therefore, the old boys' case must necessarily fail.

Cases referred to :

1. *Murugesu v. Northern Divisional Agricultural Producers Union* (1952) 54 NLR 517
2. *Richard Perera v. Albert Perera* (1963) 67 NLR 445
3. *Societe Des Produits Nestle SA v. Multitech Lanka (Pvt) Ltd.* (1999) 2 Sri LR 298
4. *The Vera Cruze* (1884) 10 AC 59
5. *Blackpool Corporation v. Slarn Estate Company Ltd.* (1922) 1 AC 27
6. *Ghouse v. Ghouse* (1988) 1 Sri LR 25
7. *London and Blackwall Railway v. Limehouse D.B.W.* (1856) 3 KGJ 123
8. *Thaiagarajah v. Karthigesu* (1966) 69 NLR 73
9. *Amaris v. Amerasinghe* (1919) 21 NLR 176

APPEAL from the judgement of the Court of Appeal

K. N. Choksy, P.C. with *K. Wijetunga* for the 17th defendant - appellant in 55/99 and 17th defendant - respondent in 56/99 and 57/99

D.S. Wijesinghe, P.C. with *Roland Perera*, for plaintiff - appellants in 56/99

Faisz Musthapha, P.C. with *N. Mahendran and Faiza Musthapha Markar* for plaintiff - respondent in 55/99 and 57/99.

H.L. de Silva, P.C. with *Romesh de Silva, P.C.* and *S.C. Crossette Thambiah* for 1st-13th; 15th and 16th defendants - appellants in 57/99 and 1st - 13th, 15th and 16th defendants - respondents in 55/99 and 1st - 13th defendants - respondents and 16th and 17th respondents in 56/99.

Cur adv vult.

JANUARY 21, 2000
DHEERARATNE, J.

Introduction

I must frankly admit that the resolution of the legal disputes in this case had the teasing nature of solving a cross-word puzzle, or rather a cryptic cross-word puzzle. In DC case No. 4974 the plaintiff as the father of two students attending St. Thomas College Mt. Lavinia (parent's case), and in case No. DC 4949 the plaintiffs as old boys of STC (old boys' case), sued the Board of Directors and the Warden of the STC, seeking a declaration in each case, that the purported appointment of the 17th defendant - respondent as Warden, was irregular. In each case, an interim injunction was prayed for preventing the 17th defendant - respondent from assuming office as Warden. Admittedly the 17th defendant - respondent, although a graduate, has absolutely no experience as a teacher. The basis of challenging the appointment of the 17th defendant - respondent as Warden in each case was that the Education Ordinance No. 31 of 1939, was applicable to the STC; that regulations made by the Minister of Education under that Ordinance, provided that only a person with 10 years teaching experience was eligible to be appointed as Principal of any school, which included a fee levying school as well. Admittedly, the post of Warden is equivalent to that of a Principal. The learned trial judge refused to issue an interim injunction in the parent's case; thereafter he also refused to issue an interim injunction in the old boys' case. I may mention here, in passing, that in order to avoid needless delay and duplication of proceedings, situations like this should have ordinarily demanded a trial judge, either taking up the main trial expeditiously or taking up the interim injunction inquiry and trial together. I am inclined to think that the burden of taking such a decision is with the trial judge, but the Bar should actively co-operate with him, to reach that decision. See the observations made in the cases of *Murugesu* Vs. *Northern Divisional Agricultural Producers Union*[1] *Richard Perera* Vs.

Albert Perera[2] and *Societe Des Produits Nestle SA* Vs. *Multitech Lanka (Pvt) Ltd.*[3] The plaintiff in the parent's case and the plaintiffs in the old boys' case moved the Court of Appeal in revision on both the respective orders of the trial judge. The Court of Appeal, having consolidated both cases, set aside the order of the trial judge made in the parent's case and made order issuing an interim injunction as prayed for. As regards the old boys' case, the Court of Appeal held that the plaintiffs had no cause of action to sue. From the judgment of the Court of Appeal 3 appeals have been now preferred. In appeal No. 55/99, the 17th defendant in the parent's case, in appeal No. 56/99, the plaintiffs in the old boys' case, and in appeal No. 57/99, the defendant Board of Governors of the STC in the parent's case, are the respective appellants.

When the three appeals came up for hearing before us, in order to secure the speedy and final resolution of all matters in dispute pending between the parties, we suggested the following course of action, which, in the best traditions of the Bar, was met with the ready agreement and approval of learned counsel for appellants and respondents in all the three appeals: that was;-

1. Parties agreed to consolidate the appeals SC 55/99, 56/99 and 57/99.

2. Parties agreed that if the Education Ordinance No. 31 of 1939 and the regulations made thereunder are applicable to the STC, the appointment of the 17th defendant as Warden was invalid.

3. Parties agreed that this Court should decide the following questions only, in order to finally determine the District Court cases No. 4947 and No. 4949; namely, (A) Whether the plaintiff in DC No. 4947 and the plaintiffs in DC No. 4949, had a right to sue to obtain a declaration that the appointment of the 17th defendant was invalid?; (B) If any one of the parties to either action had a right to sue,

did the Education Ordinance and the rules made thereunder govern the appointment of the 17th defendant as Warden?

4. Parties agreed that final judgments will be entered in the aforesaid District Court actions in terms of the judgment that will be delivered by this Court.

We realized during the course of arguments of learned counsel, that the two intricate and interesting questions of law we have been called upon to answer, were so much inextricably interwoven with each other, that in deciding them, we were left with two alternative approaches. The first, was to deal with the right of the parties to sue, on the assumption that the Education Ordinance was applicable to the STC and then decide the question of applicability of that Ordinance; the second, was to deal initially with the question of applicability of that Ordinance to the STC and then decide the question of the right of parties to sue. We chose the latter option as it seemed to us to appeal better both to logic and reason. In deciding those questions of law, we have specifically disregarded the several items of evidence in this case, pointing to the fact that the Board of Governors of the STC, had for a long course of time, acted on the basis that the Education Ordinance was applicable to the STC; for example obtaining permission from the Minister of Education to enable the then Warden to continue in office, when the regulations made by the Minister, which will be referred to in full later, came into force. In our view, such conduct on the part of the Board of Governors, is irrelevant to the decision of the legal issue of the applicability of the Education Ordinance.

THE ST. THOMAS' COLLEGE ORDINANCE NO. 7 OF 1930, RULES MADE THEREUNDER AND THE EDUCATION ORDINANCE NO. 31 OF 1939, AND REGULATIONS MADE THEREUNDER.

As the years of enactment of the two statutes indicate, the STC Ordinance is anterior to the Education Ordinance. According to the long title of the STC Ordinance, it is an

enactment to "incorporate St. Thomas' College Board of Governors and to amend the Law relating to St. Thomas' College". Section 2 of the Ordinance, deals with the incorporation of the Board of Governors as a corporation sole and section 10 deals with the power of the Board to make rules. Rule 11 made in terms of that section reads as follows :-

"The Warden and Sub-Warden of St. Thomas' College, Mt. Lavinia, and the Headmasters of Branch Schools shall be appointed by the Board subject to the approval of the Bishop, and shall have other academic qualifications as may be approved by the Board. They shall be members of the Church of Ceylon or of any Church in communion with the same, unless, in any particular instance, the Board with the approval of the Bishop shall determine otherwise."

The long title of the Education Ordinance states "An Ordinance to make better provision for education and to revise and consolidate the law relating thereto ." Section 61 refers to the applicability of Ordinance and reads :- "The provisions of this Ordinance shall not apply to any institution, devoted mainly or entirely to the education in agriculture of persons who are not less than sixteen years of age". Section 62 defines an "unaided" school to mean "a school which is not a Government school or an assisted school". Section 49 provides that on or after 1st June 1951, no person shall maintain any unaided school, unless the principal or other person for the time being in control of the school, has notified to the Director-General (DG) in writing, all such particulars relating to the school, as the DG may, by notice published in the Gazette, require to be furnished to him, in respect of the unaided school. Section 50 enables the DG, or any inspecting officer of the department, or any other person generally or specially authorized by the DG, to enter and inspect and examine the pupils therein and all the registers of admission and attendance of any such school. Section 51 empowers the DG, on being satisfied after an inspection of an unaided school, that it is open to the type of complaints mentioned in that section, to

order measures to be taken to remedy the matters of complaint within a specified time, and if no such remedial measures are taken, to order discontinuance of such school. Section 37 enables the Minister to make regulations for or in respect of several matters, one being (n) "the qualifications, period of training, salaries, appointment, registration, grading, suspension, and removal of teachers." It was not seriously contended that the word "teacher" in that context did not include a "Principal". By a notification in the Government Gazette of 9.12.1983, regulations made by the Minister on 29th May 1983 were published. I shall set out that notification in full.

THE EDUCATION ORDINANCE

REGULATIONS made by the Minister of Education under section 37 of the Education Ordinance (Chapter 185)

RANIL WICKRAMASINGHE
Minister of Education

Colombo, May 24, 1983.

Regulations

1. These regulations may be cited as the Assisted Schools and Unaided Schools Regulations, 1983.

2. All assisted schools and unaided schools shall conform to the following requirements in regard to the qualifications, appointment and period of training of their teachers :-

   (i) All teachers appointed henceforth should have at least one of the following qualifications :-

      (a) University degree;

      (b) Trained Teachers Certificate;

      (c) Diploma Certificate in Music, Dancing, Art, Agriculture, Home Science, Technical subjects and any other subject notified from time to time;

(d) Passes in three subjects at the General Certificate of Education (Advance Level) Examination.

(ii) Those in category (d) should obtain the Trained Teachers Certificate within ten years of joining the service.

(iii) A principal should be a University Graduate with at least ten years of teaching experience.

(iv) A person who has been convicted in a Court of Law for a criminal offence or has been dismissed from any post in the public service shall not be eligible for such appointment.

3. Teachers who do not conform to the conditions stipulated in regulation 2, but who are already in service are required to obtain the approval of the Minister to continue in service. It shall be obligatory on the part of the manager to make the requisite application to the Minister.

Consideration of submissions made on behalf of the Warden and the Board of Management of the STC.

It was forcefully contended by learned President's Counsel appearing on behalf of the Warden and the Board of Management of the STC, that the STC Ordinance was enacted prior to the Education Ordinance; that the STC Ordinance is a special enactment; that it is a self-contained Ordinance meant exclusively for the STC, while the Education Ordinance is a general enactment applicable to all schools except to those which have a statute specifically enacted for them; that Rule 11 made by the Board of Management has not been specifically repealed or rendered inoperative by the legislature by the passage of the Educational Ordinance : that there cannot be an implied repeal, that if that has occurred the Board would be defunct in respect of all its statutory powers and even cease to exist as a corporate body; and that the maxim "generalia specialibus non derogant" must be applied and therefore the Education Ordinance does not apply to the STC and its Board.

Among several decided authorities, three principal cases were referred to in the course of the arguments by learned President' Counsel for the Warden and the Board of Governors, to which I shall instantly refer. In my view it is important to consider closely the nature and effect of the enactments dealt with in those cases. The first of those, was the case of *The Vera Cruze*[4] in which Earl of Selborne LC said, "Now if anything be certain it is this, that where there are words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that the earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so". The special Act referred to in that case was the Fatal Accidents Act (Lord Campbell's Act) of 1846 which dealt with 'damages for loss of life'; and the general Act referred to was the Admiralty Court Act of 1861, which gave jurisdiction to the Admiralty Court, by using the general words relating to actions as "over any claim for damages done by any ship". The second, was the case of *Blackpool Corporation* Vs. *Slarn Estate Company Ltd.*[5] in which Viscount Haldane observed "..... in that state of matters we are bound , in construing the general language of the 1919, to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle in not to be taken as meant to rip up what the Legislature had before provided for individually, unless the intention to do so is specially declared. A mere general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them may, of course, be manifested, but the presumption is that language which in its character only general refers to subject-matter appropriate to class as distinguished from individual treatment.

Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifested." The individual Act referred to in that case, was the private (as opposed to public and general) enactment, the Blackpool Improvement Act of 1917, and the general enactment referred to was the Acquisition of Land (Assessment of Compensation) Act of 1919; and the dispute which arose in that case related to the question as to which Act was applicable for the assessment of compensation for the land acquired. The third, was a judgment of this Court in *Ghouse* Vs. *Ghouse*[6] in which, on the application of the maxim "generalia specialibus non derogant", it was held that the Muslim Intestate Succession Ordinance No. 10 of 1931, being a special law applicable to Muslims, prevailed over the provisions of the general law, the Adoption Ordinance No. 24 of 1941, as far as a Muslim was concerned. The other illustrations submitted by learned counsel to demonstrate that the STC Ordinance was a special enactment, were those private, local and personal enactments passed by the Parliament in the UK, permitting corporations to do various acts, which they were unable to perform under the common law, for example, to acquire land, to impose rates or taxes on inhabitants of an area, in constructing public projects like railways, canals or harbours and for the supply of gas, electricity or water.

In connection with the proliferation of those private Acts in the UK at one time, granting special powers to various bodies and boards, not enjoyed by them under the common law, I would refer to a few illuminating lines from a review written by Sir Cecil T. Carr KC. on the book (in two volumes) authored by Dr. O. Cyprian Williams, titled "The Historical Development of Private Bill Procedure and Standing Orders in the House of Commons." Sir Cecil wrote :-

"According to a hoary academic legend, variously retold and never yet verified, the head of an Oxford College, in the far off days when such appointments were subject to the condition

of celibacy, astonished the fellows of his society by announcing his marriage and confronting them with a clause in the local Canal Act which gave him statutory sanction.

It could have happened. In the canal mania of the seventeen-nineties, comparable with the railway mania of the eighteen-forties, over a hundred Canal Acts were passed. Toulmin Smith, who disliked all local legislation, complained in particular of the spate of private Inclosure Acts because nobody knew what might be hidden in them. In his "Government by Commissions", published just hundred years ago, he emphasised the danger of obnoxious enactments being "smuggled through Parliament by a few projectors unknown to the mass of inhabitants, as now often happens". There are some 4,000 Inclosure Acts in the century preceding the general statute of 1845, another 4,000 Railway Acts between 1830 and 1887, and some 1,500 Turnpike Acts in the half-century before 1809. Other impressive ranges of statistics could indicate that we owe to private bill legislation not only our system of communication but also our supply of water, gas and electricity and many other social improvements and amenities." (The Law Quarterly Review Vol 66; 1950 page 216)

As stated by Wood VC in *London and Blackwall Railway* Vs. *Limehouse D.B.W.*[7] (Quoted by Craies and by Bindra) "The legislature in passing a special Act, has entirely in its consideration **some special power which is to be delegated for the body applying for the Act on public grounds.** When a general Act is subsequently passed, it seems to be a necessary inference that the legislature does not intend thereby to regulate all cases not specially brought before it, but looking to the general advantage of the community, without reference to particular cases, it gives large and general powers which in their generality might, except for this very wholesome rule of interpreting statutes, override the powers which, upon consideration of the particular case, **the legislature had before conferred by the special Act for the benefit of the public.** The result of a contrary rule of construction would be

that the legislature, having authorised by special Acts the construction of some public work, would be supposed afterwards by a general Act to throw it into the power of a few persons to prevent that public work from being carried out." (Emphasis added)

The reason for this rule of construction is that in passing a special Act, the Parliament devotes its entire consideration to the particular subject; and when a general Act is subsequently passed, it is presumed that the Parliament has not repealed or modified the former special Act, unless it appears that the special Act again received consideration from the Parliament.

What is the real nature and effect of the STC Ordinance? As the long title of the Ordinance indicates the legislative purpose of the enactment is to incorporate the STC Board of Governors and the law relating to the STC. All what the Ordinance has sought to achieve was to grant a corporate personality to the STC Board, and to declare its functions and powers of internal management. No part of the functions or powers either of the State or of the Minister of Education has been conceded, conferred upon or granted to the Board of the STC by the Ordinance, to make that a special enactment in the field of education. The Board has been granted a legal personality, but it has not been granted any monopoly, immunity or special privilege not granted to other persons either natural or legal. The Board has not been granted some special authority to perform any act which it had no authority to perform under the normal law of the land. It could have run the management of the STC even without the Ordinance not having been passed, but of course, devoid of its corporate personality.

Although it is unnecessary to provide for in an enactment of the nature of the STC Ordinance, through an abundance of caution, section 13 has been put in, to make it quite certain that rights of others remain unaffected by the passage of that Ordinance. That section reads, "Nothing in this Ordinance

contained shall prejudice or affect the rights of the Republic or of any body politic or corporate, or of any other person, except such as are mentioned in the Ordinance and those claiming by, from, or under them". The rule making power granted to the Board under section 10, enables the Board to make rules inter alia "(d) for the employment, appointment and dismissal of the warden, the sub warden and other members of the staff of the college and the orphanage". The rule making power and the rules made thereunder, are nothing but private arrangements and comprise no part of a general scheme of legislation; they are meant for the protection of private interests. As Salmon says, "The great bulk of enacted law is promulgated by the State in its own person. But in exceptional cases it has been found possible and expedient to entrust this power to private hands. The law gives to certain groups of private individuals limited legislative authority touching matters concerning themselves. A railway company, for example, is able to make by-laws for the regulation of its undertaking. A university may make statutes binding upon its members. A registered company may alter those articles of association by which its constitution and management are determined. Legislation thus effected by private persons, and the law so created, may be distinguished as 'autonomic'" (10th Edition - Glanville Williams 161)

The rule making power granted to the Board of the STC under section 10, should be read subject to the overriding authority of the Minister to make regulations, in terms of the power granted to him by the Education Ordinance, in respect of unaided schools, inasmuch as the terms of employment, appointment and dismissal by the Board of its employees under that section, should be read subject to the normal law of the land, such as the Employees' Provident Fund Act, the Shop and Office Employees Act, and the Industrial Disputes Act etc. The maxim "generalia specialibus non derogant" has no application in the instant case. For the above reasons I hold that the Education Ordinance is applicable to the STC and the

appointment of the Warden should be in accordance with the qualifications specified in the regulations made by the Minister under the Education Ordinance.

The right of plaintiffs to sue.

As stated earlier, in the parent's case and the old boys' case substantial final reliefs claimed are the same, namely for a declaration that the 17th defendant is not entitled to be appointed to the post of Warden of the STC and for a declaration that the appointment of the 17th defendant as Warden is invalid and/or of no force in law. (Prayer to the plaint in the parent's case - (a) and (b); in the old boys' case - (a) to (d). In the parent's case the plaintiff pleaded inter alia, that he is the father of two students attending the STC; that he is concerned with their welfare and education; and that the appointment of the 17th defendant, who is disqualified in terms of the Rules of the Education Ordinance, is prejudicial to the school and its students. In the old boys' case, the plaintiffs pleaded inter alia, that they have been elected and are members of the Executive Committee of the Old Boys' Association (OBA); that it was decided at a meeting of the Executive Committee of the OBA and the decision was conveyed to the Board of Governors, objecting to the appointment of the 17th defendant as Warden, since he is disqualified in terms of the Rules made under the Education Ordinance; and that they have an abiding interest in the STC as Executive Committee members of the OBA. It was further pointed out that according to Rule No. 2 of the OBA Rules of Association, one of the objects was to make recommendations for the better management and administration of the STC; therefore it was contended, that the plaintiffs in the old boys' case were interested in getting a competent and a qualified Warden appointed. It was also submitted that the STC Rule No. 1(3) provides, that two representatives from amongst the old boys of the STC Mt. Lavinia, should be elected as ex officio members of the Board of Governors. Therefore it was contended that they are not mere strangers or busy - bodies. It was also contended that,

they as old boys, have a right to get their children admitted to the STC in the future. On those facts, it was submitted that they are entitled to the declaratory relief as prayed for as they have a right to sue, firstly, because they are persons having "sufficient or real interest"; secondly because they have a 'contingent right' to have their children admitted to the STC in the future.

It is important to remember in considering the nature of the two actions, that we are not concerned with any public law litigation, but with litigation to vindicate private rights. The basic question to be asked, in the first place, in relation to both cases, to my mind is, whether there exists a cause of action to sue, within the meaning of the Code of Civil Procedure (CPC), in each case. This is so, even in a case where declaratory relief is sought from an original Court. But before I deal with that aspect of the matter, let me first examine, what a cause of action is within the meaning of section 5 of the CPC.

Section 5 reads :- "Cause of action is a wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury."

It could be seen that the definition primarily speaks of the existence of a 'wrong'; that is a generic term which embraces a variety of specific categories of wrongs. The definition then seeks to signify some of the specific categories of wrongs that may be included in that generic term, like the denial of a right, the refusal to fulfil an obligation etc. It is quite obvious that the definition deals with what is usually referred to as a civil wrong or a legal wrong, which as Salmon puts it is "a violation of justice according to law." A wrong cannot exist independent of a violation (or a threatened violation) of law.

The tenor of the submissions of both President's Counsel in the parent's case and the old boys' case, was that declaratory relief could be sought from an original civil court, independent

of the existence of a wrong, falling within the definition of a cause of action. There was always no doubt about the competency of a civil court to grant declaratory relief in respect of matters not contemplated in section 217 (G) of the CPC, provided there was cause of action within the meaning of the CPC. The declaratory decrees section 217 (G) of the CPC refer to, are those that "declare a right or status"; not mere declarations of any sort. The declaratory relief claimed by the plaintiff in the leading case of *Thaiagarajah Vs. Karthigesu*[8] was a declaration of his civil status that he was not married, which status was denied by the defendant in that case. H.N.G. Fernando SPJ. (as he then was) delivering the judgment observed :-

"Counsel has argued that under our Code a person cannot institute an action unless he is able to plead that he has a cause of action as defined in section 5 of the Code. A similar argument was considered in *Aziz* Vs. *Thondaman* (1959) 61 NLR 217, where the court apparently took the view that because section 217 (G) of the Code declares that a decree may 'declare a right or status', a person may therefore bring an action to have a right or status declared. The precise objection, based on the definition of 'cause of action' was (I think with respect) not clearly formulated in that judgment. The objection is that the definition **does** expressly include the denial of a **right,** but makes no reference to the denial of a **status,** and that therefore the denial of a status does not give rise to an actionable cause. The answer to this objection is that the definition and the provision of section 217 (G) must be read together, and construed as far as reasonable so as to render both provisions effective. Inconsistency is avoided by the construction that, in the definition, 'denial of a right' includes the denial of a status. To deny a status can involve the denial of the legal rights flowing from such status. To deny the plaintiff's status of bachelor was to deny his rights and his capacity to contract a valid marriage. A cause of action can therefore arise upon that denial. Any other construction

would render the provision for a decree or order declaring a status a dead letter, and would offend the principle of construction *ut magis valeat quam pereat.*"

What then is the legal nexus between the plaintiff in the parent's case and the plaintiffs in the old boys' case on the one side and the Board of Governors on the other, which gives rise to a 'wrong' on which an action could be grounded? The 'wrong' in each case must be considered separately as the 'wrong' in one, does not become the 'wrong' in the other. Again the fact that there is no 'wrong' in one case, does not mean that there is no 'wrong' in the other. That leads me to examine the nature of the legal relationship between the opposing parties in the two cases.

In my view, the legal relationship between the parent and the Board of Governors, is one of contract. It is an implied contract to educate his children. An implied term of that contract, is the obligation on the part of the Board of Governors, to conform to the regulations made by the Minister, in relation to the qualifications of the Warden, designed for the purpose of providing better education. Let me refer to the legal principle involved.

According to Dr. C. G. Weeramantry's *Law of Contracts* Volume 1 page 102, "Contracts may be either express or implied. Express contracts are formed by the express words of the parties, whether oral or written. Implied contracts, however, are inferred by the law from the conduct of parties. Both types of contracts will thus be seen to proceed from the consent of parties, though the manner of expression of such consent differs.

The only difference between the two types of contract being that the intention is expressed by words in the one case and by the conduct in the other, the main practical result flowing from the distinction would probably centre around the nature of the evidence to be led in proof of the contract and its terms.

Implied contracts would arise when for example a patient consults a doctor, or a pedestrian hails a taxi-cab or a customer sits down to a meal at a restaurant. In all these cases the law infers a contract from the conduct of parties.

Particular terms forming part of a contract may be express or implied. Thus, a number of implied conditions are imported into a contract of sale by the Sale of Goods Ordinance, while, on occasion, the Courts will by implication read into a contract terms which are not there in order to give the contract business efficacy."

I am of the view that the plaintiff in the parent's case, has not one but two contracts with the Board of Governors, for the education of his two children. One of the implied conditions of these contracts as mandated by the Education Regulations made by the Minister, is for the Board of Governors to provide the plaintiff's two children with a qualified Warden with a minimum of ten years experience as a teacher. The failure on the part of the Board, to provide the plaintiff's children with such a Warden, in breach of that implied condition, amounts to not only 'the refusal to fulfil an obligation', but also 'the neglect to perform a duty' within the meaning of section 5 of the CPC. Those are the wrongs, for the prevention or redress of which, a cause of action accrued to the plaintiff in the parent's case, to sue the Board of Governors.

I am fortified in the view I have taken, by the judgment in the case of *Amaris* Vs. *Amerasinghe*[9]. The plaintiff in that case alleging that the defendant who was a head teacher in an aided school, refused to grant leaving certificates to his sons, brought an action to compel the defendant to grant such certificates and to recover damages. There was a Code issued by the Department of Education, which contained a rule that a teacher must furnish a certificate in the prescribed form to every pupil who leaves the school. In that case De Sampayo J. observed :-

"The Code, however, contains practically similar provisions in the case of English schools, and I need only concern myself with the question as to what bearing the rules have on the obligations of the teacher towards the parents of the pupils. The Commissioner (of Requests) considered that any infringement of them was only a matter for the Department of Education, and would not form the subject of an action. I am not able to take the same view. It is true that the rules in question are primarily intended to serve the purposes of the Department, and the Government grant may depend on their regular observance. But they may also affect the relation between the parent and the teacher. That relation is, of course, referable to a contract. But the terms of the contract may be expressed or implied. I should say that the grant of a leaving certificate, such as the Code provides, would in ordinary circumstances be an implied term of the contract. The withholding of a certificate would prevent the pupil from entering another and perhaps, better school, and consequently from making further educational progress. The grant of a certificate is, therefore, an important matter in the point of view of the parent, and, in the absence of agreement to the contrary, should naturally be presumed to be part of his contract with the teacher. There was in this case no express agreement relating to the certificate, and I think it is only reasonable to hold that the grant of a certificate was impliedly included in the contract between the plaintiff and the defendant."

Similar to the view taken by the Commissioner of Requests in *Amaris' case* (supra), learned President's Counsel for the Warden and the Board of the STC, submitted that the breach of any Education Regulations, if any, is a matter solely for the Department of Education. I am unable to subscribe to that view. In the instant case, the implied condition was one of remarkable importance to any parent, concerned with giving the best education to his children, and was one that was statutorily imposed upon the Board of Governors by the State.

For the above reasons I hold that the plaintiff in the parent's case has a cause of action to sue the Board of Governors; and that he is entitled to succeed.

I am unable to discover any such relationship in law between the plaintiff old boys and the Board of Governors, so as to make the disputed appointment of the Warden, an infliction of a 'wrong' on them to ground a cause of action to sue the Board of Governors. No cause of action can be grounded either on 'a sufficient or real interest' or 'a contingent interest', without a legal nexus between the parties, giving rise to a 'wrong'. Therefore the old boys case must necessarily fail.

Conclusion

Since I have come to positive findings on the two main legal issues, in terms of the agreement reached by the parties at the commencement of the arguments, I direct the District Court, Colombo, to make order granting the declarations claimed in paragraphs (a) and (b) to the prayer of the plaint in action No. 4974 (parent's case), without costs. I further direct the District Court, Colombo, to make order dismissing action No. 4949 (old boys' case), without costs.

WIJETUNGA, J. - I agree.

ISMAIL, J. - I agree.

District Court directed to grant declarations claimed in action No. 4974 and to dismiss action No. 4949.