GOVERNMENT MEDICAL OFFICERS ASSOCIATION AND ANOTHER

v.

SENANAYAKE

COURT OF APPEAL
GUNAWARDENA, J.
JAYAWICKREMA, J.
C.A.L.A. 186/99
D.C. COLOMBO 5365/99/SPL
OCTOBER 04, 2000

Civil Procedure Code - S. 34, S. 207, S. 406, S. 794, S. 798 Enjoining Order - Disobedience - Contempt of Court - Appeal Procedure - Leave to Appeal or Final Appeal - Greater right includes a lesser right - Res Judicata

The Plaintiff Respondent instituted action against the Defendant Petitioner - Trade Union (GMOA) seeking a declaration that the strike action was illegal, unlawful and further sought relief by way of an injunction preventing the GMOA from resorting to strike action. Enjoining Order was issued from continuing the strike. The strike continued showing defiance and open disobedieance.

The Plaintiff Respondent thereafter complained to Court and summons were issued on the GMOA and the other Defendants who were members of its Executive Committee.

The Defendants appeared in Court and raised an objection to the jurisdiction of the Court, which was disallowed.

The Respondent Petitioners sought leave to appeal from the said Order and Leave was granted by mutual consent. On the date of hearing the Plaintiff Respondent raised the objection that, the Petitioners have followed the wrong procedure in seeking leave to appeal inasmuch as the correct procedure was to have directly appealed against the impugned order.

It was contended by the Petitioners that (i) that inasmuch as leave had already been granted of consent, it is not open to the Plaintiff Respondent to object subsequently - as the Court is functus. (2) granting leave to appeal is *Res Judicata* between the parties

Held :

(i) The Plaintiff Respondent is estopped from raising the objections to the procedure since he had consented to leave being granted - consent removes the effect of error.

It is to be observed that although the right of appeal is not a matter of procedure and is a substantive one - the procedure for filing appeal is procedural. Procedural rules are meant to promote the ends of justice and not to thwart. The right of appeal is the greater right in relation to the right to make an application forleave to appeal.

(ii) The Respondent Petitioners are entitled to waive as a matter of legal right intended to be conferred on them under S. 798 which provided a direct appeal. As such the provisions in S.798 which states that a party shall appeal against the order made by the District Court in contempt proceedings can never have a mandatory force.

The word 'shall' must necessarily be interpreted in a permissive sense, although the term shall in common parlance conveys a command.

Per Gunawardena, J.

"Law is the dictate of reason, and it is somewhat irrational to say that one has no right to seek leave to appeal for no other or better reason than one has a right to appeal. He to whom the greater is lawful ought not to be debarred from the less is unlawful."

(iii) Court can be said to be functus officio when the courts task is finally accomplished.

(iv) An order granting leave to appeal does not fall within the scope of any of the three sections - S. 34, S. 207, S. 406 - Setting out or creating the law relating to *res judicata*.

An interim order that is made at some stage between the commencement of an action and its final determination that is during the progress of an action or matter cannot attract to itself the operation of the rule of *res judicata*.

APPLICATION for leave to appeal - leave been granted.

Cases referred to :

1. *Bristol Corporation v. Sinnat* - 1917 2 Ch. 340, 347.

2. *Herath v. Attorney General* - 60 NLR 193.
3. *N. G. Samindra v. N. G. Surasena* - CAM 2. 7. 2000 - CALA 211/96.
4. *Re 56 Denton Road - Twickenhim* - 1953 Ch. 51

K. N. Choksy P.C., with *Ronald Perera* for Respondent Petitioner.

K. Kanag Iswaran with *Lalanath de Silva*, *M. C. Sumanthiran* and *Mihiri Gunawardena* for Plaintiff Petitioner Respondent.

Cur. adv. vult.

February 19, 2001.

U. DE Z. GUNAWARDANA, J.

The plaintiff - respondent had filed an action in the District Court of Colombo against the defendant trade union, which is the Government Medical Officer's Association, (G.M.O.A) seeking a declaration to the effect that the strike action commenced by it on 12th June 1999 was illegal and unlawful and also ancillary relief by way of an injunction preventing the said union from persisting in its wayward course of action. It is common knowledge that habitual and constant strike actions commenced by the said association did cause untold hardship and extreme mental and physical suffering to the patients and the general public, and would have, undoubtedly, caused Hippocrates, who enunciated the obligations and duties of physicians, to turn many times in his grave, and, would have had to do so, of late, with unfailing regularity and frequency. One wonders whether the supposedly August association above - mentioned is devoid of the kindness natural to humanity. There is no gainsaying that anti - social strike actions by doctors have become a way of life in Sri Lanka - clearly overstepping the limits of moderation. This intolerable state of affairs has obviously prompted the plaintiff-respondent, (who had displayed a readiness to do things for the benefit of the people in general) to file this action against the G.M.O.A. who is the 1st respondent-petitioner.

The learned District Judge issued enjoining order, on 22nd June 1999 to be operative until 06. 07. 1999, restraining the aforesaid defendant union from continuing the strike or the

concerted refusal on the part of doctors to perform their duties. The action of the defendant union, or rather that of the officer, who acted on its behalf, when the summons and the enjoining order were sought to be served on the defendant union, strikes one as ludicrous and deserves to be condemned in the most stringent terms. At first, an officer had signed the precept in acknowledgment of the receipt thereof, and thereafter had struck off his signature at the instance of another. This act is final proof of their unbearable conceit and arrogance. Such uncouth, and unbecoming conduct, so patently lacking in fineness of feeling and good taste, unerringly point to men who are not only deficient in mind as to be incapable of rational conduct, but also to character in which the quality of delicacy and seemliness are undesirably absent. The strike continued showing defiance and open disobedience. And in consequence of that, upon motion by the plaintiff - respondent, the learned District Judge on 25th June 1999, issued summons in form 132 together with warrants in pursuance of section 794 of the Civil Procedure code on the 1st and the 2nd - 13th respondents who are, respectively, the defendant - union and members of its executive committee.

On the 30th of June 1999, the respondents appeared before the District Court and raised an objection to the jurisdiction of the Court. The learned District Judge made order on 16. 08. 1999 with regard to the jurisdictional objection and held that the defendant - respondent (G.M.O.A) could be charged as it was (or rather as it is) and that 2nd - 13th respondents - petitioners ought also to be charged for aiding and abetting the defendant - petitioner - i.e. the G.M.O.A. The defendant - respondent - petitioner (G.M.O.A) and 2 - 13th respondents - petitioners made an application to the Court of Appeal on 31. 08. 1999 for leave to appeal against the aforesaid order of the learned District Judge.

On the 21st of September 1999 leave to appeal was granted by mutual consent of the parties and further hearing was re-fixed in the Court of Appeal for 7th October 1999 on which date the learned President's Counsel for the plaintiff - respondent

raised the objection that the 1st - 13th respondents - petitioners had followed a wrong procedure in seeking leave to appeal inasmush as the correct procedure was to have directly appealed against the order complained of in pursuance of section 798 which states that: "an appeal shall lie to the Supreme Court from every order, sentence or conviction made by any Court in the exercise of its special jurisdiction ..... to punish by way of summary procedure the offence of contempt....." The argument, though, somewhat, supported by authority, has the reek or affectation of an odiously technical one, as the sequel would serve to show.

Anyhow, before considering that argument any further, it would be apposite to look, in a preliminary way, at the counter arguments put forward by the learned President's Counsel (Mr. K. N. Choksy) on behalf of the 1st - 13th respondents - petitioners. Perhaps, none but he could have devised better or more able arguments although they would not prove to be wholly acceptable on this, of all occasions. There is no denying that his arguments worked like a charm and it would be churlish not to freely acknowledge that this order derived, somewhat, immeasurably from the material enshrined in his arguments for no other reason than that they set me thinking. The argument is two - fold, and, to summarise it in my own words, is as follows: (a) inasmuch as leave had already been granted, of consent, on 21st of September 1999, it is not open to the plaintiff - respondent to object subsequently, to the procedure adopted by the 1st - 13th respondents in seeking to leave to appeal, more so, as the "Court is now functus".

(b) the order granting leave to appeal is *res judicata* between the parties.

To consider the two - fold submission reproduced above in order : (a) There is no scope for the argument that the "Court is now functus" and has therefore no power to consider the correctness of the procedure adhered to by the 1 - 13th respondents - petitioners in seeking leave to appeal - instead of

directly appealing against the order in question. It is not wholly correct to say that the Court of Appeal " made order on 21. 09. 1999 granting leave to appeal". As explained earlier, the leave was granted of consent which, in fact, obviated the need for the Court itself to make a considered order, as such. The order granting leave made by this Court, if it can be called an order, can be likened, if, in fact, it is not veritably so, for instance, to a consent order - the provisions and terms of which were settled and agreed to by parties to the action. There was no adjudication by the Court of Appeal of the rights and status of 1st - 13th respondent - petitioners. I think it would be more correct to have said that the plaintiff - respondent is now estopped from impugning the correctness of the procedure adopted by the 1st - 13th respondent - petitioners, since the plaintiff - respondent had consented to leave to appeal being granted to the 1st - 13th respondent - petitioners - leave being what they sought, in the first instance. To quote from George Spencer Bower, whose name will long continue to be remembered for his celebrated treatise on " The law Relating to Estopped by Representation": "Not even the plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal; it is equally plain that the same results cannot be achieved by conduct or acquiescence by the parties. Any such attempt to create or enlarge jurisdiction is in fact the appointment of a judicial officer by a subject .....

On the other hand where nothing more is involved than a mere irregularity of procedure or (e.g) non - compliance with statutory conditions precedent to the validity of a step in litigation, of such a character that, if one of the parties be allowed to waive the defect or to be estopped by conduct from setting it up, no new jurisdiction is thereby impliedly created and no existing jurisdiction impliedly extended beyond its existing boundaries, the estoppel will be maintained and the affirmative answer of illegality will fail."

(The above is an excerpt from Spencer Bower.)

In Bristol Corporation v. Sinnat[1] Neville J said at 347: "When a provision like this is put in a statute for the protection of the public, a member who has no desire to rely on the protection given him has a perfect right to waive the giving of the notice altogether."

The plaintiff - respondent, of free of choice, has waived or discarded the objection that he could have taken to the procedure adopted by the 1st - 13th respondents in seeking leave to appeal, assuming, of course, that the procedure of appealing directly against the order had been devised by the law not for their benefit, that is, not for the benefit of the 1st - 13th respondent, (they being the parties aggrieved by the order of the learned District Judge) and also the that 1st - 13th respondents had no legal right to seek leave to appeal and were prohibited from doing so - both of which assumptions would wholly be indefensible and insupportable. As stated above, the learned President's Counsel for the plaintiff-respondent by his unequivocal act of consenting to grant leave had barred himself from raising any objection to the mode (adopted by the 1st - 13th respondents - petitioners) of appealing against the order - that is, by seeking in the first instance, leave to appeal.

It is to be observed that the mode of proceeding to question the correctness of the order, that is: by directly appealing against the said order as provided for by section 798 of the Civil Procedure Code, had been prescribed or thought up by the law, to my way of thinking, to assist the person or party or parties aggrieved by the order, in this instance, the 1st - 13th respondents - petitioners (they being the parties so affected) and to facilitate matters from their stand - point by obviating the more circuitous and indirect mode of appealing, that is, by seeking, in the first instance, leave to appeal. By providing for a direct appeal to a party affected or aggrieved by the order in contempt proceedings, section 798 seeks to get round or do away with the inconvenience of first obtaining leave, in order to be able to appeal. Section 798 of the Civil Procedure Code, provides a procedure which by means of a direct appeal, seeks to make relief available without

delay and perhaps without too much attention to detail - delay and attention to detail being features of the procedure according to which one has to obtain leave first, in order to get the right of appeal. Thus, it will be seen that, in the circumstances of this case, the right of direct appeal against an order as provided for in section 798 in contempt proceedings will inure or take effect to the benefit of the 1st - 13th respondents - have turned out. And it is they i.e. 1st - 13th respondents - petitioners who have not availed themselves of that benefit or advantage of a direct appeal, and chosen to forgo it and as the maxim goes: "quilibet potest renunciare juri pro se introducto"- which means every one may relinquish a right introduced for his benefit. So that it is not open to the plaintiff - respondent to complain that the 1st - 13th respondents had not directly appealed against the order, when they could have done so as a matter of legal right, but had chosen, instead, to seek leave to appeal.

The argument of the learned President's Counsel for the 1st - 13th respondents - petitioners that the Court of Appeal is now functus need not, in fact, be considered. In the circumstances of this case I have no reason to rule definitely on the validity of that submission since, for the reasons stated above, the plaintiff - respondent has no right initially, because the 1st - 13th respondents - petitioners are not precluded by law to seek leave to appeal, and in any event, no right at this stage, because the plaintiff - respondent is estopped, to object to the procedure chosen to be followed by the respondents - petitioners, that is, of seeking leave to appeal against the order of the District Court. The 1st - 13th respondents - petitioners, by choosing to seek leave to appeal, have not prejudiced a right of the plaintiff - respondent and they have only, so to speak, renounced an advantage which the law had accorded to them, i. e. to respondents - petitioners themselves - they being the parties challenging or impugning the order made by the District Court in the exercise of its special jurisdiction to punish the offence of contempt.

In any event, even on the assumption, which would be a manifestly erroneous and absurd one, i. e. that although the

direct right of appeal is given to the party aggrieved by the order of the District Court, yet that party or parties who, in this instance are the 1st - 13th respondents - petitioners, cannot waive that right of making a direct appeal without the consent of the party in whose favour the order was given, who, in this instance, is the plaintiff - respondent - even then, the plaintiff - respondent by his conduct, as explained earlier, had waived the irregularity in the procedure. In other words, assuming, for the sake of argument, that the plaintiff - respondent had a right to object to the 1st - 13th respondents - petitioners relinquishing the benefit conferred upon them, by section 798 which made available to the 1st - 13th respondents - petitioners, the advantage of preferring a direct appeal - yet the plaintiff - respondent, by his conduct, as explained earlier, had consented to adopt the procedure and, as such, is thereby estopped from questioning the regularity thereof.

However, in regard to the argument that the Court is now functus, because leave had already been granted on 21st September 1999, I wish to say, in passing, that a Court can be said to be functus officio when the court's task is finally accomplished, that is, when the court's authority is exhausted - the court having accomplished the purpose. In any event, it is doubtful whether the court can be said to be functus, when the Court of Appeal itself had not on its own made any order either granting leave or refusing it. As stated above, the respondent - petitioners obtained leave, of consent or by mutual consent of the parties, which relieved the court of the need to make a considered order. There is a total lack of authority on the point. No precedent was cited. Anyhow, as I said before, I need not express an authoritative opinion in regard to the question whether the court, under no circumstances, can be said to be functus officio when an order is made, which is, be it noted, not a final order (but an interim one) in the sense of an order bringing the proceedings to an end or finality.

To deal with the second point put forward by Mr. Choksy P.C.: to reproduce his own words: "that order granting leave is also res judicata between the parties".

As observed by His Lordship Basnayake C. J. in *Herath v. Attorney General*[2] 60 N.L.R. 193 the whole of our law relating of res judicata is to be found in sections 34, 207 and 406 of the Civil Procedure Code. Section 34 requires the plaintiff to include of the whole of his claim in the action and if he relinquished any part of his claim, without the leave of the Court, he is barred or precluded from suing for the reliefs or remedies so omitted. Section 207 renders all decrees passed by the District Court, final as between the parties - subject to an appeal. And Section 406, substantially states "that if a plaintiff withdraws an action, without permission of Court to bring a fresh action - he shall be precluded from bringing a fresh action in respect of the same matter. I have briefly considered above, the scope of the three sections in the Civil Procedure Code embodying the whole of the Sri Lankan law relating res judicata to show that an order granting leave to appeal (assuming that the Court of Appeal had made such an order) does not fall within the scope of any one of the three sections setting out or creating the law relating to res judicata. Res judicata means a matter adjudicated or a matter settled by final judgment of the Court. The effect of the law of res judicata is to oust the jurisdiction of the Court altogether when there is a final judgment rendered by a Court of competent jurisdiction on the merits - such judgment being conclusive as to the rights of parties. The rule of res judicata constitutes an insuperable or an absolute legal impediment to a subsequent action on the same cause of action or claim. It has been said that "sum and substance of the whole rule is that a matter once judicially decided is finally decided".

I cannot bring myself to hold that an interim or interlocutory order, that is made at some stage between the commencement of an action and its final determination, that is, during the progress of an action or matter, can attract to itself the operation of the rule of res judicata.

The self - same argument, that is, that a party aggrieved by an order, made by the District Court in the exercise of its jurisdiction to punish the offence contempt cannot seek leave to appeal, was considered by me in an earlier un-reported case

(*N. G. Samindra v. N. G. Surasena*[3]) That was an appeal from an order of the District court of Kandy, convicting a person of the offence of contempt, in that the man had allegedly obstructed the surveyor, in the execution of a commission issued to the surveyor in a partition case. And this is what I said on that occasion. To cite the relevant excerpt of my own judgment, with which my brother Yapa J. agreed: " When the law has accorded, as pointed out above, the right to appeal, an appeal lies as a matter of right, and no leave to appeal need-be or rather could be sought - although it is debatable as to whether or not the right of appeal carries with it as a necessary concomitant, the right to seek leave to appeal. It can, to say the least, arguably be said that the right of appeal, in any event, does not exclude the right to seek leave to appeal, although, perhaps, it is wholly unnecessary or superfluous to seek leave or permission to obtain a thing which one is entitled to, as a matter of legal right. Law is the dictate of reason. (lex est dictamen rationis) and it is somewhat irrational to say that one has no right to seek leave to appeal, for no other or better reason than that one has a right to appeal. He to whom the greater is lawful ought not to be debarred from the less as unlawful. (non debet cui plus licet quod minus est non licere) A person, for instance, who has a right to enter a particular place is not to be debarred from entering that place because he has sought leave, needlessly though it be, to enter it."

Comparatively speaking, the right of appeal is the greater right in relation to the right to make an application for leave to appeal. The right of appeal is a right that one already has, as a matter of law whereas by an application for leave to appeal one asks for that right i. e. the right to appeal. A right of appeal that has materialised is an actual fact or is a vested right and is larger than an inchoate right, if not, no right. Right of appeal is one that is already crystallised and vested in the person affected by the order. It is irrational to say that one loses a lesser right because one enjoys the greater one, unless one is expressly prohibited from seeking or exercising the lesser right, for the lesser right is subsumed under the greater right. And there is no such express prohibition. Prohibitions are not to be presumed.

What is not prohibited must be deemed to be permitted. That is a inveterate principle which, in fact, is a rudiment of the law.

The argument of the learned President's Counsel for the plaintiff - respondent was that the word "shall" in section 798 of the Civil Procedure has to be interpreted in a peremptory sense. Repetition of Section 798 is un - avoidable in the context and it reads thus.: "An appeal shall lie to the Supreme Court from every order, sentence or conviction made by any Court in the exercise of its special jurisdiction to take cognizance of, an to punish by way of summary procedure the offence of contempt of Court and the procedure on any such appeal shall follow the procedure laid down in the Criminal Procedure Code regulating appeals from orders made in the ordinary criminal jurisdiction of District and Magistrate's Court".

The word "shall" in the expression " an appeal shall lie to the Supreme Court" must necessarily be interpreted in a permissive sense although the term "shall" in common parlance conveys a command. For, if the word "shall", in the excerpt of section 798 reproduced above, is construed in a compulsory sense the party aggrieved by the order, if not, all the parties to the proceeding in which the order was made, would be under an obligation to appeal against the order, irrespective of whether they wish to do so or not and will have no choice of action but to appeal. It is unthinkable that the legislature would have been so irrational as to have intended such a result. Justice must not be the slave of grammar. The term "shall" that occurs in the latter part of the same section (798), which latter part is as follows: "..... and the procedure on any such appeal shall follow the procedure laid down in the Criminal Procedure Code..." According to the procedure prescribed in the Criminal Procedure Code one has to directly appeal against the order. The question is whether or not the adherence to the procedure laid down in the Criminal Procedure Code is mandatory. I think the term "shall" in the expression "shall follow the procedure in the Criminal Procedure Code" also has to be interpreted in an enabling or permissive sense for the reason that a party for whose benefit or convenience, a direct appeal was provided for by

section 798 of the Civil Procedure is entitled to waive that benefit, as explained in an earlier part of this order. Rationally understood, the party for whose benefit the appeal procedure was made easier was obviously the party who was dissatisfied with the order and who therefore wanted to challenge it. In the case in hand, it is the respondents - petitioners who are seeking to challenge the order and they have done so by seeking leave to appeal, in the first instance. Inasmuch as the respondents - petitioners have an undoubted right to waive the benefit of the procedure indicated in section 798, the adoption of the said procedure is not compulsory - so far as the respondents - petitioners are concerned. The objection raised by the plaintiff - respondent to the procedure adopted by the respondents - petitioners in filing an application for leave to appeal is wholly untenable. To summarise the reasons for the decision : (a) The plaintiff - respondent is estopped from raising the objection to the procedure since he had consented on 21. 09. 1999 to leave being granted. Omnis consensus tollit errorem - is a well - known maxim which means that consent always removes the effect of error. It is to be observed that although the right of appeal is not a matter of procedure and is a substantive one - the procedure for filing appeal is procedural. Procedural rules are meant to promote the ends of justice and not to thwart them.

(b) The respondents - petitioners are entitled to waive as a matter of legal right the benefit intended to be conferred on them under section 798 of the Civil Procedure Code which provided a direct appeal. As such the provisions in section 798 of the Civil Procedure Code which states that a party "shall" appeal against the order made by the District Court (in the exercise of its contempt jurisdiction) can never have a mandatory force - so far as the respondents - petitioners are concerned - as explained above.

The objection raised by the plaintiff - respondent to the effect that the application for leave to appeal filed by the respondent - petitioners cannot be entertained by the Court of Appeal (in that the respondents - petitioners have chosen the wrong mode of appeal) is hereby over-ruled.

As a final note, I wish to say that sometimes it works injustice, if one were to interpret sections or the law in an overly technical sense, as did happen in a case under the Legis Actio Procedure in the Roman times which procedure became odious owing to its excessive formalism and technicality. In that case, which I remember from my student days, the plaintiff who sued the defendant for cutting his vines lost the case, the only sin or transgression, if any, he had committed being, that he used the word "vines" in the plaint when he should have said "trees" for the law of Twelve Tables which provided for the action spoke in general terms of "trees" (actio de arboribus succisis). It looks as if the Roman Judge who decided that case was not conspicuous for his common - sense, for both trees and vines derived their sustenance from the soil - difference, if any, between the two being that the former with a self-supporting stem, grew vertically to the ground and the latter, usually, horizontally. One need not be well informed about the science of plants to know that both trees and creepers (vines) come under the genus of plants - vines, being a creeping or a climbing plant.

I cannot bring myself to reject the application for leave to appeal for no other or better reason than that the respondents - petitioners have a right of appeal. A decision of this kind has to be taken pragmatically - the test must always be adopting the technique which best fits the job to be done. Whilst ruling in favour of the 1st (G.M.O.A) and the 2nd - 13th respondents who are its executive committee members, I am constrained to add, as a final note, that I am overwhelmed with wonder that there is a total lack of compassionate reluctance on the part of the G.M.O.A to inflict pain and suffering on others, - distress being a concomitant of the strike action which the G.M.O.A. is excessively fond of - perhaps, by force of habit.

I wish to say, by way of an addendum, that Mr. Choksy's argument i. e. that the Court of Appeal is functus (since it has made order granting leave, which argument, to be honest, I had circumvented with circumspection) certainly contains an underlying layer of good sense and, perhaps, good law. I had avoided considering that argument because I have chosen to

base or rest this order on other grounds. But the learned President's Counsel had not substantiated his argument. However, of one thing, one can be certain, if of no other, i.e. that the statutory power to decide is often a "power to decide once and once only." Vaisey J. accepted that principle in these words: "where Parliament confers on a body ..... the duty of determining any question, the deciding or determining of which affects the rights of the subject, such decision ..... made and communicated in terms which are not expressly preliminary or provisional is final and conclusive and cannot in the absence of express statutory power or consent of the person or persons so affected be altered or withdrawn by that body." *Vide Re. 56 Denton Road, Twickenhem*[4] (1953) Ch. 51.

The suggestion that a conclusive decision can be altered with the consent of the person affected needs qualification, since consent by itself cannot confer a power which does not exist. And, it remains to consider, assuming that the Court of Appeal had, in fact, made order granting leave, whether or not such an order can be said to be a preliminary order for the observations Vaisey J. reproduced above, seem to suggest that a preliminary order will not attract to itself the qualities of finality and conclusiveness - upon which the argument of functus arises.

JAYAWICKRAMA, J. - I agree.

Preliminary Objection Overruled.