

THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 1 SRI L.R. - PART 11**

**PAGES 281 - 308**

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**CODE OF INTELLECTUAL PROPERTY ACT (NO. 52 OF 1979) –** Section 281

10 – The author of a protected work shall have the exclusive right to do

or authorize any person to reproduce the work, make translations, ad-

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Minister in regard to industrial disputes – Section 17(1) – Duties and

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*Fernando v. Gamlath*

SC *(Suresh Chandra J,)* 281

In the instant case the Learned Judge of the Commercial

High Court having considered the evidence before Court had

arrived at the conclusion that the late Mr. C.T. Fernando was

entitled to rights in respect of the composition in respect of

the song “pinsiduwanne” in terms of the provisions of the

Code of Intellectual Property Act, he had further held that the

Plaintiff who is the widow of the Late Mr. C.T. Fernando had

inherited such rights but went onto hold that the Defendant

had not infringed such rights.

Although the Plaintiff alleged the distortion of the

musical composition by the Defendant there was no proof of

such distortion which was established by the Plaintiff and

the Learned High Court Judge arrived at the conclusion that

there was no such distortion. Considering the evidence before

the Commercial High Court the Learned Judge has arrived at

a correct fnding on that matter.

With the advancement in technology it is very easy to

copy works of original artists, composers, singers, etc. But

there has to be a way of safeguarding the rights of the original

artists such as the singer as in the present instance, specially

when a singer has achieved a reputation which would be

recognized for generations and generations. Once such

recognition has been there, and rights acquired which

according to law can be inherited, the works of such original

reputed artists such as singers can be used by others only

by obtaining permission from the original artist or from those

who inherit such rights which amounts to a recognition of the

fame and reputation of the original singer.

We fnd that the Defendant had in the case before the Com-

mercial High Court admitted including the said song in his

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teledrama without permission from the Plaintiff. Futhermore

in evidence the Plaintiff stated that the Defendant had asked

permission from her to use the said song of her late hus-

band to which she had declined. The book published by the

Educational Publishing Department which the Defendant

claims to have been the source material used for the song in

his teledrama contained only the lyrics to the said song and

to which the Plaintiff claimed no such copyright as copyright

was owned by a different individual who is not a party to the

above action. In such an event as the Plaintiff had the rights

for the musical composition under the Act it will be clear that

the use of the said composition by the Defendant without

permission was an infringement of the rights of the Plaintiff.

The Plaintiff had claimed the sum of Rs. 25,000/= for the said

infringement by the Defendant in view of the position that

there has been an infringement of the Plaintiffs rights regard-

ing the composition by the Defendant and the Plaintiff would

be entitled to damages as claimed by her plaint. Therefore a

sum of Rs. 25,000/= as claimed by the Plaintiff is awarded to

her which is to be paid by the Defendant.

In the petition of appeal fled by the Plaintiff she had

prayed for:

(a) setting aside the judgment of the High Court dated

27.11.2000;

(b) to decide the appeal in her favour;

(c) alternatively to send the case back for a fresh hearing.

As stated above the judgment of the High Court is varied

in relation to the fnding that there has been no infringement

of the Plaintiffs rights as there has been such infringement.

In the prayers mentioned above there is no specifc prayer

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claiming damages except for seeking a decision in favour of

the Appellant which would presuppose seeking a decision

as prayed for in the Plaint which includes a prayer claiming

damages in the sum of Rs. 25,000/=. This is to be considered

only for the purposes of granting relief to the Plaintiff as there

is a fnding regarding the infringement of the Plaintiffs rights

which would naturally result in causing damages to the owner

of such rights. However such damages are limited to the

amount claimed by the Plaintiff in her plaint which is the

sum of Rs. 25,000/=.

In the above circumstances the Plaintiffs appeal is

allowed and she is awarded a sum of Rs. 25,000/= as

damages with costs fxed at Rs. 10,500/=.

**J.A.N. DE SILVA CJ** - I agree.

**EKANAYAKE J** - I agree.

*Appeal allowed. Appellant is awarded Rs. 25,000/- as*

*damages with costs fxed at Rs. 10,500/-.*

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**JAYANTHA GUNASEkARA VS. JAYATISSA GUNASEkARA**

**AND OTHERS**

COuRT OF APPEAL

SISIRA DE ABREW. J

SALAM. J

LECAMWASAM. J

CA PHC APN 17/2006 (DB)

HC AWISSAWELLA 55/04

MC AvISSAWELLA 65720

FEBRuARy 25, 2011

MARCH 3, 4, 2011

MAy 16, 2011

***Constitution Article 154 (P) 3 (b) - Primary Courts Procedure Act –***

***Section 2, Section 66, Section 68 - Section 76 - High Court exercising***

***revisionary jurisdiction - Appeal to Court of Appeal - Does the fling***

***of an appeal ipse facto stay the execution of the judgment of***

***the High Court? - Cassus omissus clause in the Primary Courts***

***Procedure Act - Applicability of the provisions of the Civil Procedure***

***Code - Stare decisis - Obiter dicta - Ratio decidendi - Approbation -***

***reprobation - Principles***

The petitioner sought to revise the judgment of the Provincial High

Court entered in the exercise of its revisionary jurisdiction under Art

154 (3) b. The High Court set aside the order made by the Primary Court

under Section 68 (3) by which order the Magistrate had determined that

the petitioner had forcibly been dispossessed of the subject matter by

the respondent. The respondent moved in revision, the High Court held

that the respondent is entitled to possession. The petitioner preferred

an appeal to the Court of Appeal. The respondent sought to enforce the

judgment of the High Court.

The petitioner contended that, on the lodging of the appeal to the

Court of Appeal the order of the High Court to execute the order was

automatically stayed.

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**Held:**

(1) Mere lodging of an appeal against the judgment of the High Court in

the exercise of its revisionary power in terms of Section 154 P (3) (b)

of the Constitution to the Court of Appeal does not automatically

stay the execution of the order of the High Court.

Per Abdus Salam.J

“In the case of Kanthilatha and Nandawathie the decision reached

is on the assumption that the cassus omissus clause is applicable

and therefore the approach reached by inadvertence needs to be

set right. Further in Kathilatha’s case obiter dictim has been given

prominence ignoring the ratio decedendi; the judgment of Sillem (7)

relied and referred to in Edward vs. de Silva (8) is a criminal matter

arising from a statutory offence”.

Per Abdus Salam.J

“In any event to rely on the decision in Attorney General vs. Sillem

for our present purpose may amount to destructive analysis of

Capter vII of the Primary Courts Procedure Act than the ascer-

tainment of the true intention of the Parliament and carry it out

by flling in the gaps - obviously to put off the execution process

until the appeal is heard would tantamount to prolong the agony

and to let the breach of the peace to continue for a considerable

length of time”.

Held further:

(2) In view of the decision in Kayas vs. Nazeer (3) the cassus omissus

clause (Section 78 of the Primary Courts Procedure Act) has no

application to proceedings under Cap vII of the Act.

(3) The High Court set aside the order of the Magistrate solely based

on the purported failure to endeavour to settle the matter prior

to the inquiry. This was one of the objections taken by the

respondent. The Magistrate has taken meaningful steps to settle

the matter, on that aspect of the matter the learned High Court

Judge has erred when he came to the conclusion that such an

attempt is not in compliance with the provisions of the Primary

Courts Procedure Act.

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(4) The objection to jurisdiction must be taken at the earliest possible

opportunity. If no objection is taken and the matter is within the

plenary jurisdiction of the Court, court will have jurisdiction to

proceed with the matter and make a valid order.

It is the respondent before the High Court Judge who had beneftted

by that argument. He has not adverted the Magistrate to the non

compliance of Section 66 (6) before the commencement of the in-

quiry.

**AppLICAtIoN** in revision of an order of the Provincial High Court of

Avissawella- on a preliminary objection taken.

**Cases referred to:-**

*1. R.A. Kusum Kanthilatha vs. Indrasiri -* 2005 1 Sri LR 411 (overruled)

*2. R.P. Nandawathie vs. K. Mahindasena –* CA PHC 242/06

*3. Kayas vs. Nazeer -* 2004 1 Sri LR 202

*4. Perera vs. Gunathilake* (1900) 4 NLR 181

*5. Imampu vs. Hussenbi* AIR 1960 Mysore- 203

*6. Kanagasabai vs. Mylvaganam* 78 NLR 280- 282

*7. Edward vs. de Silva* 46 NLR 343

*8. A.G. vs. Sillem* 11 Eng. LR 1208

*9. Keel vs. Asirwathan* 4 CLW 128

*10. Ragunath Das vs. Sundra Das Khelri* AIR 1914 PC 352

*11. Malkav Jun vs. Nahari* NLR 25 Bombay 338

*12. Charlotte Perera vs. Thambiah and another -* 1983 1 Sri LR 352

*13. Rustom vs. Hapangama Co. Ltd* 1978-79- 2 Sri LR 225, 1978/79/80-

1 Sri LR 353

*14. Ali vs. Abdeen* 2001- 1 Sri LR 413

*15. Mohamed Nizam vs. Justin Dias* CA PHC- 16/2007

*16. David Appuhamy vs. Yassasi Thero* 1987-1 Sri LR 253

*17. Visuwalingam and others vs. Liyanage and others –* 1983- 1 Sri LR

203

*18. Banque Des Marchands De Hoscou v. Kindersley and another –*

1950 - 2 All ER 549 at 552.

*19. Evans vs. Bartlam* 1937- 2 All ER 646 – 652

*20. Lissenden vs. Bosh Ltd* 1940 Al 412- (1940) 1 All ER 405, 412

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*W. Dayaratne PC* with *Rangika Jayawardane, D.M. Dayaratne* and

*Nadeeka Karachchi* for 1st party respondent-petitioner.

*Rohan Sahabandu* for 2nd party respondent.

September 30th 2011

**AbDuS SALAm, J.**

This is an application to revise the judgment of the

Provincial High Court entered in the exercise of it’s

revisionary jurisdiction under Article 154 P (3) (b) of the

Constitution. By the impugned judgment, the Learned High

Court Judge set aside the determination made in terms of

section 68 (3) of the Primary Court Procedure Act (PCPA) and

ordered the unsuccessful party in the Magistrate’s Court to

be restored to possession of the subject matter, pending the

determination of an appeal preferred to this court. (Emphasis

is mine)

The important events leading up to the present revision

application began with the fling of an information in the

Magistrate’s Court, under section 66 (a) (i) of PCPA. The

dispute was over the right of possession of a land between

two brothers, viz. Jayantha Wickramasingha Gunasekara1

(1st party-respondent-petitioner) and Jayathissa Wickramas-

ingha Gunasekara2 (2nd party - 1st respondent-petitioner-

respondent). The involvement of the other parties in the

dispute is not dealt in this judgment, as they had merely

acted as the agents of the two main rival disputants.

The learned Magistrate, in making his determination,

held *inter alia* that the petitioner had forcibly been dispos-

sessed of the subject matter by respondent, within a period

of two months before the fling of information and accord-

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ingly directed that he (the party dispossessed) be restored to

possession.

Against the determination, the respondent moved in

revision in the High Court which set aside the same,

purportedly due to the failure to induce the parties to

arrive at a settlement of the dispute under section 66(8)

of the PCPA, and held that the respondent is entitled to

the possession of the disputed property and directed the

Magistrate to forthwith handover the same to him.

The Petitioner (Jayantha) preferred an appeal to this

Court against the said judgment of the High Court. Pending

the determination of the appeal, he also fled a revision

application challenging the validity of the judgment of the

learned High Court judge and in particular the part of the

order of the judge of the High Court directing the execution

of his judgment forthwith, pending the determination of the

appeal. The legality of the impugned judgment of the learned

High Court judge, based on the sole ground of failure to

settle the dispute will be examined in this judgment at

another stage.

There are two conficting views expressed on the question

as to whether the fling of an appeal against the decision of a

High Court in the exercise of its revisionary powers in respect

of a determination made under part vII of the PCPA would

*ipso facto* stay the execution of its judgment or it operates

otherwise.

In order to resolve the confict, the present divisional

bench was constituted to hear and dispose of the revision

application. Being mindful of what prompted the constitution

of the divisional bench, I now venture to embark upon a brief

discussion on the pivotal question. It is worthwhile to briefy

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refer to the two conficting decisions. In point of time the frst

decision was made in *R A Kusum Kanthilatha Vs Indrasiri*(1)

where it was held *inter alia* that upon proof of an appeal

being preferred to the Court of Appeal against a judgment of

the High Court acting in revision in respect of an order made

under part vII of the PCPA, **the original court should stay**

**its hand until the determination of the appeal.** (Emphasis

added)

The second and subsequent view was expressed in the

case of *R P Nandawathie Vs K Mahindasena*(2) where it was

held *inter alia* that the **mere lodging of an appeal does not**

**automatically stay the execution of the order of the High**

**court.** (Emphasis added)

At the argument we were adverted to the position that

prevailed immediately prior to the vesting of the revision-

ary powers in the High Court in respect of orders made un-

der chapter vII of the Primary Courts Procedure Act. Prior

to the introduction of the Constitutional provision in Article

154 P (3) (b), the revisionary jurisdiction in relation to or-

ders of the Primary Court concerning land disputes where the

breach of the peace is threatened or likely had to be invoked

through the Court of Appeal. Any person dissatisfed with

the order of the Court of Appeal had to seek special leave to

appeal from the Supreme Court within 42 days. under Su-

preme Court Rules of 1990 a party aggrieved by the judg-

ment of the Court of Appeal in the exercise of its revisionary

powers had to apply for stay of proceeding till special leave

is granted. Every party aggrieved by such a judgment of the

Court of Appeal had to seek the suspension of the execu-

tion of the judgment of the Court of Appeal in the Supreme

Court. As has been submitted by the learned counsel this

shows that by mere lodging an application for special leave to

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appeal invoking the jurisdiction of the Supreme Court, does

not ipso facto, stay the order of the Court of Appeal. It does

not stay the execution of judgment. This shows that even prior

to the recognition of the revisionary powers of the High Court

in terms of Article 154 P (3) (b) of the Constitution the rule

was to execute the judgment and exception was to stay

proceedings.

Be that as it may, the fact remains that in both cases

referred to above the question relating to the execution of

orders made under part vII of the PCPA pending appeal has

been decided on the premise that the provisions of the Civil

Procedure Code are applicable. This is basically an incor-

rect approach which should stand corrected by reason of the

decision *Kayas Vs Nazeer*(3). In the circumstances, I do not

propose to delve into the applicability of the *casus ommisus*

clause in the Primary Courts Procedure Act, in respect of

proceedings under chapter vII, in view of the decision of His

Lordship T B Weerasuriya, J who held that the *casus omisus*

clause (Section 78) of the Act has no application to proceed-

ings under chapter vII. The relevant passage with omission

of the inapplicable words from the judgment in the case of

*Kayas (supra)* is deservedly chosen for reproduction below:

“Section 2 of the Primary Court Procedure Act stipu-

lates that subject to the provisions of the Act and other

written law, the civil and criminal jurisdiction of the

Primary Court shall be exclusive. Part III of the Act ….

Provides for the mode of institution of criminal prosecu-

tions; while part Iv of the Act comprising provides for

the mode of institution of civil actions. Thus, Section 78

has been designed to bring in provisions of the Criminal

Procedure Code Act or the provisions of the Civil

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Procedure Code Act only ……… Inquiries into disputes

affecting land …….. under part vII comprising Sections

66 – 76 are neither in the nature of a criminal prosecution

….. nor in the nature of civil action. Those proceedings

are of special nature since orders that are being made are

of a **provisional nature to maintain status quo for the**

**sole purpose of preventing a breach of the peace and**

**which are to be superseded by an order or a decree of**

**a competent Court.** Another signifcant feature is that

Section 78 while making reference to criminal prosecu-

tions or proceedings and civil actions or proceedings, has

not made any reference to disputes affecting land. This

exclusion would reveal the legislative intent that Sec-

tion 78 is not intended to be made use of, for inquiries

pertaining to disputes affecting land under part vII of the

Act ”- (Emphasis is mine)

The vital question that needs to be resolved now is

whether execution of orders made under Part vII would

be automatically stayed by reason of an appeal fled under

154 P (3) (b) of the Constitution or it would operate otherwise.

To fnd an answer to this question one has to necessarily

examine chapter vII of the legislation in question which deals

with what is commonly known among the laymen as “section

66 cases”.

Historically, there has always been a great deal of rivalry

in the society stemming from disputes relating to immov-

able properties, where the breach of the peace is threatened

or likely. In the case of *Perera Vs. Gunathilake*(4) His Lord-

ship Bonser C.J, with an exceptional foresight, spelt out the

rationale well over a century and a decade ago, underlying

the principle as to why a court of law should discourage all

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attempts towards the use of force in the maintenance of the

rights of citizens affecting immovable property. To quote His

Lordship

“In a Country like this, any attempt of parties to use

force in the maintenance of their rights should be promptly

discouraged. Slight brawls readily blossom into riots with

grievous hurt and murder as the fruits. It is, therefore, all

the more necessary that courts should be strict in discoun-

tenancing all attempts to use force in the assertion of such

civil rights”.

Let us now look at how the Indian court had once viewed

the importance of preserving the peace. In the case of *Imambu*

*v. Hussenbi* (5) the court emphasized the importance in this

manner …..

“The mere pendency of a suit in a civil Court is wholly an

irrelevant circumstance and does not take away the dispute

which had necessitated a proceeding under section 145. The

possibility of a breach of the peace would still continue.”

In the case of *Kanagasabai Vs Mylvaganam*(6)

Sharvananda, J (as His Lordship was then) whose outspo-

kenness needs admiration stated as follows….

“The primary object of the jurisdiction so conferred on

the Magistrate is the prevention of a breach of the peace aris-

ing in respect of a dispute affecting land. The section enables

the Magistrate temporarily to settle the dispute between the

parties before the Court and maintain the status quo un-

til the rights of the parties are decided by a competent civil

Court. **All other considerations are subordinated to the**

**imperative necessity of preserving the peace.** ………..The

action taken by the Magistrate is of a purely preventive and

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provisional nature in a civil dispute, pending fnal

adjudication of the rights of the parties in a civil Court. The

proceedings under this section are of a summary nature and

it is essential that **they should be disposed of as expedi-**

**tiously as possible** ………….. Sub-sections (2) and (6) of

section 63 of the Administration of Justice Law underline the

fact that the order made by the Magistrate under sections

62 and 63 is intended to be effective only up to the time a

competent Court is seized of the matter and passes an order

of delivery of possession to the successful party before it, or

makes an order depriving a person of any disputed right and

prohibiting interference with the exercise of such right.”

The emphasis added by me in the preceding paragraph

in the process of quoting Sharvananda, J speaks volumes

about the sheer determination and the commendable courage

adopted by the Supreme Court as to need for prompt

execution of orders made in “66 matters”. To recapitulate the

salient points that are in favour of expeditious execution of

orders under part vII, the following points are worth being

highlighted.

1. It is quite clear, that the intention of the legislature in

enacting Part vII of the PCPA is to preserve the peace

in the society. If an unusual length of time (sometimes

more than a decade) is taken to execute a temporary

order for the prevention of peace, the purpose of the legis-

lation would defnitely be defeated and the intention of the

Legislature in introducing the most deserving action of

the era in the nature of *sui generis* would be rendered

utterly ridiculous.

2. In as much as there should be expeditious disposal of a

case stemming from the breach of the peace there should

correspondingly be more expeditious and much effcient

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methods to give effect to the considered resolution of the

dispute, with a view to arrest in some way the continued

breach of the peace and to avoid justice being frustrat-

ingly delayed.

3. All other considerations being subordinate to the

imperative necessity of preserving the peace, the execution

mechanism also should keep pace with the Legislative

commitment designed under Chapter vII of the PCPA.

The word “appeal” generally signifes legal proceedings

of a Higher Court to obtain a review of a lower court decision

and a reversal of it or the granting of a new trial. It is said

that the wisest of the wise is also bound to err. The Judges

are no exception to this rule. Justice Cardozo a well known

American judge once observed that *“the inn that shelters*

*for the night is not the journey’s end” but “we are all on the*

*journey, a journey towards ………….our legal response, to the*

*legal needs of the public. We are at various stages in this long*

*journey have devised various structures and various solutions*

*and they might be inadequate for the night, but they are not*

*our journey’s end”*.

This thought becomes particularly appropriate when one

considers the specifc prohibition imposed by the legislature

in its own wisdom against appeals being preferred under

Chapter vII, with the full knowledge of the fallibility of judges

as human beings. It is common knowledge that an appeal is

a statutory right and must be expressly created and granted.

under Chapter vII not only the Legislature did purposely

refrain from creating such a right but conversely imposed

an express prohibition. Presumably, as the determinations

under chapter vII are categorized as of temporary nature

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even with regard to the execution of them we are required

to ensure a meaningful construction of the statute as shall

suppress the mischief and advance the remedy.

The next question which needs to be addressed is, what

then is the nature and the purpose of the right of appeal con-

ferred under Article 154 P (3) (b) of the Constitution. Such a

right is unquestionably not against the determination made

under 66(8)(b), 67(3), 68(1)(2)(3)(4) 69(1)(2),70,71 or 73 by the

primary court. It is quite clear on reading of section 74(2)

which is nothing but a draconian measure taken in the best

interest and absolute welfare of a society. However, the fact

remains that such a measure is necessary to safeguard their

rights until a court of competent jurisdiction is seized of the

situation to fnd a permanent resolution.

There is no gainsaying that the revisionary powers of this

court are extensive and extremely far and wide in nature.

It is an absolutely discretionary remedy. Such powers are

exercised only in exceptional circumstances. This reminds

us of the right of appeal granted under Article 154 P (3) (b)

is a right to **challenge the judgment of the High Court**

**exercising revisionary powers** and not to impugn the

primary court judge’s order by way of an appeal. When

section 74(2) of the Primary Court Procedure Act is closely

scrutinized along with Article 154 P (3) (b), it would be seen

that it makes a whale of difference as to the purpose, nature,

and scope of such right of appeal. Had the right of appeal

been granted under chapter vII at the very inception of its

introduction, the interpretation under consideration would

have been totally different. Appeals contemplated under

Article 154 P (3) (b) on one hand and appeals permitted under

the Civil, Criminal, Admiralty, Labour, Agrarian, Judicature

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and other laws on the other hand are worth examining to fnd

out whether an appeal under 154 P (3) (b) in fact *ipso facto*

should stay proceedings in the original court.

Needless to state that in an application for revision as

contemplated under Article154 P (3) (b), what is expected to be

ascertained is whether there are real legal grounds for

impugning the decision of the High Court in the feld of law

relating to revisionary powers and not whether the impugned

decision is right or wrong. Hence, in such an application the

question of a re-hearing or the re-evaluation of evidence in

order to arrive at the right decision does not arise. The appeal

in the strict sense is not one against the determination of the

judge of the primary court but against the judgment of the

High Court exercising revisionary powers. Therefore, it would

be correct to say that the right of appeal is not unconditional

as in the other cases but a qualifed right provided one has

the legal ground to invoke the discretionary jurisdiction of the

High Court against an order under chapter vII.

In the case of *Kanthilatha(supra)* relying heavily on the

decision in *Edward Vs De Silva* (7) it was observed that the

ordinary rule is that once an appeal is taken from the

judgment of an inferior Court, the jurisdiction of the court

in respect of that case is suspended. The judgment in

*Edward Vs de Silva (supra)* was based on the decision of *A.G.*

*vs. Sillem*(8).

The judgment in *Edward Vs De Silva (supra)* relates to

the question of the procedure to be followed when a judg-

ment creditor is desirous of reaping the reward of his hard

work in the District Court, pending the determination of the

appeal. The provisions of the Civil Procedure Code being

applicable in such an instance, it was held it is a condition

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precedent for execution pending appeal to notice the

judgment debtor in terms of section 763 of the CPC and

also make him a party to such incidental proceedings.

Commenting on the failure to take such steps, it was held that

it would result in a failure of jurisdiction and none of the orders

made thereafter would be of any legal consequences. Further,

commenting on the effect of issuing writ pending appeal in

a civil action Soertsz A.C.J opined that the ordinary rule is

that once an appeal is taken from the judgment of an inferior

Court, the jurisdiction of that Court is suspended except, of

course, in regard the perfecting of the appeal. His Lordship

then cited with approval the dictum of Lord Westbury, Lord

Chancellor (1864), who observed in *Attorney-General v. Sillem*

*(supra)* at 1208 as follows …

“The effect of a right of appeal is the limitation of the

jurisdiction of one Court and the extension of the jurisdiction

of another”.

Having cited the above dictum, Soertsz A.C.J expressed

that the right of appeal being exercised the case should be

maintained in *status quo* till the appellate Court has dealt

with it. His Lordship then expressed that the language of

Chapter 49 of the Code makes it suffciently clear that the

Legislature was creating an exception to the ordinary rule in

a limited way.

Soertsz A.C.J was greatly infuenced by the decision of

the Privy Council in three Indian cases *Keel Vs Asirwathan*(9),

*Ragunath Das v. Sundra Das Khelri*(10) and *Malkar Jun v.*

*Nahari*(11) when His Lordship decided Edward’s case. Surpris-

ingly, neither the three Indian cases nor the case of *Edward*

*Vs De Silva (supra)* were either relevant or have any bearing

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whatsoever in respect of the pivotal issue before us. With due

respect even the dicta of Lord Parker and Lord Westbury, had

no bearing upon the present revision application, especial-

ly with regard to the question of execution pending appeal

under chapter vII of PCPA.

The *stare decisis* in the case of *Edward Vs De Silva*

*(supra)* centered round the right to maintain an application

for writ pending appeal without making the judgment-debtor

a party and with no notice to him. Whatever pronouncement

made in that judgment as to the limitation of the jurisdiction

of one court, extension of the jurisdiction of another and the

*status quo* to be maintained till the appellate court has given

its decision when an appeal is pending is nothing but an

obiter. It is in any event extremely inapposite to an application

for execution of a determination/order made under chapter

vII of the PCPA pending appeal.

In passing it might be useful to observe that the Legis-

lature like in the Civil Procedure Code has not provided a

mechanism for an aggrieved party to obtain an order staying

the execution of the judgment, when it conferred the right

of appeal under Article 154 P (3). The presumption is that

when Article 154 P (3) was introduced the Legislature was not

unaware of the existence of section 74(2) of the Primary Court

Procedure Act, particularly chapter vII.

If such provisions are not made in the Constitution or in

any other Acts including the High Court of the Provinces (Spe-

cial Provisions) Act 19 of 1990, then the observations of His

Lordship Chief Justice Samarakoon would be of some use,

although strictly may not be relevant. Nevertheless, let me

reproduce the words of His Lordship for the sake of clarity.

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“Today’s legal position thus appears to me to be that it

is not competent for the Court to stay execution of the

decree merely on the ground that the judgment-debtor

has preferred appeal against it, but it is competent for

the Court to stay execution of a decree against which

an appeal is pending, if the judgment – debtor satisfes

the Court that substantial loss may result to him unless

an order for stay of execution is made and furnishes the

necessary security for the due performance of such

decree, as may ultimately be binding upon him”. (*Charlotte*

*Perera Vs Thambiah and Another*(12)

Hence, we are constrained to state that in the case of

*Kusum Kanthilatha (supra)* and *Nandawathie (supra)* the

decision reached is on the assumption that the *casus omisus*

clause is applicable and therefore the approach reached by

inadvertence needs to be set right. Further, in Kanthilatha’s

case the obiter dictum has been given prominence ignoring

the *ratio decidendi*. The judgment of *Sillem* relied and referred

to in *Edward Vs De Silva* is a criminal matter arising from a

statutory offence namely to refuse to pay certain revenues

due to Her Majesty. As was rightly observed in the case of

*Attorney General vs Sillem (supra)* the creation of a right of

appeal is an act which requires legislative authority. Neither

the inferior nor the superior tribunal, nor both combined can

create such a right, it being essentially one of the limitations

and the extension of jurisdiction.

In any event to rely on the decision in *Attorney General*

*vs Sillem* for our present purpose may amount to destructive

analysis of Chapter vII of the PCPA than the ascertainment

of the true intention of the Parliament and carry it out by fll-

ing in the gaps. Obviously, to put off the execution process

until the appeal is heard would tantamount to prolong the

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agony and to let the breach of the peace to continue for a

considerable length of time. This in my opinion cannot be the

remedy the Parliament has clearly decided upon. Hence I am

confdent that the construction we are mindful of placing

by this judgment would defnitely suppress the mischief

and subtle inventions and evasions for continuance of the

mischief.

In the result subject to the slight variation as to the

basis of the decision, we are inclined to follow the decision

in *R P Nandawathie Vs K Mahindasena (supra)* and therefore

hold *inter alia* that the **mere lodging of an appeal against**

**the judgment of the High Court in the exercise of its**

**revisionary power in terms of Article 154 p (3) (b) of the**

**Constitution to the Court of Appeal does not automati-**

**cally stay the execution of the order of the High court.**

The petitioner has fled a petition of appeal and also a

revision application. As the determination of the petition of

appeal is still pending in order to avoid duplicity of work,

it would be convenient to consider the merits of the revi-

sion application in this judgment itself. It is trite law that

when there is alternative remedy available the existence of

special circumstances need to be established necessitating the

indulgence of court to exercise such revisionary powers

vested in terms of the Constitution. *Vide Rustum v. Hapangama*

*Co. Ltd*.(13)

It has already been stated that the judgment of the

learned district judge setting aside the determination of

the magistrate was solely based on the purported failure to

endeavour to settle the matter prior to the inquiry. In order

to come to this conclusion the learned High Court judge has

relied heavily on the judgment of *Ali Vs. Abdeen* (14) in which

it was held inter alia that the making of an endeavor by

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the Court to settle amicably is a condition precedent which

had to be satisfed before the function of the Primary Court

under section 66(7) began to consider who had been in

possession and the fact that the Primary Court had not made an

endeavor to persuade parties to arrive at an amicable

settlement fundamentally affects the capacity or deprives

the Primary Court of competence to hold an inquiry into the

question of possession.

As far as the present case is concerned admittedly the

learned magistrate has endeavoured to settle the dispute

among the parties. This is clearly borne out by the record

maintained by the learned Magistrate. The journal entry

which demonstrates the attempt made by the Magistrate had

been reproduced by the learned High Court Judge at page 13

of the impugned judgment. In terms of the judgment at page

13 the learned High Court Judge has reproduced some of the

proceedings of the Magistrate in the following manner.

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fjkqfjka fmkS isá kS;s{jrhd bÈßm;a l, lreKq wkqj fiajlhka

w;r iduh lvùug wdikak ;;a;ajhla we;s njg ks.ukh lrñ

iui:hla weoa±hs úuiñ' iu¾:hla i|yd wjia:dj foñ' ±kg iu:hla

ke;s nj md¾Yjlrejka okajhs'

upon perusal of the journal entries it is quite clear that

the learned Magistrate has taken much interest to endeavour

the parties to settle the matter. In terms of Section 66(7) it

is the duty of the Primary Court to endeavour to settle the

matter amicably before the matter is fxed for inquiry.

A different view has been taken by a Bench of two Judges

in *Mohomed Nizam v. Justin Dias*(15) where His Lordship

Sisira de Abrew, J clearly held that the delayed objection

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regarding non compliance of Section 66(7) cannot be taken

for the frst time at the stage of the appeal. This view was

totally different to the basis of the decision in *Ali v. Abdeen*

*(supra)* on the ground of laches.

On the facts, the present case is much stronger than the

case of *Ali v. Abdeen (supra)* and *Mohomed Nizam v. Justin*

*Dias (supra)* as regards the question or laches or acquies-

cence or express consent.

For purpose of completeness let me reproduce the

relevant part of the judgment of Sisira de Abrew, J. which

reads as follows:-

“According to the above judicial decisions, the P.C.J.

does not assume jurisdiction to hear the case if he fails

to act under section 66(6) of the Act. In the present case,

have the parties taken up the issue of jurisdiction in the

Primary Court? The answer is no. The appellant in this

appeal takes up the issue of jurisdiction only in the Court

of Appeal. If the appellant or the respondent wants to

keep up the issue of jurisdiction it must be taken up at

the earliest opportunity.”

This view is supported by the judicial decision in *David*

*Appuhamy Vs. Yassasi Thero*(16) where it was held that an

objection to jurisdiction must be taken at the earliest possible

opportunity. If no objection is taken and the matter is with-

in the plenary jurisdiction of the Court, the Court will have

jurisdiction to proceed with the matter and make a valid

order.

By reason of the argument advanced before the learned

High Court judge as to the non-compliance of section 66(6),

it is the respondent before the High Court judge who had

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benefted by that argument. He has not adverted the

Magistrate to the non-compliance section 66 (6) before the

Magistrate commenced the inquiry. In any event as has been

stated above there has been meaningful steps taken by the

Magistrate to settle the matter. On that aspect of the matter

the learned High Court judge has erred when he came to the

conclusion that such an attempt is not in compliance with

the provisions of the PCPA.

In the land mark case of *Visuvalingam And Others Vs*

*Liyanage And Others*(17) it was held that where a person by

words or conduct made to another a representation of fact,

either with knowledge of its falsehood or with the intention

that it should be acted upon, or so conducts himself that

another would as a reasonable man, understand that a

certain representation of fact was intended to be acted on,

and that other has acted on such representation and alters

his position to his prejudice, an estoppel arises against the

party who has made the representation, and he is not allowed

to aver that the fact is otherwise than he represented it to

be.

“The phrase “approbating and reprobating” or “blowing

hot and cold” must be taken to express, frst, that the par-

ty in question is to be treated as having made an election

from which he cannot resile, and secondly, that he will not be

regarded……….as having so elected unless he has taken a

beneft under or arising out of the course of conduct which he

has frst pursued and with which his present action is incon-

sistent” – Per Evershed M.R., (1950) 2 A.E.R. 549 at 552.

“The doctrine of approbation and reprobation requires

for, its foundation, inconsistency of conduct, as where a man,

having accepted a beneft given to him by a judgment can-

not allege the invalidity of the judgment which confers the

beneft” – Lord Russel in *Evans v. Bartlam*(19).

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“In cases where the doctrine of approbation and

reprobation does apply, the person concerned has a choice of

two rights either of which he is at liberty to accept, but not

both. Where the doctrine does apply if the person to whom

the choice belongs irrevocably and with knowledge adopts the

one, he cannot afterwards assert the other,” Per Lord Atkin in

*Lissenden v. Bosh Ltd*(20).

Therefore it is quite clear that the petitioner who invoked

the revisionary jurisdiction of the High Court having taken

part in the settlement and clearly expressed his unwilling-

ness to have the matter settled (although the settlement was

tried at a premature stage) cannot be allowed to take the

advantage to attack the determination on the ground.

Taking into consideration all these matters, it is my

considered view that the learned High Court Judge was clearly

wrong when he reversed the determination of the learned

Magistrate based on the ground of non compliance of

Section 66(7) of the PCPA. For the foregoing reasons, I

allow the revision application and accordingly set aside

the impugned judgment of the Judge of the High Court.

Consequently the determination that was challenged by

way of revision in the High Court will now prevail and the

learned Magistrate is directed to give effect to the same. The

registrar is directed to cause a copy of this judgment fled

in the relevant fle pertaining to appeal No CA PHC 35/2006.

There shall be no costs.

**SISIrA DE AbrEw, J**- I agree

**LECAmwASAm, J.** - I agree

*Application allowed.*

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SC 305

**BROwN & COMPANY PLC V. MINISTER OF LABOUR**

**AND 6 OTHERS**

SuPREME COuRT

J.A.N. DE SILvA, CJ

SALEEM MARSOOF, PC., J. AND

P.A.RATNAyAKE, PC., J.

S.C.APPEAL NO. 108/2008

S.C( SPL.) LA NO. 12/2003

CA ( APPLICATION) NO. 2056/2003

NOvEMBER 1ST, 2010

***Industrial Disputes Act – Section 3(1)(d) – Of consent, parties to***

***the Industrial dispute refer the dispute for settlement by Arbitra-***

***tion to an Arbitrator, for settlement by Arbitration. – Section 4(1)***

***– Powers of the Minister in regard to industrial disputes – Section***

***17(1) – Duties and powers of Arbitrator – Section 36(4) – In the***

***Conduct of Proceedings in respect of an industrial dispute any***

***industrial court, Labour Tribunal, Arbitrator or the Commissioner***

***is not bound by any provisions of the Evidence Ordinance.***

The dispute that arose between the relevant employees with Brown

& Co., and Browns Engineering, has been referred for settlement by

arbitration in terms of Section 4(1) of the Industrial disputes Act. The

Arbitrator, after considering the evidence placed before him, entered

an award in favour of the relevant employees of Brown & Co., that they

are entitled to receive travel expenses from 1st June 1992 up to the

termination of their services with effect from 23rd November 1996. The

Arbitrator also found that in addition to aforesaid amounts, 4th, 5th,

6th Respondents were entitled to receive respectively further sums of

Rs. 349,095.37, Rs. 346,907.00 and Rs. 366,219.00 as total dues and

directed Brown & Co. to pay the said sums.

Being aggrieved by the said Award of the Arbitrator, Brown & Co. fled

the Writ application from which this appeal was fled in the Supreme

Court, seeking a mandate in the nature of a Writ of Certiorari quashing

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the said award and a Writ of prohibition to prevent the Commissioner

of Labour from taking steps to enforce the said Award.

**Held:**

(1) Arbitration under the Industrial Disputes Act is intended to be even

more liberal, informal and fexible than commercial Arbitration,

because Section 17(1) of the Industrial Disputes Act requires the

Arbitrator to make all such inquiries into the dispute as he may

consider necessary, hear such evidence as may be tendered by

the parties to the dispute and thereafter make such award as may

appear to him just and equitable.

(2) The function of the arbitral power in relation to industrial disputes

is to ascertain and declare what in the opinion of the Arbitrator

ought to be the respective rights and liabilities of the parties as

they exist at the moment the proceedings are instituted.

(3) The Arbitrator’s role is more inquisitorial, and he has a duty to go

in search for the evidence, and he is not strictly required to follow

the provisions of the Evidence Ordinance in doing so. The proce-

dure followed by him need not be fettered by the rigidity of the

law.

Per Marsoof, J. –

“It is important not to lose the sight of the fact that this appeal

arises from an application for the Writ of Certiorari to quash the

award of the arbitrator in an industrial arbitration, and the Court

of Appeal which refused the appeal in the circumstances of this

case did so in the exercise of its supervisory jurisdiction and not

in its capacity as an appellate Court.”

(4) The Court of Appeal did not err in affrming the fnding of the

Arbitrator that although reimbursement of the cost of travelling

was not expressly provided for in the letter of appointment is-

sued to the relevant employees of the Brown & Co. it was just and

equitable to award them an allowance to meet the offcial travelling

expenses, especially considering the fact that they had been pro-

vided with a company vehicle for their offcial and personal travel

in the past and withholding of this facility had given rise to an

industrial dispute.

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(5) The impunged award of the Arbitrator is just and equitable and

there are no errors on the face of the record to justify intervention

by way of *certiorari*.

**Cases referred to -**

*(1) Associated Provincial Picturehouses V. Wednesbury Corporation, -*

(1948) 1 KB 223

*(2) Council of Civil Service Unions V. Minister for the Civil Service –*

(1985) AC 374

*(3) Thiruvanakaresu V. Siriwardene and Others –* (1986) 1 SLR 185

*(4) Brown & Co. Ltd. and another V. Ratnayake, Arbitrator and others*

(1994)3SLR 91

**AppEAL** from the Court of Appeal dated 30.11.2007

*A.R.Surendra, PC, Nadarajar Kandeepan* and *K. Tharshini* for Petitioner-

Petitioner-Appellant

*Yuresha de Silva, S.C.,* for 1st and 2nd Respondent – Respondent –

Respondents

*Rohan Sahabandu* with *Dulani Warawewa* for 4th - 6th Respondent –

Respondents*.*

*Cur.adv.vult*

March17th 2011

**SALEEm mArSooF, J.**

The Petitioner-Petitioner-Appellant (hereinafter referred

to as “Brown & Co.”), is a Company incorporated in Sri Lanka

with the corporate name Brown & Company (Pvt.) Ltd., which

name has since been changed to Brown & Company PLC.

The 4th to 6th Respondent-Respondent-Respondents (herein-

after referred to as the “relevant employees”) were originally

employed as Engineering Executives in the Engineering

Division of Brown & Co. They were purportedly transferred

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to the 7th Respondent-Respondent-Respondent Browns

Engineering (Pvt.) Ltd. (hereinafter referred to as the Browns

Engineering) with effect from 1st January 1992, and their

services were subsequently terminated by the letters dated

23rd November 1994 consequent to a decision taken by the

management of Browns Engineering to close its business.

Even prior to the said closure of business and termi-

nation of the services of the relevant employees, they had

apprised the management of Browns Engineering as well

as the Board of Directors of Brown & Co. of some of their

grievances and sought redress. One of their grievances was

related to the expenses they had to incur personally as a

result of the withdrawal of the facility of a company main-

tained vehicle with fuel, made available to them for their

offcial and personal travel by Brown & Co., prior to their

transfer to Browns Engineering. This facility had been

continued even thereafter, up to and inclusive of the month

of May 1992. It is common ground that the offcial vehicles

used by them while working for Brown & Co. were sold to

them in May 1992, at prices determined on valuations by the

Automobile Association of Sri Lanka, and the relevant

employees had been provided with soft loans by Browns

Engineering to fnance their purchases. As a result of the

decision not to continue the facility of a company maintained

car after the said sale of vehicles after 1st June 1992, the

relevant employees were compelled to utilize the vehicles

purchased by them even for their offcial travel, sans the

facility of a company driver or provision for fuel. They

agitated for redress of this and other grievances, claiming

*inter alia*, a sum of Rs. 15,000 per month in lieu of the

company maintained vehicle, a sum of Rs. 3,000 per month

as driver’s salary and an additional allowance of Rs. 5,250

for fuel computed on the basis of 150 litres per month at