

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 13**

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**PUBLISHED BY THE MINISTRY OF JUSTICE**

**Printed at M. D. Gunasena & Co. Printers (Private) Ltd.**

**Price: Rs. 25.00**

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**PRIYANTHI CHANDRIKA JINADASA v.**

**PATHMA HEMAMALI AND 4 OTHERS**

SUPREME COURT

DR. SHIRANI A. BANDARANAYAKE, C.J.,

RATNAYAKE, P.C., J. AND

EKANAYAKE, J.

S.C. (HC) CALA NO. 99/2008

WP/HCCA/GPH NO. 62/01 (F)

D.C.GAMPAHA NO. 33465/L

NOVEMBER 8TH , 2010

***Supreme Court Rules of 1990 – Rule 7 – Every application for***

***special leave to appeal shall be made within six weeks of the***

***order, judgment, decree or sentence of the Court of Appeal in***

***respect of which special leave to appeal is sought – Rule 20(3)***

***– where the Court of Appeal does not grant or refuses to grant***

***leave to appeal, an application for special leave to appeal to the***

***Supreme Court may be made in terms of Rule 7.***

The judgment of the High Court was delivered on 15.07.2008. In terms

of the Supreme Court Rules, 1990, the time limit within which leave to

appeal applications are to be fled is six (06) weeks from the impugned

judgment and accordingly, the application for leave to appeal should

have been fled on or before 26.08.2008. However, the present applica-

tion had been fled only on 01.09.2008. The Defendents – Respondents

raised a preliminary objection that it had been fled out of time.

The Petitioner took up the position that since this was an application

for leave to appeal from a judgment of the High Court, the Supreme

Court Rules of 1990 would not be applicable to such an application.

Consequently, it was contended that in the absence of Rules for this

type of applications, the concept that applications must be fled within

‘a reasonable time’ should be applicable. It was also submitted that

attention should be given to the circumstances of this application.

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**Held:**

(1) An application for leave to appeal from the High Court (Civil

Appeal) of the Provinces to the Supreme Court should be fled

within 42 days from the date of the judgment.

(2) The language used in Rule 7 of the Supreme Court Rules of 1990

clearly shows that the provisions laid down in the said Rule are

mandatory and that an application for leave to appeal should be

made within six weeks of the order, judgment, decree or sentence

of the Court below of which leave is sought from the Supreme

Court. In such circumstances it is imperative that the application

should be fled within the specifed period of six weeks.

(3) It is not possible to consider the contended circumstances as

mitigating factors when the Petitioner had failed to take all steps

to ensure that the leave to appeal application is preferred within

the stipulated time limit.

Per Dr. Shirani A. Bandaranayake, C.J.,--

“…I hold that the petitioner had not complied with the Supreme

Court Rules of 1990. A long line of cases of this Court had decided

that non compliance with Rule 8(3) as well as Rule 28(3) would

result in the dismissal of an application for leave from this

Court.”

**Cases referred to:**

*1. George Stuart and Co. Ltd. V. Lankem Tea and Rubber Plantations*

*(Pvt.) Ltd.* - --(2004) 1 Sri L.R. 246

*2. Nirmala de Mel V. Seneviratne* --- (1982) 2 Sri L.R. 569

*3. Jafferjee V. Perera* – C.L.W. Vol. 79 pg. 81

*4. L.A. Sudath Rohana V. Mohamed Zeena & others – S*.C. H.C. C.A.L.A.

No. 111/2010 – S.C. Minutes of 17.3.2011

*5. K. Reaindran V. K. Velusomasundram –* S.C. (Spl.) L.A. Application

No. 298/99 – S.C. Minutes of 07.02.2000

*6. N.A. Premadasa V. The Peoples’ Bank –* S.C. (Spl.) L.A. Application

No. 212/99 – S.C. Minutes of 24.02.2000

*7. Hameed V. Majibdeen and others – S.C. (Spl.) L.A. Application*

No. 38/2001 – S.C. Minutes of 23.07. 2001

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*8. K.M. Samarasinghe V. R.M.D. Ratnayake and others –* S.C. (Spl.)

L.A. Application No. 51/2001 – S.C. Minutes of 27.07.2001

*9. Soong Che Foo V. Harosha K. De Silva and others –* S.C. (Spl.) L.A.

Application No. 184/2003 – S.C. Minutes of 25.11.2003

*10. C.A. Haroon V. S.K. Muzoor and others –* S.C. (Spl.) L.A. Application

No. 158/2006 – S.C. Minutes of 24.11.2006

*11. Samantha Niroshana V. Senerath Abeyruwan –* S.C. (Spl.) L.A.

Application No. 145/2006 – S.C. Minutes of 02.08.2007

*12. A.H.M. Fowzie and two others V. Vehicles Lanka (Pvt.) Ltd. – 2008*

*B.L.R. 127*

*13. Woodman Exports (Pvt.) Ltd. V. Commissioner-General of Labour –*

*S.C. (Spl.) L.A. Application No. 335/2008 – S.C. Minutes of*

*13.12.2010*

**AppliCAtion** for leave to appeal to the Supreme Court from judgment

of the High Court of the Western Province (Civil Appeals)

*Hemasiri Withanachchi* for the Petitioner

*Manohara de Silva, P.C.,* with *Pubudini Wickramaratne* for the

Defendants - Respondents - Respondents

*Cur-adv.vult*

July 07th 2011

**Dr. SHirAni A. BAnDArAnAyAke, CJ.**

This is an application for leave to appeal from the

judgment of the High Court of the Western Province (Civil

Appeals) holden at Gampaha dated 15.07.2008. By that

judgment the learned Judges of the High Court had

dismissed the appeal of the plaintiff-appellant, now deceased.

Thereafter the widow of the said plaintiff-appellant (herein-

after referred to as the petitioner), preferred an application

before this Court for leave to appeal.

When this application for leave to appeal was taken for

support, learned President’s Counsel for the defendants-

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respondents-respondents (hereinafter referred to as the

respondents) raised a preliminary objection stating that the

application for leave to appeal is out of time.

Since a preliminary objection was raised, both parties

were heard on the said objection.

Learned President’s Counsel for the respondents submit-

ted that the judgment of the High Court was delivered on

15.07.2008 and in terms of the Supreme Court Rules, 1990,

the time limit within which leave to appeal applications are

to be fled is six (06) weeks from the impugned judgment and

therefore the said application for leave to appeal should have

been fled on or before 26.08.2008. Since the present applica-

tion had been fled only on 01.09.2008, learned President’s

Counsel contended that it had been fled out of time.

Learned Counsel for the petitioner took up the position

that since this is an application for leave to appeal from the

judgment of the High Court, the Supreme Court Rules of

1990 would not be applicable to such an application. Accord-

ingly, it was contended that since there are no Rules for this

type of applications, the concept that applications must be

fled within ‘a reasonable time’ should be applicable. It was

also submitted that attention should be given to the circum-

stances of this application which warrants the indulgence of

this Court.

Having stated the submissions made by the learned

President’s Counsel for the respondents and the learned

Counsel for the petitioner, let me now turn to consider the

said submissions on the basis of the preliminary objection

raised by the learned President’s Counsel for the respon-

dents.

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The Supreme Court Rules of 1990, deal with many mat-

ters pertaining to appeals, applications, stay of proceedings

and applications under Article 126 of the Constitution.

Part 1 of the said Rules, refers to three types of appli-

cations dealing with leave, which includes special leave to

appeal, leave to appeal and other appeals. Rule 7 which is

under the category of applications for special leave to appeal

from the judgments of the Court of Appeal clearly states that

such an application should be made within six seeks (6) of

the impugned judgment. The said rule is as follows:

“Every such application shall be made within six weeks

of the order, judgment, decree of sentence of the Court

of Appeal in respect of which special leave to appeal is

sought.”

In terms of Rule 7, it is quite clear that any application

for special leave to appeal should be made within six weeks

from the order, judgment, decree or sentence of the Court of

Appeal on which such leave is sought.

It is however to be borne in mind that the said Rule 7

deals only with applications for special leave to appeal from

the judgments of the Court of Appeal and the present applica-

tion for leave to appeal is from a judgment of the Civil Appel-

late High Court of the Western Province holden at Gampaha.

As stated earlier categories B and C of Part I of the

Supreme Court Rules, 1990 deal with leave to appeal and

other appeals, respectively. Whilst the category of leave to

appeal deals with instances, where Court of Appeal had

granted leave to appeal to the Supreme Court, other

appeals refer to all other appeals to the Supreme Court

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from an order, judgment, decree or sentence of the Court of

Appeal or any other Court or tribunal. Thus, it is evident that

the present application for leave to appeal from the judgment

of the High Court of the Western Province (Civil Appeal) holden

at Gampaha would come under the said category C. The said

section 28(1), which refers to such appeals is as follows:

“28(1) Save as otherwise specifcally provided by or under

any law passed by Parliament, the provisions of this

rule shall apply to all other appeals to the Supreme

Court from an order, judgment, decree or sentence of

the Court of Appeal or any other Court or tribunal”

(emphasis is added).

It is therefore not correct to state that there are no rules

made by the Supreme Court that would be applicable to

applications for leave to appeal from the High Court of the

Province to the Supreme Court.

Considering the preliminary objection raised by the

learned President’s Counsel for the respondent, it is also

necessary to be borne in mind the nature of this applica-

tion. It is not disputed that in this case the petitioner had

fled action in the District Court of Gampaha seeking, *Inter*

*alia,* a declaration that the petitioner is entitled to the land

described in the schedule to the plaint and a decree evicting

the respondents from the land in question and placing the

petitioner in vacant possession.

Direct applications for leave to appeal from the High

Court to the Supreme Court came into being only after the

establishment of High Courts of the Provinces. Until such

time, according to the procedure that prevailed, such appli-

cations were preferred from the order, judgment, decree or

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sentence of the Court of Appeal. In such circumstances, if the

Court of Appeal had not granted leave to appeal, an applica-

tion could be made to the Supreme Court for special leave to

appeal. Rules 19 and 20 of the Supreme Court Rules refer to

this position and Rule 20(3) in particular, deals with the time

frame in such applications. The said Rule 20(3) is as follows:

“Where the Court of Appeal does not grant or refuses to

grant leave to appeal, an application for special leave to

appeal to the Supreme Court may be made in terms of

Rule 7.”

Rule 7 clearly states that every such application shall

be made within six weeks of the order, judgment, decree or

sentence of the Court of Appeal in respect of which special

leave to appeal is sought.

Accordingly it is quite clear that a litigant, who is dissat-

isfed with the decree of a criminal matter, which had come

before the High Courts (Civil Appellate) of the Provinces

would have to prefer an application before the Supreme Court

within six (6) weeks of the order, judgment, decree or sen-

tence in question.

This position was considered by the Supreme Court in

the light of the situation regarding an application made on

the basis of an Arbitral Award in *George Stuart and Co. Ltd. V*

*Lankem Tea and Rubber Plantations (Pvt.) Ltd.*(1), where it was

stated that,

“When no provision is made in the relevant Act, specify-

ing the time frame in which an application for leave to

appeal be made to the Supreme Court and simultane-

ously when there are Rules providing for such situations,

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the appropriate procedure would be to follow the current

Rules which govern the leave to appeal application to

the Supreme Court. **Consequently such an application**

**would have to be fled within 42 days from the date of**

**the Award”** (emphasis added).

Accordingly, it is evident that an application for leave to

appeal from the High Court (Civil Appeal) of the Provinces to

the Supreme Court should be fled within 42 days from the

date of the judgment.

It is not disputed that the judgment of the High Court

was delivered on 15.07.2008. It is also not disputed that

the petitioner had fled this leave to appeal application on

01.09.2008. It is therefore quite apparent that the petition-

er had fled her application for leave to appeal well after 42

days and therefore the petitioner had not complied with the

Supreme Court Rules 1990.

Learned Counsel for the petitioner contended that

although there is a delay in fling the leave to appeal

application, it was not intentional and was due to circum-

stances which prevailed at that time. His position was that the

original plaintiff-appellant had passed away on 15.08.2008

and that considering the social and cultural background of

our society it is common knowledge that during a period,

where there had been a bereavement of a close relative,

the matters connected therein would take precedence over

litigation.

Learned Counsel for the petitioner contended that even

though the Supreme Court Rules may specify a time limit in

preferring an application to the Supreme Court for leave to

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appeal, there could be a waiver with regard to the said time

frame based on the discretion of the Court. Learned Counsel

for the petitioner relied on the decisions in *Nirmala de Mel v*

*Seneviratne*(2), and *Jafferjee v Perera*(3).

In *Nirmala de Mel v Seneviratne (supra)*, the preliminary

objection raised by the respondent was on the basis that the

petitioner in that case had no status to fle the appeal before

the order of Court to substitute her and the appeal was out of

time. The Court whilst holding that it was within time since

it was fled on a Monday, which was the next working day

and therefore had been within time had also held that the

petitioner could fle the petition of appeal prior to being

ordered to be substituted for the reason that there was a

*lacuna* in the Supreme Court Rules and therefore the said

steps taken could be regarded as regular.

It is to be noted that *Nirmala de Mel v Seneviratne*

*(supra)* is a case decided well before the present Supreme

Court Rules came into being. In the present application

as clearly stated earlier, the facts are totally different to

*Seneviratne’s (supra)* case. As has been stated clearly, there

is no *lacuna* in the Supreme Court Rules and the said

Rules are quite clear on the time limit permitted for such

application.

In *Jafferjee and others (supra)* it was apparent that

there had been compliance with the conditions on which

conditional leave was obtained long before the time limit

imposed by Court for such compliance was over.

The question that arises in the context of the aforemen-

tioned decisions is that, in terms of the provisions laid down

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in Rule 7 of the Supreme Court Rues, 1990 as to wheth-

er there is a discretion for the Court to ignore or vary the

stipulated time period of 42 days.

As clearly stated in *L.A. Sudath Rohana v Mohamed*

*Zeena and others*(4) Rules of the Supreme Court are made in

terms of Article 136 of the Constitution, for the purpose of

regulating the practice and procedure of this Court. Similar

to the Civil Procedure Code, which is the principal source of

procedure, which guides the Courts of civil jurisdiction, the

Supreme Court Rules regulates the practice and procedure of

the Supreme Court.

The language used in Rule 7, clearly shows that the

provisions laid down in the said Rule are mandatory and that

an application for leave for this Court should be made within

six weeks of the order, judgment, decree or sentence of the

Court below of which leave is sought from the Supreme Court.

In such circumstances it is apparent that it is imperative that

the application should be fled within the specifed period of

six (6) weeks.

The position taken up by the petitioner was that the

original plaintiff had obtained a copy of the judgment of the

High Court with a view to lodge an application for leave to

appeal in this Court, but had been seriously taken ill and

died on 15.08.2008. The petitioner submitted that she had

to attend to the funeral of the original plaintiff, being her

husband and the religious ceremonies and due to that she

could not prefer this application within the stipulated time

period.

It is to be noted that the judgment of the High Court was

delivered on 15.07.2008 and the original plaintiff had died

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one month later on 05.08.2008. The present petitioner, who

is the widow of the original plaintiff, had stated in her petition

that by the time she sought legal advice from her Attorney-

at-Law, she was informed that the appealable period of time

had lapsed.

It is therefore quite clear that the petitioner was fully

aware that by the time she took steps to prefer an application

for leave to appeal before this Court, that appealable period of

time had lapsed. Further it is to be borne in mind that in any

event the original plaintiff-appellant had not fled an applica-

tion for leave to appeal from the judgment of the High Court

before his demise.

Considering all the circumstances it is apparent that it

is not possible to consider those as mitigating factors when

the petitioner had failed to take all steps to ensure that the

leave to appeal application is preferred within the stipulated

time limit.

For the reasons aforesaid, I hold that the petitioner had

not complied with the Supreme Court Rules of 1990. A long

line of cases of this Court had decided that non compli-

ance with Rule 8(3) as well as Rule 28(3) would result in the

dismissal of an application for leave from this Court

(*K. Reaindran v. K. Velusomasundram*(5), *N.A. Prema-*

*dasa v. The People’s Bank*(6), *Hameed v Majibdeen and*

*others*(7), *K.M. Samarasinghe v R.M.D. Ratnayake and*

*others*(8), *Soong Che Foo v. Harosha K. De Silva and others* (9)

*C.A. Haroon v S.K. Muzoor and others*(10), *Samantha Niroshana*

*v Senarath Abeyruwan*(11), *A.H.M. Fowzie and two others v*

*Vehicles Lanka (Pvt.) Ltd.*(12), *Woodman Exports (Pvt.) Ltd. v*

*Commissioner-General of Labour*(13), *L.A. Sudath Rohana v*

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*Mohamed Zeena and others (supra).* It is also to be noted that

in *George Stuart and Co. Ltd. (supra)*, the application for leave

to appeal was rejected since it was fled out of time.

In the circumstances, for the reasons aforesaid, I uphold

the preliminary objection raised by the learned President’s

Counsel for the respondents and dismiss the petitioner’s

application for leave to appeal.

I make no order as to costs.

**rAtnAyAke, p.C., J.** - I agree.

**CHAnDrA ekAnAyAke, J.**- I agree.

*Preliminary objection upheld. Application for Leave to Appeal*

*dismissed.*

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**JAYAWARDENE v. OBEYSEKERE AND 5 OTHERS**

SUPREME COURT

J.A.N. DE SILVA, C.J.,

AMARATUNGA, J. AND

MARSOOF, J.

S.C. (CHC) APPEAL NO. 21/2009

H.C. (CIVIL) NO. 28/2008

S.C. (CHC) APPEAL NO. 22/2009

H.C. (CIVIL) NO. 30/2008

S.C. (CHC) APPEAL NO. 23/2009

H.C. (CIVIL) NO. 28/2008

AUGUST 31ST, 2010

***Civil Procedure Code – Section 6, 7, 8, 375, 393 – If the right to sue***

***on the cause of action survives to the surviving plaintiff/s or against***

***the surviving defendant/s upon the death of one out of several***

***plaintiffs or defendants, action to proceed at the instance of the***

***surviving plaintiff or plaintiffs or against the surviving defendant***

***or defendants – Summary - Regular Procedure. Companies Act 7 of***

***2007 - Section 224.***

The 1st, 2nd and 3rd Petitioner-Respondents instituted two actions before

the Commercial High Court of Colombo in terms of Section 226 of the

Companies Act, No. 7 of 2007. Whilst the two cases were pending, the

3rd Petitioner - Respondent died. The learned President’s Counsel for

the Petitioner-Respondents took up the position that the case could

proceed without effecting any substitution in place of the deceased

3rd Petitioner-Respondent. Accordingly no substitution was made in

place of the deceased party. The learned President’s Counsel appearing

for the Appellant and the Respondent- Respondents submitted that

substitution in place of the deceased party was mandatory and that

the action could not proceed any further without effecting such

substitution.

The learned High Court Judge permitted the Petitioner-Respondents to

proceed with the action. This appeal is preferred against the said order

made on 11th May 2009 by the learned High Court Judge.

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**HelD:**

(1) Unless the operation and the application of the Civil Procedure

Code is expressly prevented, the regular procedure of the civil

procedure must be applied. Section 8 of the Civil Procedure Code

should be understood as providing for the application of regular

procedure where-

(a) the Civil Procedure Code does not provide for summary

procedure

(b) any other law does not provide for summary procedure

(c) where a law does not provide for any other procedure

Per J.A.N. de Silva, C.J.-

“I am frmly of the view that the broad and inclusive defni-

tion given to the term cause of action in Section 5 as well as in

innumerable cases should not be limited… The wording in Section

7 cannot restrict Section 6 and the meaning attached to the term

cause of action …”

“Therefore in conclusion, I am of the opinion that the circumstances

of this case attract the provisions of the Civil Procedure Code, and

specifcally Section 393.”

(2) Per J.A.N. de Silva, C.J.,

“… I hold that the facts of the case attract Section 393 of the

Civil Procedure Code and that a cause of action survived to the

plaintiffs “alone”. But the plaintiffs failed to satisfy the second

requirement of making an application by way of summary

procedure and therefore the plaintiffs are prevented fatally from

proceeding any further”.

**Cases referred to:**

*1. Duhilanomal and Others V. Mahakanda Housing Co. Ltd. 1982(2)*

*Sri. L.R. 504*

*2. Gajanand V. Sardarmal – AIR 1961 Raj. 223*

**AppeAl** from an order of the Commercial High Court (Colombo)

*Jayawardene V. Obeysekere And 5 Others*

SC *(J.A.N. de Silva CJ.)* 351

*S.A. Parathallingam, P.C.,* with *Rajindra Jayasinghe* and *Ranil*

*Angunawela* for the 3rd Respondent – Appellant

*Romesh de Silva, P.C.,* with *Aritha Wickramanayake, Chanaka de*

*Silva, Aruna Samarajeewa, Sugath Caldera, Shanaka Cooray* and

*Eraj de Silva* for the 1st and 2nd Petitioners – Respondents

*D.S. Wijesinghe, P.C.,* with *K. Molligoda* for the 2nd Respondent –

Petitioner in SC (CHC) Appeal 23/2009

*Nihal Fernando, P.C.,* with *Rajindra Jayasinghe* for the 3rd Respondent –

Petitioner in SC (CHC) Appeal 23/2009

*Shanaka Amarasinghe* for the 4th Respondent–Respondent *M.A. Suman-*

*thiran* for the 1st Respondent Company

*Cur.adv.vult*

July 07th 2011

**J.A.n. De SilvA CJ**

This is an appeal from an order of the Commercial High

Court of Colombo. The 2nd Respondent - Appellant (hereinafter

referred to as the Appellant) seeks to set aside the order of the

learned High Court Judge dated 11th May 2009. This Order

was challenged in all three cases, this court decided to

amalgamate all three cases together to deliver judgment.

The facts of this case in so far as they are relevant to this

application are as follows.

The 1st, 2nd and 3rd Petitioner-Respondents instituted two

actions before the Commercial High Court on the same day

in terms of section 226 of the Companies Act No 7 of 2007.

Perusal of the trial record indicates that court was informed

of the death of the 3rd Petitioner-Respondent on the 15th

of October 2008, which was the date fxed for the fling of

objections by the Appellant and the Respondent-Respondents.

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It is at this point that controversy arose as to the

direction with which the action should proceed thence-

forth. The learned Counsel appearing for the 1st, 2nd and 3rd

Petitioner-Respondents submitted that the case could

proceed without any substitution in place of the 3rd Petitioner-

Respondent, and therefore did not seek to substitute any

person. The learned Counsel appearing for the Appellant and

the Respondent-Respondents submitted that an application

for substitution was mandatory and that the action could

not proceed any further without such an application having

being made.

Parties made extensive oral submissions and also

tendered written submissions on the said question. By order

dated 11th May 2009 the learned High Court Judge held with

the Petitioner-Respondents and permitted the Petitioner-

Respondents to proceed with the action. This appeal was

preferred against the said order.

The Appellant contends that section 393 of the Civil

Procedure Code applies to the aforesaid circumstances. The

Petitioner-Respondents contend that the procedure to be

followed in respect of disputes arising under the Companies

Act 7 of 2007 is *sui generic* and therefore submit that the Civil

Procedure Code has limited application to the circumstances

of this case.

The Petitioner-Respondents advanced several arguments

in this connection which deserve full and careful consider-

ation.

The learned President’s counsel for the Petitioner-

Respondents drew our attention to section 520 of the Com-

panies Act No. 7 of 2007. The said section reproduced in its

entirely is as follows:

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*(1) Every application or reference to court under the pro-*

*visions of this Act shall, unless otherwise expressly*

*provided or unless the court otherwise directs, be by*

*way of petition and affdavit, and every person against*

*whom such application or reference is made, shall be*

*named a respondent in the petition and be entitled*

*to be given notice of the same and to object to such*

*application or reference.*

*(2) Every application or reference made to the court in the*

*course of any proceeding under this Act or incidental*

*thereto, shall be made by motion in writing.*

*(3) The Registrar shall be entitled to be heard or repre-*

*sented in any application or reference made to the*

*court under this Act at any stage of such application or*

*reference.*

*(4) In all proceedings before court by way of application*

*or reference under this Act, no order for costs shall be*

*made against the Registrar.*

The learned President’s counsel for the Petitioner-

Respondents also drew our attention to section 6 and 7 of the

Civil Procedure Code. Section 6 defnes as to what constitutes

an action. It reads,

*Every application to a court for relief or remedy obtainable*

*through the exercise of the court’s power or authority, or*

*otherwise to invite its interference, constitutes an action.*

Section 7 states that

*The procedure of an action may be either “regular” or*

*“summary”*

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It was then submitted that the procedure found in

section 520 of the Companies Act No. 7 of 2007 did not fall

into either category and therefore the procedure laid down in

the Civil Procedure Code should not apply in respect of dis-

putes arising out of the Companies Act.

Section 8 which was inserted into the Civil Procedure

Code as an amendment in 1980 states that unless specif-

ically provided, proceedings should be by way of “regular”

procedure.

The Civil Procedure Code itself, despite the wording

in section 7 paves the way for another type of proceedings

i.e. found in chapter VIII to be followed in respect of liquid

claims. The procedure set out therein is distinctly different to

the “regular” procedure as well as the “summary” procedure

already referred to.

Therefore I think it would be unwise to contend that a

procedure found in a statute alien to the forms found in the

Civil Procedure Code would not attract the provisions relating

to the regular procedure of the Civil Procedure Code.

The legislature may have in its wisdom adopted various

procedures to be followed in relation to the diverse actions

which it deems appropriate.

Yet unless the operation and the application of the Civil

Procedure Code is expressly prevented, I am of the opinion

that the regular procedure of the civil procedure must be

applied in terms of section 8.

Section 8 states,

*Save and except actions in which it is by this Ordinance*

*or any other law specially provided that proceedings may*

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*be taken by way of summary procedure, every action shall*

*commence and proceed by a course of regular procedure,*

*as hereinafter prescribed.*

In other words section 8 of the Civil Procedure Code

should be understood as providing for the application of

regular procedure where,

(a) the Civil Procedure Code does not provide for

summary procedure

(b) any other law does not provide for summary

procedure

(c) where a law does not provide for any other

procedure

I am therefore convinced that the proceedings under

scrutiny was found to be an action in which, in addition to

the application to the general procedure found in the compa-

nies Act, the regular procedure found in the Civil Procedure

Code must fll any procedural lacuna.

The learned counsel for the Respondent-Respondent

submitted that in any event section 393 applied only to

regular procedure adverting to the words found in the

section, which are “plaintiff” and “defendant”.

I fnd this submission by the learned president’s counsel

untenable. Section 375 of the Civil Procedure Code is clear,

in that an application by way of summary procedure can be

made in the course of an ongoing action whether such action

be conducted by way of summary or regular procedure.

Chapter LV of the Civil Procedure Code refers to incidental

proceedings. The chapter deals with circumstances ranging

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from the death of a party, the assignment of interest of a

party, marriage and bankruptcy. These are circumstances

that affect any action irrespective of the procedure followed.

Whilst I concede that the words “plaintiff” and

“defendant” are suggestive, I do not think that the wording

itself should be considered as a compelling reason suffcient

to deprive the effect of the statutory provision in respect of

actions conducted under “non-regular” procedure.

The learned President’s Counsel then attempted to

advance the argument that the proceedings in question did

not fall within the defnition of an action, thereby attempting

to take away the specifc application of section 393 as well as

the pervasive application of the Civil Procedure Code referred

to previously.

The learned President’s Counsel noted that the term

“cause of action” is one which is foreign to the Companies Act,

and that its inclusion in section 393 prevents the application

of the said section in this instance.

The learned President’s Counsel defned the term “cause

of action” broadly as a wrong which may result in an action

without referring to the defnition given to the same in sec-

tion 5 of the Civil Procedure Code. Thereafter he sought to

limit the ambit of that defnition with the use of section 7. It

was his submission that since the procedure set out in the

Companies Act did not fall into either regular or summary

procedure, that this “application” would not constitute an

action.

I fnd little merit in this submission. Section 5 defnes a

cause of actions as

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*“cause of action” is the wrong for the prevention or redress*

*of which an action may be brought, and includes the denial*

*of a right, the refusal to fulfll an obligation, the neglect to*

*perform a duty and the infiction of an affrmative injury”*

The same section defnes an action as

*“action” is a proceeding for the prevention or redress of a*

*wrong*

Section 6 of the Civil Procedure Code states as to what

constitutes an action

*Every application to a court for relief or remedy obtainable*

*through the exercise of the court’s power or authority, or*

*otherwise to invite its interference, constitutes an action*

Therefore simply put a cause of action is a wrong, for

which a relief or redress is obtainable through the exercise of

the courts power or authority. The words used in section 5

are inclusive so as to capture varied circumstances in to the

fold of a cause of action.

I am frmly of the view that the broad and inclusive

defnition given to the term cause of action in section 5

as well as in innumerable cases should not be limited as

suggested by the learned President’s Counsel. The wording in

section 7 cannot restrict section 6 and the meaning attached

to the term cause of action. Clearly, the tail cannot be seen

to wag the dog.

Therefore in conclusion, I am of the opinion that the

circumstances of this case attract the provisions of the Civil

Procedure Code, and specifcally section 393.

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I now turn to the application of section 393 of the Civil

Procedure Code to the circumstances of this case.

Section 393 in its entirety is as follows.

*If there be more plaintiffs or defendants than one and*

*any of them dies, and if the right to sue on the cause of*

*action survives to the surviving plaintiff of plaintiffs alone,*

*or against the surviving defendant or defendants alone,*

*the court shall, on application in the way of summary*

*procedure, make an order to the effect that the action do*

*proceed at the instance of the surviving plaintiff of plain-*

*tiffs, or against the surviving defendant or defendants*

It appears that section 393 introduces two requirements

to be fulflled before court can issue an order for the action to

proceed. Namely,

(a) the right to sue on the cause of action must survive

to the surviving plaintiff or plaintiffs alone

(b) an application must be made by way of summary

procedure

The Appellant contends that in the instant case nei-

ther of the requirements have been fulflled. The learned

President’s Counsel for the Appellant drew our attention to

section 373 which requires every application by summary

procedure to be made upon a duly stamped petition.

It is common ground that no such written application

was made. The language of section 373 makes it clear that

the requirement is one which is imperative.

I shall frst consider as to whether the right to sue on the

cause of action survives to the plaintiffs.

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The learned President’s Counsel for the Appellant took

great pains to demonstrate that section 393 had no applica-

tion to the instant case and that the right to sue survived the

death of the 3rd Respondent, to his heirs and therefore the

Respondents should have substituted such heirs in place of

the 3rd Respondent.

The Action of the 1st to 3rd Respondents have been

instituted in terms of section 224 read with section 226 of the

Companies Act No 7 of 2007. The petition fled by the respon-

dents before the Commercial High Court states that they are

jointly entitled to make the said application. The Appellants

refer to certain other paragraphs which also lend credence to

the assertion that the application was joint in nature.

The Appellant also draws our attention to the reliefs

sought, specifcally to prayers (D) and (E) which seek an

order seeking the purchase of the collective shares of the

petitioners etc.

I am inclined, in considering the said observations made

by the learned President’s Counsel for the Appellant, to agree

with him that the Respondents instituted this action as a

joint action.

The learned President’s Counsel for the Appellant also

sought to demonstrate that the action found in section 224 of

the Companies Act No 7 of 2007 is inherently joint in nature

and that it was not a personal action in nature.

Section 224 is as follows.

*Subject to the provisions of section 226, any shareholder or*

*shareholders of a company who has a complaint against*

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*the company that the affairs of such company are being*

*conducted in a manner oppressive to any shareholder or*

*shareholders (including the shareholder or shareholders*

*with such complaint) may make an application to court, for*

*an order under the provisions of this section.*

The language of the section clearly suggests that the

right to institute this action is attached to the shareholding.

Where a shareholder is of the view that the affairs of the com-

pany are conducted in a manner oppressive to him or other

shareholders, he may make a complaint.

When such a single complainant dies, a question arises

as to whether the right to sue survives and devolves on his/

her heirs. Clearly the shares will devolve on the heirs. Any

prospective rights attached to the shares must devolve on the

heirs as well.

In such circumstances I am of the opinion that the right

to sue does not survive to the heirs on the basis that the

action requires a shareholder to form an opinion that the af-

fairs are conducted in a manner oppressive to shareholders.

With the demise of the complainant, his complaint loses

sanctity. Clearly it is available to the heir or any other share-

holder to make a fresh complaint. But as far as the original

complaint is concerned, it ceases to be of effect with the death

of the complainant.

What then is the application of the above principle to a

joint complaint? Does it necessarily follow that the surviving

complainants may continue with their action so long as they

continue to hold the threshold shareholding requirement?

The learned President’s Counsel for the Appellant sub-

mitted that section 393 has no application in the instant case

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on the basis that the cause of action does not survive to the

1st and 2nd Respondents **alone.**

The word “alone” in section 393 has been judicially inter-

preted in the case of

**Duhilanomal and Others v. Mahakanda Housing Co.**

**ltd.**(1)

*“Alone”, in the context of section 393 of the Civil Procedure*

*Code, means in my view that the survivors are liable to*

*be sued independently without any others being, joined;*

*“alone”does not mean “none else other than the survivor”.*

A similar view has been taken in India in *Gajanand vs*

*Sarharmal* (2), where the Indian Civil Procedure rules have the

identical provisions to our section 393. It was held in that

case that,

*“The test whether a right to sue survives in the surviving*

*plaintiffs or against the surviving defendants is whether the*

*surviving plaintiffs can alone sue or the surviving defendants*

*could alone be sued in the absence of the deceased plaintiff or*

*defendant respectively.”*

On the strength of the aforesaid authorities prima facie

it appears that the surviving complaints could continue the

action if each of them satisfy the shareholding threshold.

But the learned President’s Counsel for the Appellant

contends further that in any event it is section 394 that the

instant circumstances attract and not section 393.

Section 394 is as follows.

*If there are more plaintiffs than one, and any of them dies,*

*and if the right to sue does not survive to the surviving*

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*plaintiff or plaintiffs alone, but survives to him or*

*them and the legal representative of the deceased*

*plaintiff jointly, the court may cause the legal representative,*

*if any, of the of deceased plaintiff to be made a party, and*

*shall thereupon cause an entry to that effect to be made on*

*the record and proceed with the action.*

If the right to sue survives to the heirs as submitted

by the Appellant, this application would hinge on a single

issue. I.e. whether the right to sue survives to the remaining

complainants and the legal representatives of the deceased

complainant ***jointly***?

The word “jointly” needs careful interpretation. Clearly it

is used in section 394 in a sense directly opposite to the word

“alone” found earlier in the same section and in section 393.

It is also relevant to note that section 393 precedes

section 394, and that the circumstances envisaged in the

said sections are necessarily mutually exclusive. This asser-

tion is given added credence by the use of the words “does

not” found in section 394.

Therefore I am of the view that section 394 attracts

circumstances where the right to sue survives to the heirs,

and where the surviving plaintiffs fail the test laid down in

*Gajanand vs Sardarmal, (supra)* making future prosecution

to be made jointly a necessity.

For reasons already stated, in the instant case, I am not

of the view that a joint prosecution of the case by the remain-

ing complainants and the heirs is necessary.

Therefore I hold that the facts of the case attract section

393 of the Civil Procedure Code and that a cause of action

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survived to the plaintiffs “alone”. But the plaintiffs failed to

satisfy the second requirement of making an application by

way of summary procedure and therefore the plaintiffs are

prevented fatally from proceeding any further.

In the circumstances, we direct the learned High Court

Judge of the Commercial High Court to terminate the

proceedings in these two cases pending before him with an

order for appropriate costs.

**AMArAtungA J.**- I agree.

**MArsOOf J.**- I agree.

*High Court Judge of the Commercial High Court directed to*

*terminate the proceedings in both cases pending before him*

*with an order for appropriate costs*

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**ROSHAN vS. THE ATTORNEY GENERAL**

COURT OF APPEAL

ROHINI MARASINGHE.J

SARATH DE ABREW.J

CA 120/2004

HC GAMPAHA 46/2004

MARCH 2, 17, 2009

JULY 9, 17, 2009

***Penal Code- Section 300, Section 383 - Identifcation - Delay in hold-***

***ing - Unlawful detention in Police custody? - Evidence Ordinance***

***Section 27, Section 54, Section 114(d) - Dock statement - Evalua-***

***tion - Can a conviction be sustained under a section which does not***

***create an offence - Best Evidence Rule - Constitution Article 13 (3)***

The accused-appellant was indicted under Section 300, Section 383,

Penal Code - after trial without a jury was convicted on both grounds.

In appeal it was contended that there was an improper constitution of

the Identifcation Parade and long delay in holding the parade, that the

Doctor who attended on the injuries of the complainant was not called

that, the conviction cannot be sustained under a section which does

not create an offence and that there was improper evaluation of the

dock statement and the improper admission of inadmissible evidence

with regard to bad character.

**Held:**

(1) The parade has been held belatedly 50 days after the event. Court

has failed to consider the impact on the unreasonable delay on the

ability of the complainant to make a genuine identifcation. The

accused had not been afforded an opportunity to be represented

by Counsel at the parade and the parade has been improperly and

unfairly constituted.