

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] 2 SRI L.R. - PART 1**

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**SIRIwARDANA v. SENEvIRATNE AND 4 OTHERS**

Supreme Court

Dr. Shirani a. BanDaranayake, J.,

Sripavan, J. anD

SureSh ChanDra, J.

S.C. (F.r.) appliCation no. 589/2009

July 22nD, 2010

auguSt 26th 2010

***Constitution – Fundamental Rights – Article 12 (1) – All persons***

***are equal before the law and are entitled to the equal protection***

***of the law – Concept of legitimate expectation***

the petitioner complained that the 1st and 2nd respondents had delayed

her appointment as a Social Welfare Superintendent and thereby had

violated her fundamental rights guaranteed in terms of article 12 (1)

of the Constitution. the petitioner contended that she had a legitimate

expectation that she would be appointed to the next available vacancy

based on the result of the examination held on 23.06.2007. the

petitioner submitted that she believed that the said appointment was

delayed or not flled due to the representations that were made by the

Trade Union of the Social Services Offcers of the Western Province, to

the 1st respondent.

**Held**

(1) a careful consideration of the doctrine of legitimate expectation

shows that whether an expectation is legitimate or not is a

question of fact. this had to be decided not only on the basis of

the application made by the aggrieved party before Court, but also

taking into consideration whether there had been any arbitrary

exercise of power by the administrative authority in question.

(2) the concept of equal protection referred to in article 12(1) of the

Constitution embodies a guarantee against arbitrariness and

unreasonableness. the concept of legitimate expectation would

embrace the principle that in the interest of good administration it

is necessary for the relevant authority to act fairly.

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(3) a mere hope or an expectation cannot be treated as having a legiti-

mate expectation.

per Dr. Shirani a. Bandaranayake, C.J.

“the interpretation suggested by the learned Counsel for the

petitioner, that the petitioner had a legitimate expectation that

she would be appointed for the next available vacancy, since

she was placed 3rd in the order of merit at the examination can-

not be accepted, as such an interpretation to paragraph 3 of the

Gazette Notifcation of 08.12.2000(A) would give rise to uncertainty in

flling future vacancies. Moreover, that would create an unreason-

able and irrational procedure in flling up future vacancies as that

would prevent persons, who would be eligible to apply for the said

positions”.

**Cases referred to:**

(1) *Schmidt v. Secretary of State for Home Affairs* – (1969) 1 all er

904

(2) *Breen v. Amalgamated Engineering Union* – (1971) 1 all er 1148

(3) *Re Westminister City Council* – (1986) aC 668

(4) *Attorney – General of Hong Kong v. Ng Tuen Shiu* – (1983) 2 all er

346

(5) *Council of Civil Service Unions v. Minister for the Civil Service* – (1984)

3 all er 935

(6) *Union of India v. Hindustan Development Corporation –* (1933) 3

SCC 499

(7) *Attorney General for New South Wales v. Quinn* – (1990) 64 australian

lJr 327

**AppliCAtion** complaining of infringement of fundamental rights

guaranteed under article 12 (1) of the Constitution.

*A.H.H. Perera* for petitioner

*Nerin Pulle, SSC,* for 1st to 3rd and 5th respondents

*Cur.adv.vult*

march 10th 2011

**Dr. SHirAni A. BAnDArAnAyAke, J.**

the petitioner was a matron at the Seth Sevana State

elders home at mirigama and had commenced her duties on

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SC *(Dr. Shirani A. Bandaranayake, J.)* 3

15.10.1996. Consequent to a notice published in the govern-

ment gazette of 08.12.2006 by the Secretary to the provincial

public Service Commission of the Western province (a), the

petitioner had sat for the examination pertaining to the

recruitment of Social Welfare Superintendent of the Depart-

ment of Social Services of the Western province. according

to the petitioner she was placed 3rd in order of merit at that

examination. however as there had been only two vacancies

to be flled on the basis of the said examination, viz., at the

Bellantara Specialized Children’s home and the gangodawila

house of Detention, she could not be appointed as a Social

Welfare Superintendent. nevertheless, the petitioner had a

legitimate expectation founded on the basis of paragraph 3 of

the Gazette Notifcation dated 08.12.2006 (A), that she would

be appointed to the next available vacancy.

on 12.12.2008, the Social Welfare Superintendent of the

Department of Social Services of the Western province, who

was the administrator and the Supervisor of the State elder

home at mirigama had retired and a vacancy of the said posi-

tion had arisen since that date. the petitioner submitted that

the offcer, who retired had availed himself of his leave prior

to retirement in September 2008 and acting arrangements

were made to attend to the duties of that offcer. Accordingly

the petitioner stated that she was requested to attend to the

relevant duties for two (2) days each week.

the petitioner also submitted that she was directed

to appear before the 3rd respondent on 22.06.2009 with

documents inclusive of a certifcate from the Head of the

Department. accordingly, the petitioner had appeared before a

Committee, where the 3rd respondent was the Chairman and

later the 4th respondent had told her that the said Committee

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had summoned her to scrutinize her qualifcations to recom-

mend her for an appointment as a Social Welfare Superin-

tendent.

the petitioner also submitted that she verily believed

that the said appointment was not flled due to the repre-

sentations that were made by the registered trade union of

the Social Services Offcers of the Western Province, to the 1st

respondent. She had alleged that the 1st respondent is of the

view that there is merit in the representations made by the

trade union against her.

accordingly, the petitioner complained that the 1st and

2nd respondents had delayed her appointment and thereby

had violated her fundamental rights guaranteed in terms

of article 12(1) of the Constitution for which this Court had

granted leave to proceed.

the petitioner’s complaint is based on paragraph 3

of the Gazette Notifcation dated 08.12.2006 (A). The said

paragraph 3 is as follows:

“03. number of vacancies existing –

(1) Bellantara Specialized Children’s home – 01

(2) gangodawila house of Detention – 01

although the number of vacancies calculated at present is

as indicated above, the said number of vacancies is likely

to be more or less depending on exigencies of the service

at the time of recruitment. the decision of the Western

provincial public Service Commission with regard to the

number of vacancies that would be flled will be fnal and

conclusive.”

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learned Counsel for the petitioner contended that he

relies on the phrase that ‘although the number of vacancies

calculated at present is as indicated above, the said number

of vacancies is likely to be more or less depending on the

exigencies of the service at the time of recruitment’ and there-

fore that the petitioner had a legitimate expectation that she

would be recruited for the next vacancy in December 2008

based on the results of the examination held on 23.06.2007.

it is to be noted that in paragraph 3 of the said gazette

Notifcation of 08.12.2006 (A), reference was made only for

two vacancies that existed at the time of the said Notifcation.

it was further stated that the number of vacancies could be

more or less depending on exigencies of the service, however

at the time of recruitment.

it is not disputed that the closing date for applications

was 26.01.2007 and the recruitments were made on the

basis of the examination held on 23.06.2007 to fll up the

two vacancies that had existed. it is also not disputed that

at the time of the publication of the Gazette Notifcation in

December 2006 and at the time of the examination, there had

been only two vacancies to be flled in the positions of Social

Welfare Superintendents of the Western provincial Depart-

ment of Social Services.

As stated earlier, paragraph 3 of the Gazette Notifcation

of 08.12.2006 clearly had stated that the number of vacan-

cies would be more or less depending on exigencies of the

service **‘at the time of recruitment’**. a plain reading of the

said paragraph 3 therefore clearly indicates that the number

of vacancies should be advertised or fnally decided at least

by the date of recruitment. on the date of recruitment, the

respondents had flled only two (2) vacancies that had been

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advertised and there is no material to indicate as to whether

there had been any other vacancies at that time. in the

circumstances, along with the flling of the said two (2)

vacancies, the purpose of the holding of the relevant exami-

nation on 23.06.2007 became fulflled and the results of that

examination thereafter cannot be used for flling any other

vacancies of the post of Social Welfare Superintendents.

the contention of the learned Counsel for the petitioner

was that in view of paragraph 3 of the Gazette Notifcation of

08.12.2006 (a), the petitioner had a legitimate expectation

that she would be appointed as a Social Welfare Superinten-

dent and therefore the petitioner should be appointed to the

existing vacancy at the Seth Sevane State elders home at

mirigama.

the term, now known as legitimate expectation,

was frst used by Lord Denning, in *Schmidt v. Secretary*

*of State for Home Affairs*(1). the Court, referring to a

decision of the government to reduce the period already

allowed to an alien to enter and stay in england, had held

that the person had a legitimate expectation to stay in

england that cannot be violated without following a reason-

able procedure. this was immediately followed in *Breen v.*

*Amalgamated Engineering Union*(2).

Discussing the concept of legitimate expectation,

David Foulkes (administrative law, 7th edition, Butter-

worths, 1990, pg. 272) had expressed the view that a promise

or an undertaking could give rise to a legitimate expectation.

explaining his view, Foulkes had stated thus:

“the right to a hearing, or to be consulted, or generally

to put one’s case may also arise out of the action of the

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authority itself. this action may take one of two, or both

forms; a *promise* (or a statement or undertaking) or a

regular *procedure.* **Both the promise and the procedure**

**are capable of giving rise to what is called a legitimate**

**expectation, that is, an expectation of the kind which**

**the Court will enforce”** (emphasis added).

the concept of legitimate expectation was considered

and discussed in *Re Westminster City Council*(3), where lord

Bridge had introduced the concept in the following words:

“the Courts have developed a relatively novel doctrine in

public law that a duty of consultation may arise from a

legitimate expectation of consultation aroused either by a

promise or by an established practice of consultation.”

the observations of *David Foulkes (supra)* in the

applicability of the concept of legitimate expectation was

clearly illustrated by the decision in *Attorney General of Hong*

*Kong v. Ng Tuen Shiu*(4) and *Council of Civil Service Unions v.*

*Minister for the Civil Service*(5).

in *Ng tuen Shiu (supra)* the decision that he had a

legitimate expectation was based on a promise given by the

government whereas in *Council of Civil Service Unions (su-*

*pra)* the decision was based on the legitimate expectation

that arose out of a regular practice. in the circumstances a

mere hope or an expectation cannot be treated as having a

legitimate expectation.

the meaning and scope of the doctrine of legitimate

expectation was considered at length in *Union of lndia v*

*Hindustan Development Corporation*(6) where it was clearly

stated that:

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“time is a three-fold present: the present as we experience

it, the past as a present memory and future as a present

expectation. For legal purpose, the expectation cannot be

the same as anticipation. it is different from a wish, a

desire or a hope nor can it amount to a claim or demand

on the ground of a right. however earnest and sincere a

wish, a desire or a hope may be and however confdently

one may look to them to be fulflled, they by themselves

cannot amount to an assertable expectation and a mere

disappointment does not attract legal consequences. a

pious hope cannot amount to a legitimate expectation.

the legitimacy of an expectation can be inferred only

if it is founded on the sanction of law or custom or an

established procedure followed in a natural and regular

sequence. again it is distinguishable from a mere expec-

tation. Such expectation should be justifable legitimate

and protectable. every such legitimate expectation does

not by itself fructify into a right and, therefore, it does not

amount to a right in a conventional sense.”

a careful consideration of the doctrine of legitimate

expectation, clearly shows that, whether an expectation is

legitimate or not is a question of fact. this has to be decided

not only on the basis of the application made by the

aggrieved party before Court, but also taking into consideration

whether there had been any arbitrary exercise of power by

the administrative authority in question.

accordingly, the question that would have to be looked

into would be as to whether there was a promise given to the

petitioner or a regular procedure that future vacancies would

be flled on the basis of a previously held examination on

which there had been selections made on the results of the

said examination.

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as stated earlier, a plain reading of the words in

paragraph 3 of the Gazette Notifcation clearly shows that

the number of vacancies would depend on the exigencies of

the service at the time of recruitment. When the examination

was held on 23.06.2007, in terms of the Gazette Notifcation,

there had been only two (2) vacancies. the petitioner had not

disputed this position. admittedly, those two (2) vacancies had

been flled in terms of the Gazette Notifcation of 08.12.2006

(a) and the subsequent examination held on 23.06.2007. the

impugned vacancy had arisen in December 2008 and as had

been shown, by that time, the vacancies which had arisen

in December 2006 had been flled by the respondents. It is

not disputed that at the time the vacancies were advertised

by way of the Gazette Notifcation dated 08.12.2006 (A), and

thereafter when the examination was held on 23.06.2007,

there was no vacancy for the post of Social Welfare Superin-

tendent at the State elders home at mirigama. By the gazette

Notifcation (A), steps were taken to fll up the two (2) existing

vacancies, which were clearly stipulated in the said gazette

Notifcation. In the event, if there were to be other vacancies

that should have been taken into consideration in flling up

on the basis of the examination that was held on 23.06.2007,

they should have been vacancies that would have arisen **‘on**

**exigencies of the service at the time of recruitment’**.

accordingly, beyond the point of recruitment, the results of

that examination cannot be considered for any other appoint-

ment. the interpretation suggested by the learned Counsel

for the petitioner, that the petitioner had a legitimate expec-

tation that she would be appointed for the next available

vacancy, since she was placed 3rd in the order of merit at the

examination cannot be accepted, as such an interpretation to

paragraph 3 of the Gazette Notifcation of 08.12.2006 (A)

would give rise to uncertainty in flling future vacancies.

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moreover, that would create an unreasonable and irratio-

nal procedure in flling up future vacancies as that would

prevent persons, who would be eligible to apply for the said

positions.

the applicability of the doctrine of legitimate expectation,

which imposes in essence a duty to act fairly, was described

vividly by Brennan, J., in *Attorney General for New South*

*Wales v. Quinn* (7) in the following terms:

“The Court must stop short of compelling fulfllment of

the promise or practice unless the statute so requires or

the statute permits the repository of the power to bind

itself as to the manner of the future exercise of the power.

**it follows that the notion of legitimate expectation**

**is not the key which unlocks the treasury of natural**

**justice and it ought not unlock the gate which shuts**

**the Court out of review on the merits”** (emphasis

added).

the reasons stated above, clearly indicate that the

petitioner’s claim that since she was placed 3rd in order of

merit at the examination, that she had a legitimate expec-

tation that she would be appointed at the next vacancy for

Social Welfare Superintendent cannot be accepted. the

petitioner’s allegation that her fundamental rights guaran-

teed in terms of article 12(1) of the Constitution had been

violated was on the basis of the aforesaid legitimate expec-

tation. article 12(1) of the Constitution, which refers to the

right to equality reads as follows:

“all persons are equal before the law and are entitled to

the equal protection of the law.”

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SC *(Dr. Shirani A. Bandaranayake, J.)* 11

the concept of equal protection referred to in article

12(1) of the Constitution embodies a guarantee against

arbitrariness and unreasonableness. the doctrine of legiti-

mate expectation had developed in the context of reasonable-

ness and in the light of the decision in *Attorney General of*

*Hong Kong v. Ng Tuen Shiu (supra)* the concept of legitimate

expectation would embrace the principle that in the interest

of good administration it is necessary for the relevant

authority to act fairly.

Considering all the aforementioned facts and circum-

stances, it is clear that the decision of the respondents

cannot be categorized as arbitrary and unlawful which had

violated the petitioner’s fundamental rights guaranteed in

terms of article 12(1) of the Constitution.

For the reasons aforesaid, i hold that the petitioner has

not been successful in establishing that her fundamental

right guaranteed in terms of article12(1) of the Constitution

had been infringed by the respondents. this application is

accordingly dismissed. i make no order as to costs.

**SripAvAn, J.** – i agree.

**SureSH CHAnDrA J.** – i agree.

*Application dismissed.*

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**MARTIN AND ANOTHER vS. ASSISTANT COMMISSIONER OF**

**AGRARIAN SERvICES AND 2 OTHERS**

Court oF appeal

SiSira De aBreW, J.

gooneratne, J.

Ca (phC) 42/99

hC hamBantota 93/97

auguSt 29, 31, 2010

***Agrarian Services Act – Section 26 – Writ of Mandamus – Could***

***it be issued against the Assistant Commissioner of Agrarian***

***Services ordering him to issue a certifcate under Section 26?***

the 1st respondent made an application to the assistant Commissioner

of Agrarian Services to issue a certifcate under Section 26. This was

refused. the high Court issued a Writ of mandamus on the assistant

Commissioner of agrarian Services directing him to issue a Section 26

certifcate. On appeal.

**Held:**

a Writ of mandamus can only issue against a natural person who

holds public offce. Relief can only be obtained against a natural person

and high Court could not have issued a Writ of mandamus directing

the asst. Commissioner of agrarian Services to issue a Section 26

certifcate.

**AppeAl** from an order of the high Court of hambantota.

**Cases referred to:-**

*1. Haniffa vs. Chairman, Urban Council, Nawalapitiya –* 66 nlr 48

*2. P.B.D. Dayarathne vs. Dr. Rajitha Senaratne –* Ca 1790/2003 –

Cam 2004

*Daya Guruge* for respondent–appellant

*Sarath Weerakoon* for 1st respondent

*Yuresha de Silve S.C.* for 2nd and 3rd respondent.

*Martin and Another vs. Assistant Commissioner of Agrarian Services and 2 others*

CA *(Sisira de Abrew J.)* 13

november 04th 2010

**SiSirA De ABrew J.**

the 1st respondent in this case made an application to

the 2nd respondent to issue a certifcate under Section 26

of the agrarian Services act against the two appellants as

they have, as ande cultivators of the 1st respondent’s paddy

feld, failed to give their praveniya (due share) to him (the 1st

respondent). the 3rd respondent, appointed by the 2nd

respondent, took up the position that as the appellants have

ceased to be the ande cultivators in 1973, the 1st respondent

was not entitled to get a certifcate under Section 26 of the

agrarian Services act. the 2nd respondent, therefore, refused

to issue the said certifcate. The 1st respondent challenged the

said decision of the 2nd respondent in the high Court by way

of a writ application. the learned high Court Judge (hCJ),

by his judgment dated 23.2.99, set aside the said decision of

the 2nd respondent and directed to issue a certifcate under

Section 26 of the agrarian Services act. Being aggrieved by the

said judgment the appellants have appealed to this court.

it is undisputed that the appellants were the ande

cultivators of the 1st respondent’s paddy feld during the

period commencing from yala season in 1982 to maha

season in 1991/1992. The inquiring offcer Agrarian

Services, on 30.3.93, has decided that the appellants should

give praveniya to the 1st respondent for the said period. the

application by the 1st respondent to the 2nd respondent under

Section 26 of the agrarian Services act was in respect of the

said period. therefore it is incorrect to decide that the appel-

lants were not entitled to give praveniya on the basis that they

ceased to be the tenant cultivators. one should not forget the

fact that they were the tenant cultivators during the relevant

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period. therefore the decision of the learned high Court Judge

on the facts appears to be correct. But the learned counsel for

the appellant took up a legal objection before us and contend-

ed that the writ issued against the 2nd and the 3rd respondents

could not have been issued as they were not natural persons.

i now advert to this contention. the 2nd and the 3rd respon-

dents are assistant Commissioner of agrarian Services and

the Inquiring Offcer Agrarian Services. They are not natural

persons. in *Haniffa vs. Chairman Urban Council Nawalapitiya* (1)

thambiah J held: “ a mandamus can only issue against a

natural person who holds a public offce. Accordingly in an

application for a writ of mandamus against the Chairman of

an urban Council, the petitioner must name the individual

person against whom the writ can be issued.”

in *P.B.D. Dayarathne vs. Dr. Rajitha Senarathne*(2) mar-

soof J observed: “Firstly this being an application for manda-

mus, relief can only be obtained against natural person who

holds a public offce as was decided by the Supreme Court in

haniffa vs. Chairman, urban Council nawalapitiya.”

applying the principles laid down in the above judicial

decisions, i hold that the learned high Court Judge could

not have issued a writ of mandamus directing the 2nd respon-

dent to issue a certifcate under Section 26 of the Agrarian

Services act. i therefore hold that the learned high Court

Judge was in error when he, by his judgment dated 23.2.99,

issued a writ of mandamus against the 2nd respondent. For

these reasons i set aside the judgment of the learned high

Court Judge dated 23.2.99 and allow the appeal.

**Anil GoonerAtne J**. – i agree.

*Appeal allowed.*

*Dias vs. Commissioner General of Inland Revenue*

CA 15

**DIAS vS. COMMISSIONER GENERAL OF INLAND REvENUE**

Court oF appeal

eriC BaSnayake, J.

ChitraSiri, J.

Ca 764/2000 (rev)

DC ColomBo 68552/tax

July 28, 2008

July 24, 2009

***Inland Revenue Act 38 of 2000 – Section 146, Section 149 (1),***

***Section 166, Section 166(1) – Income Tax Ordinance – Section 62 –***

***Similarities? Inland Revenue Act 4 of 1963 – Defaulter a Company -***

***Is a Director or Principal Offcer of a limited liability Company***

***liable to pay taxes due from Company from his personal assets***

***– Jurisdiction? Vicarious liability – Exceptional circumstances –***

***Applicability of the amendment 12 of 2004***

The Deputy Commissioner of Inland Revenue fled a certifcate of tax in

default in the name of the petitioner claiming a certain sum of money.

the tax defaulter is the Company and the petitioner was sued on the

basis of vicarious liability. the trial Court held that in terms of Section

166 (1) an action could be instituted against the managing Director to

recover tax defaulted by the Company.

it was contended that, the petitioner cannot be a defaulter since he has

not been duly assessed. it is the Company that was duly assessed and

that there is no provision under the act to recover taxes in default from

the managing Director of a Company - who is only a representative of

the Company – in his personal name.

**Held:**

(1) imposition of vicarious liability under a statute is not lightly to be

presumed and such liability must necessarily be imposed on clear

and unambiguous language.

(2) There is no provision in the Act which makes the principal offcer

liable for tax due from the Company – he is not liable to pay from

his personal assets.

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per eric Basnayake, J.

“provision has now been made by Section 144(B) of the inland

revenue (amendment act) 12 of 2004 – making the directors and

principal offcers liable to pay income tax payable by Companies –

this provision could not affect the present case.”

per eric Basnayake, J.

“liability was imposed on the petitioner without having authority

to do so. it could be considered as constituting an exceptional

ground for the Court to exercise extra-ordinary jurisdiction.”

**AppliCAtion** in revision from an order of the District Court of

Colombo.

**Cases referred to:-**

1. *M.E. de Silva vs. The Commissioner of Income Tax -* 53 nlr 280.

2. *Rajan Philip vs. Commissioner of Inland Revenue -* Ca 1174/81 –

DC 15676/tax vol iv tax Cases pg. 211.

3. *Hamza vs. Commissioner of Inland Revenue –* 1991 – vol iv tax

Cases at 301

*A.S.K. Senarath Aratchi* for respondent – petitioner

*Anusha Samaranayake SSC* for plaintiff-respondent.

october 15th 2009

**eriC BASnAyAke J.**

The Deputy Commissioner of Inland Revenue fled a

Certifcate of Tax in Default (P1) in the District Court of

Colombo, under section 149 (1) of the inland revenue act

no. 38 of 2000 (the act) in the name of the respondent –

petitioner (petitioner), claiming a sum of rs. 4,442,500/-. the

address of the petitioner is given as managing Director,

multisacks pvt. Co. no. 222, galle road, gorakana, panadura.

The certifcate P1 refers to File No. 114133159 for the year

2002/2003.

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it is common ground that the tax defaulter is the

company and the petitioner is sued on the basis of vicarious

liability. the learned additional District Judge by his order

dated 20.4.2006 held that in terms of section 166 (1) of the

act, an action could be instituted against the managing

Director to recover tax defaulted by the company. Section 166

of the act makes the secretary, manager, director or other

principal offcer liable to do all such acts as required to be

done by the act. the section further makes them liable for

any offences committed by the company. Section166 reads

as follows:-

**1. the secretary, manager, director or other principal**

**offcer of every company or body of persons**

**corporate or unincorporated shall be liable to do**

**all such acts, matters, or thing as required to be**

**done under the provisions of this Act by such**

**company or body of persons.**

**provided that any person to whom a notice has**

**been given under the provisions of this Act on**

**behalf of a company or body of persons shall be**

**deemed to be the principal offcer thereof unless**

**he proves that he has no connection with that**

**company or body of persons or that some other**

**person resident in Sri lanka as the principal**

**offcer thereof.**

**2. when an offence under this Act is committed**

**by a company or body of persons, corporate or**

**unincorporate, every person who at the time of**

**the commission of that offence was the secretary,**

**manager, director or other principal offcer of that**

**company or body of persons shall be deemed to be**

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**guilty of that offence unless he proves that the**

**offence was committed without his knowledge**

**and that he exercised all such diligence to**

**prevent the commission of that offence as he**

**ought to have exercised having regard to the**

**nature of his functions in such capacity and to all**

**the other circumstances.**

the submission on behalf of the petitioner

it was submitted that the petitioner cannot be a

defaulter since he has not been duly assessed. it is multiSaCkS

pvt. Company that was duly assessed. there is no provision

under the act to recover taxes in default from the managing

Director of a company in his personal capacity. he is only a

representative of the company.

Submission made on behalf of the plaintiff

the learned Senior State Counsel appearing for the

plaintiff-respondent (plaintiff) concedes in the written sub-

mission fled that the defaulter is the company, namely,

multiSaCkS pvt. Company. She submitted that in impos-

ing a fne on the defaulter it is the assets of the company and

not the principal offcer which becomes liable.

Could a Director be sued for the defaults of payments of tax

by a company.

The certifcate is fled under section 149(1) of the Act.

this section empowers the Commissioner-general to issue

a certifcate to a Magistrate or District Judge. The certifcate

contains particulars such as the name of the defaulter

and the amount defaulted. On receipt of the certifcate, the

magistrate or the District Judge is empowered to summon

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the defaulter to show cause, why further proceedings should

not be taken against him. Failure to sow cause would make

the amount (tax in default) a fne imposed by the Magis-

trate. thereupon subsection (1) of section 291 of the Code of

Criminal procedure act no. 15 of 1979 (except paragraph (a),

(b) and (i)) relating to default of payment of fnes shall apply.

Section 291 (1)(f) gives a scale according to which a term of

imprisonment not exceeding six months could be imposed

where the amount of fne exceeds one hundred rupees. In the

event of allowing time to show cause or time for payment, the

court may require bail to be granted (section 149 (5)).

Such being the consequences of default, the question

that has to be posed is whether a certifcate could be fled

against the petitioner, being the managing Director, against

payments due from the company. the learned Judge had

answered this question in the affrmative on the strength

of section 166 (1). the learned Judge made the managing

Director liable on vicarious liability. Does section166

constitute vicarious liability?

gratian J in *M. E. de Silva vs. The Commissioner of*

*Income Tax*(1) held that the provisions of section 62 of the

income tax ordinance (Cap 188) (similar to section 166(1) of

Act 38 of 2000) do not make the principal offcer of a company

chargeable out of his personal assets with tax levies on the

companies assessable income. Section 62 is as follows:-

**62: The secretary, manager or other principal offcer**

**of every company or body of persons corporate or**

**incorporate shall be answerable for doing all such**

**acts, matters or things as required to be done**

**under the provisions of this ordinance by such**

**company or body of persons: provided that any**

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**person to whom a notice has been given under**

**the provisions of this ordinance on behalf of a**

**company or body of persons shall be deemed to be**

**the principal offcer thereof unless he proves that**

**he has no connection with the company or body**

**of persons or that some other person resident in**

**Ceylon is the principal offcer thereof.**

gratian J held that “the imposition of vicarious liability

under a statute is not lightly to be presumed, and such liability

must necessarily be imposed on clear and unambiguous

language.” g.p.S. De Silva J (later Chief Justice) in *Rajan*

*Philip vs. Commissioner of Inland Revenue*(2) held that

proceedings in terms of section 111(1) of the inland revenue

act no. 4 of 1963 (similar to section 149 (1) of act 38 of 2000)

are available only against a defaulter, a person who has been

assessed to tax and had defaulted in the payment of such

tax. this is a condition precedent to the institution of pro-

ceedings for the recovery of tax. a court has no jurisdiction

to proceed against the principal offcer under section 111

of the act (at 213). (also *Hamza vs Commissioner of Inland*

*Revenue*(3) at 301.

there is no provision in the act, which makes the

principal offcer liable for the tax due from the company. Thus

the petitioner, as director or the principal offcer of a limited

liability company, is not liable to pay of his personal assets,

the tax liability of the company *(G.S.P. De Silva J in Rajan*

*Philips (supra)* at 214. his lordship arrived at this conclusion

having considered section 90 (1) of act no. 4 of 1963 which

is similar to section 62 of the income tax ordinance (Cap

188) and 166 (1) of act no. 38 of 2000. the facts relating

to the case under consideration is similar. therefore i am

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of the view that at the time of institution the court had no

jurisdiction to entertain this action. hence the learned Judge

had erred in making the order dated 20.4.2006.

*Provision has now been made by section 144B of the*

*Inland Revenue (Amendment Act) No. 12 of 2004 making*

*the directors and principal offcers liable to pay income tax*

*payable by companies. However this provision would not*

*affect the present case.*

Does revision lie?

I have already held that the plaintiff could not have fled

this certifcate in the year 2005 against the petitioner to

recover unpaid taxes of a company. the reason for that is

that the court did not have jurisdiction to entertain such

certifcate. Liability was imposed on the petitioner without

having authority to do so. it could be considered as constitut-

ing an exceptional ground for the court to exercise extraor-

dinary jurisdiction. thus by exercising revisionary jurisdic-

tion the order dated 20.4.2006 is set aside. the application is

allowed. under the circumstances of this case i make no

order with regard to costs.

**CHitrASiri, J.** – i agree.

*Application allowed.*

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**KARUNARATNE vS. SIMON SINGHO AND OTHERS**

Court oF appeal

Sathya hettige pC.J (p/Ca)

gooneratne, J.

Ca 424/2009 (tr)

DC kalutara 5722/l

July 24, 2009

marCh 5, 2010

***Judicature Act – Section 46 – Section 47 – Section 47 (1) (b) – Transfer***

***of case – Question of jurisdiction and prescription – Are they***

***questions of law of unusual diffculty?***

the petitioner sought to transfer the instant case from the District

Court of kalutara to the District Court of horana – and contended that

the petitioner made a Justus error in fling the case in the District Court

of kalutara, and if the transfer to the District Court of horana is not

allowed, then the action gets prescribed and irreparable loss and

damage would be caused to the petitioner.

the respondents contended that, the case should be dismissed on

the ground of jurisdiction and he should have recourse to Section 47

and contends that question of jurisdiction and prescription are not

questions of law of unusual diffculties an in Section 47 (1) (b) of the

Judicature act.

**Held:**

(1) When instituting action ‘jurisdiction’ and prescription’ play a vital

role and those are matters to be checked, verifed and rechecked at

the beginning even prior to fling action. Prescription and jurisdic-

tion are very fundamental principles of law and basic to our legal

system.

(2) the Civil procedure Code gives the procedure and method to be

adopted in case where the land in question does not fall within the

jurisdiction of the original Court’s jurisdiction.

if the party concerned cannot move Court under Section 47 he

would no doubt be subject to the consequences that fow.

(3) the circumstances pleaded are trivial in nature and unacceptable

to bring the case within Section 46 of the Judicature act.

*Karunaratne vs. Simon Singho and others*

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**AppliCAtion** to transfer case from the District Court of kalutara to

the District Court of horana.

**Cases referred to:-**

1. *R.C. Kurukulasuriya vs. S.M.H. Shahul* 1986 Calr 564

2. *Daya Wettasinghe vs. Mala Ranawaka* 1989 Sri l.r. 86

3. *Abdul Hasheeb vs. Mendis Perera and Others* 1991 Sri l.r. 244

4. *Lewis Tissera vs. Cotin* – 77 C.l.W. 11

5. *Chinnadurai vs. Rajasuriya* – 32 nlr 86

6. *Werthelis vs Daniel Appuhamy*

*Dhamasiri Karuanaratne* for petitioner.

*S. Mandaleshwaran* for respondent.

July 29th 2010

**Anil GoonerAtne, J.**

this is an application in terms of Section 46 of the

Judicature act, to transfer a District Court, kalutara case to

the District Court of horana. petitioner pleads that the action

is a possessory action in respect of a land called ‘Weliketaya

owita’ in the village of panagoda. it is stated that part of village

panagoda fall within the jurisdiction of horana and the

other part comes within the kalutara D.C. in the Written

Submissions fled the following special circumstances are

urged:

(a) if this transfer to D.C.. horana is not allowed by this

court, then the action gets prescribed and irreparable

loss and great injustice would cause to the

petitioner.

(b) if the said action gets prescribed the petitioner looses

all her legal rights to the land which is described in

the schedule to p7 in this case.

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(c) the respondents are trying their best to get l/5722

dismissed due to the enormous profts to them by

freely capturing a valuable land and they will be

unduly enriched. After that they will reap the benefts

forever from their act of thuggery and it may be an

encouragement to capturing lands in the future by

violent means.

(d) the police could not take action against the violence

of the respondents and as the last resort the

petitioner has sought the relief from the courts.

(e) a part of this land is used by a large number of

farmers in that area as a threshing ground (lu;)

during the paddy harvesting season with the consent

of the petitioner. the respondents violent act has

deprived them and they were badly affected in the

last season and now a public unrest exists due to the

illegal capturing of this land by the respondents. a

copy of the police complaint made by the Secretary of

the “Farmers association” of the area in this regard is

marked “x1” and attached in support of this.

(f) the petitioner has explained the circumstances that

compelled her to fle the case in Kalutara DC in

paragraphs 5.1 to 5.8 of the petition.

(i) the respondents in the paragraph 9 of their

objections admit that the relevant land is situated

at yatawara junction, yatawara, kalutara. that

itself shows that one may reasonably think that

jurisdiction is kalutara.

(ii) the land is situated in the village of panagoda a

part of which comes under the jurisdiction of D.C.

horana and the other part comes under kalutara

D.C.

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CA *(Anil Gooneratne, J.)* 25

(iii) the petitioner and his registered attorney has

exercised due care, diligence and caution to fle

the case in the correct jurisdiction and appar-

ently made a Justus error which is an excusable

error.

the respondents take up the position that the District

Court, kalutara case need to be dismissed on the ground of

jurisdiction and that the petitioner should have recourse to

Section 47 of the Civil procedure Code. respondents argue

that the question of Jurisdiction and prescription are not

questions of law of unusual diffculties as in Section 47(1) (b)

of the Judicature act.

it is evident that the petitioner runs the risk of getting

his case dismissed on the ground that the land in question

falls within the jurisdiction of the District Court of horana.

the question is whether the petitioner is entitled to apply to

the Court of appeal under Section 46 of the Judicature act

or whether in the frst instance itself whether the Petitioner

should have had recourse to Section 47 of the Civil procedure

Code. (plaint presented to wrong Court). the Civil procedure

Code gives the procedure and method to be adopted in case

where the land in question does not fall within the jurisdic-

tion of the original Court’s Jurisdiction.

the petitioner rejects the position of the respondent that

one must have recourse to Section 47 of the case. petitioner

draws the attention of this court to the following authorities

where under Section 46 of the Judicature act cases were

transferred.

Court considers the convenience of parties and witnesses.

‘expedient” *R.C. Kurakulasuriya vs. S.M.H. Shahul*(1) and

expedient would mean advisable in the *Interest of Justice*

*Daya Wettasinghe vs. Mala Ranawaka*(2); court to give

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maximum effect to the language used in the Section *Abdul*

*Hasheeb vs. Mendis Perera and Others* (3).

this court needs to consider the circumstances that

compelled the Petitioner of fle action in the District Court of

kalutara. in paragraph 5 of the petition with sub paragraphs

1- 8, several grounds are suggested. having examined those

paragraphs in paragraph 5 of the petition it appears that the

Petitioner is merely trying to fnd excuses or cure a defect

which should have been considered at the very outset or on

instituting of action. it is no excuse to urge that land adjoin-

ing to the land in question or the police area and the post

Offce which serves summons fall within the Judicial Division

of kalutara. nor can the petitioner plead that the respondent

was a party in Case no. 30/03 in kalutara Courts where there

was no objection to jurisdiction or that the land is closer to

kalutara or that the courts staff gave an assurance regarding

jurisdiction of Courts. it is also no excuse to state that the

relevant gazette could not be traced. I fnd that all the above

circumstances are trivial in nature and unacceptable to bring

the case within Section 46 of the Judicature act.

I fnd it diffcult to agree with the Petitioner that

‘jurisdiction’ and ‘prescription’ would cause some question of

unusual diffculty or that such legal principles cause some

questions of law or unusual diffculties are likely to arise,

when applying the facts of the case in hand. Document p6

defne the area, and jurisdiction of Court. There is no ambi-

guity as regards same. ‘prescription’ and jurisdiction are very

fundamental principles of law and basic to our legal system.

When instituting action ‘jurisdiction’ and ‘prescription’

play a vital role and those are matters to be checked, verifed

and rechecked at the beginning even prior to fling action. If

the party concerned cannot move court under Section 47 of

the Civil procedure Code, he would no doubt be subject to the

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CA *(Gooneratne, J.)* 27

consequences that fow. I had the beneft of reading the case

of *Lewis Tissera vs. Cotin*(4). even from earlier times courts

have taken a strict view on basic principles of jurisdiction.

the other old decided case is *Chinnadurai vs. Rajasuriya*(5)

Where an action was dismissed on the ground that the

Court had no jurisdiction and an application was made

to the Supreme Court in appeal that the plaint should be

returned to the plaintiff to be fled in the proper Court.

held, that the Supreme Court would not entertain the

application at that stage of the action.

Semble, the order, which is made upon a plead to juris-

diction made and upheld by the Court, is almost invari-

ably an order dismissing the action. . . . .

at 87 –

Counsel for the appellant, however, applied to us to

make an order returning the plaint in order that it

may be fled in the proper Court. He referred to the

provisions of section 47 of the Civil procedure Code,

and in support of his application, he invited our

attention to the case of *Werthelis v. Daniel Appuhamy*(6)*.*

that certainly is an instance where this Court in

appeal made an order directing the plaint in that case

which was found to be instituted in the wrong Court

to be returned to the plaintiff in order that he might

fle it in the Court which had jurisdiction. Wendt J., in

making that order, said that he felt justifed in doing

so by reason of certain indian cases which were cited

to him. an examination of these decisions shows that

they are based upon what is said to have been the

inveterate practice in those Courts. here, however,

the practice has always been the other way. With

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one or two isolated instances, such as the case to

which i have referred, the order which is made upon

a plea to jurisdiction tried and upheld by the Court is

almost invariably an order dismissing the action. it is

unnecessary, however, for the purpose of the disposal

of the application now before us to hold that it is

not competent for this court to make such an order.

ordinarily there can be no advantage to the plaintiff

in a plaint being returned except that he might

possibly beneft by being relieved of the obligation

to affx fresh stamps to the paper upon which it is

written. the real reason for the present application

is that the claim is now out of time and it is hoped

that by this means an avenue of escape will be found.

But there is a decision of this Court to the effect that

a plaint returned under the provisions of section 47

and thereafter feld in the Court which has juris-

diction must be taken to date from the date of the

presentation to that other Court. i am not disposed

in a case in which the issue has been properly raised

and fully tried and then fnally determined here in

appeal to make such an order even if i had the power

to do so for the sole purpose of enabling the plaintiff

to renew a litigation upon a state claim.

in the above circumstances having considered all the

facts and circumstances presented to this court by either

party i am compelled to reject and refuse the application of

the petitioner to transfer the case.

application dismissed without costs.

**HettiGe J. pC J. (p/CA)** – i agree.

*Application dismissed.*