

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 10**

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CA 253

**THOMAS vS. SAMARAkOON**

Court of AppeAl

Abdus sAlAm, J.

CA 1162/2003 (f)

dC AmpArA m/1459

JAnuAry 10, 2006

**Civil Procedure Code – Section 88 (2) – Dismissal on day fxed**

**for ex-parte hearing - Counsel held up in another Court –**

**Plaintiff absent – Application to set aside order – Plaintiff not cross**

**examined? – Judicial discretion?**

The case was fxed for ex-parte hearing. On the said day instructing

attorney submitted a letter to Court from the Counsel and moved for a

postponement of the ex-parte trial, on the ground that the Counsel was

held up in Badulla/Passara Magistrate’s Court. The plaintiff was also

absent. The trial Judge dismissed the plaintiff’s action.

The plaintiff moved to have the order of dismissal vacated. The explana-

tion offered by the plaintiff was that as his car was not roadworthy and

the Counsel was faced with the diffculties in making himself available

at the District Court of Ampara, as he had to appear in a specially fxed

case in which he was opposed to a Counsel travelling from Colombo.

The plaintiff was not cross examined.

The District Judge refused the application. On appeal,

**Held:**

(1) The District Judge should have taken into consideration the fact

that the plaintiff has to travel from Colombo to Ampara and that

his Counsel has had an engagement in some other Court.

(2) The District Judge has failed to appreciate that the registered

attorney-at-law has appeared for the plaintiff in deference to

Court, and endeavoured to discharge her duties by her client by

moving for a postponement which the trial Judge should have

considered favourably as the discretion vested in him demanded

such a course.

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(3) When the matter of the application of the plaintiff came up for

hearing, the plaintiff has not been subjected to cross-examina-

tion.

**AppeAl** from the judgment of the District Court of Ampara.

*Wijaya Niranjan Perera* for plaintiff-appellant.

*W. Dayaratne* for defendant-respondent.

June 26st 2007

**AbDul SAlAm, J.**

The plaintiff-appellant (hereinafter referred to as ‘the

plaintiff’) has preferred this appeal in terms of Section

88(2) of the Civil Procedure Code. The appeal, arises on the

dismissal of the plaintiff’s action by the learned District judge

on the day it was fxed for *ex-parte* hearing.

The plaintiff sued the defendant *inter alia* for damages

in a sum of Rs. 411.000/-. The case record bears out that

at least on ten occasions summons had been issued on the

defendant to effect personal service but without success,

as the defendant was living abroad. However, immediately

upon the return of the defendant from abroad, summons was

issued by way of substituted service, returnable on 3.3.2003.

After service of summons by way of substituted service,

as the defendant failed to respond, as required by law, the

matter was fxed for *ex-parte* hearing against him for

21.7.2003.

On 21.7.2003 when the matter was taken up for *ex-parte*

hearing, the plaintiff was absent while Mrs. Kamini

Ratnayake the registered Attorney-at-Law of the plaintiff was

present. On that day she submitted a letter to court from

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the instructed Attorney and moved for a postponement of the

exparte trial, on the ground that the counsel was held up

in Badulla/Passara Magistrate’s Court. The learned District

Judge without making any order on the application, kept the

case down to be mentioned later in the course of the day. The

case was called once again at 12.10 on the same day and

on the grounds that the plaintiff was absent and not ready

for trial, the learned District Judge dismissed the plaintiff’s

action.

Thereafter, on behalf of the plaintiff an application was

made as evident from journal entry dated 18.9.2003, to have

the order of dismissal vacated on the ground that the plaintiff

had reasonable grounds to be absent from Court on the day

the matter was fxed for *ex-parte* hearing. According to the

explanation offered by the plaintiff, he was absent on that day

as his motor car was not road worthy and his counsel was

faced with the diffculty in making himself available at the

district court of Ampara, as he had to appear in a specially

fxed case, in which he was opposed to a counsel travelling

from Colombo.

The learned District Judge refused the application of the

plaintiff to set aside the order of dismissal and to have the

case restored to the trial roll on the grounds that,

(1) the plaintiff has not made the application for restoration

of the case within a reasonable period of time and

(2) that he has failed to make out a case that warranted the

order of dismissal vacated.

Before venturing to consider the merits of the plaintiff’s

appeal, in passing, I feel obliged to state that the plaintiff

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would not have been compelled to resort to the luxury of

having to invoke the appellate jurisdiction of this Court,

against the order of the learned District Judge, had the dis-

cretion vested in the Court was rightly considered in favour

of the plaintiff, when application was made for postponement

on the frst day, it was fxed for *ex-parte* hearing. The learned

District Judge should have taken into consideration the fact

that the plaintiff had to travel from Colombo to Ampara and

that his Counsel has had an engagement in some other Court.

Even if the Counsel was available on that day, yet it would

not have been possible to take up the exparte trial as the

plaintiff was absent. The learned District Judge has failed to

appreciate that the registered attorney at law has appeared

for the plaintiff in deference to Court. She has also endea-

voured to discharge her duties by her client by moving for

postponement, which the learned trial Judge should have

considered favourably, as the discretion vested in him

demanded such a course.

As regard the application made by the plaintiff, the

learned District Judge has emphasized that the delay of 48

days in the presentation of the application by the plaintiff

under Section 88(2) is an obstacle in the way of the plaintiff

to have the order of dismissal set aside.

In terms of Section 87(3) of the Code, the plaintiff is

entitled to apply to have the dismissal set aside within a

reasonable period of time. When the matter of the applica-

tion of the plaintiff, came up for hearing, the plaintiff had

not been subjected to any cross-examination. According to

the proceedings maintained by the learned District Judge,

the matter of the application has come up for support on

18.9.2003 and the learned Counsel of the plaintiff has made

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submissions on the uncontradicted position taken up by the

plaintiff. The affdavit of the plaintiff discloses that he is a

businessman and had gone abroad immediately after the

dismissal of the action and that he has taken steps to have

the order of dismissal vacated, immediately after his return.

The learned counsel who appeared at the *ex-parte* hearing

had informed Court of his diffculty to appear as his services

had been sought in a case where he was opposed to a

Counsel travelling from Colombo.

Taking into consideration the matters urged in the

petition and affdavit of the plaintiff, the learned District Judge

should not have dismissed the application on the grounds

attributed by him in his order dated 20.10.2003, which is

appealed against.

In the circumstances, it is my considered view that justice

could effectively be meted out, only by setting aside the order

of the learned District Judge dated 20.10.2003 and substi-

tuting it with the fnding that the plaintiff has had reasonable

grounds for his default of appearance on that day. Hence,

the order of the learned District Judge dated 20.10.2003 is

set aside on the uncontradicted affdavit of the plaintiff. The

learned trial Judge is directed to restore the case to the trial

roll.

The trial Court will give priority to this matter and

conclude the *exparte* hearing without undue delay and then if

need arises notify the defendant of its decision, to enable the

defendant to purge his default, upon his electing to do so.

*Appeal allowed.*

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**WIJERATNE (COMMISSIONER OF MOTOR TRAFFIC) v. vEN.**

**DR. PARAGODA WIMALAWANSA THERO AND 4 OTHERS**

supreme Court

AmArAtungA, J.,

SRIPAvAn, J. AnD

CHAnDRA EKAnAyAKE, J.

s.C. AppeAl no. 84/2007

C.A. APPLICATIOn nO. 1978/2004

July 29t , 2009

**Constitution – Article 9 – Duty of the State to protect and foster**

**buddha Sasana – buddhist Temporalities (Amendment) Act, No. 42**

**of 1981 Section 5, Section 41 – Commissioner of buddhist Affairs**

**– Powers, functions, rights and obligations – Application for a Writ**

**of Certiorari – Who are Necessary parties - buddhist Affairs**

The Petitioner, a Buddhist priest made an application to the Commis-

sioner of Motor Traffc for a driving license in his name and in the capac-

ity of a Bhikku. The Commissioner of Motor Traffc, whilst expressing

the view that according to the Motor Traffc Act there is no impediment

for a Bhikku to obtain a driving license, inquired from the Secretary to

the Ministry of Buddha Sasana whether he has any objection to issu-

ing a driving license to the Petitioner as the Petitioner is a Bhikku. The

Commissioner of Motor Traffc also addressed a communication in this

respect to the Commissioner of Buddhist Affairs. The Commissioner of

Buddhist Affairs informed the Commissioner of Motor Traffc that it

had been decided by the Samastha Lanka Sasanarakshaka Mandalaya

that it would be inappropriate to issue driving licenses to Bhikkus. Ac-

cordingly, the Commissioner of Motor Traffc informed the Petitioner

that it is not possible to issue a driving license to the Petitioner.

The Petitioner thereafter fled an application in the Court of Appeal

seeking a writ of Certiorari to quash the decision of the Commissioner

of Motor Traffc not to issue a driving license to the Petitioner.

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SC *Thero and 4 others (Gamini Amaratunga J.)* 259

The Court of Appeal by its order dated 20.7.2007 decided to hear the

Petitioner’s application on its merits. Against this order, the Commis-

sioner of Motor Traffc sought Special Leave to Appeal from the Supreme

Court and the Supreme Court granted Special Leave to Appeal.

**Held:**

(1) The frst rule regarding the necessary parties to an application for

a Writ of Certiorari is that the person or authority whose decision

or exercise of power is sought to be quashed should be made a

Respondent to the application.

(i) If it is a body of persons whose decision or exercise of power

is sought to be quashed, each of the persons constituting

such body who took part in taking the impugned decision

or the exercise of power should be made a Respondent. The

failure to make such person or persons as Respondents to

the application is fatal and provided in itself a ground for the

dismissal of the application *in limine.*

(ii) If the act sought to be impugned had been done by one party,

who has power granted by law to give such direction, the

party who had given the directions is also a necessary party

and the failure to make such party a Respondent is fatal to

the validity of the application.

(2) The next rule is that those who would be affected by the outcome

of the Writ application should be made Respondents to the appli-

cation.

(3) A necessary party to an application for a Writ of Mandamus is the

offcer or the authority who has the power vested by law to perform

the act or the duty sought to be enforced by the Writ of Manda-

mus. All persons who would be affected by the issue of Mandamus

also shall be made Respondents to the application.

(4) The Commissioner of Buddhist Affairs has no statutory powers or

duties under the Motor Traffc Act with regard to issuing of driving

licenses.

Per Gamini Amaratunga, J. –

“The offcial designation Commissioner of Buddhist Affairs does not

make the holder of that offce the repository of all powers relating

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to Buddhism, Buddha Sasana or Buddhist Affaits in Sri Lanka or

with regard to the conduct of the Maha Sanga. The Commissioner

of Buddhist Affairs has only those powers conferred on him by

statute and nothing more.”

(5) Article 9 of the Constitution sets out the policy of the Republic

of Sri Lanka relating to Buddhism. It cannot be used to argue

that this Article confers undefned powers on the Commissioner

of Buddhist Affairs in respect of Buddhism, Buddha Sasana and

Maha Sanga in the Republic of Sri Lanka.

Article 9 of the Constitution is not relevant in deciding, as a matter

of law, whether the Commissioner of Buddhist Affairs is a neces-

sary party to the legal validity of the Petitioner’s Writ application.

(6) The Commissioner of Motor Traffc cannot invoke Article 9 of

the Constitution to contend that the Commissioner of Buddhist

Affairs is a competent authority in relation to all Buddhist affairs

in addition to the specifc powers conferred on him by Statute.

Per Gamini Amaratunga, J.

“I adopt and quote with respectful agreement what H.n.G. Fernan-

do, C.J. (in *Attorney General vs. Kodeswaran*(9) has quoted from

U.S. decision *Burton vs. United States* (10), to the effect that “it is

not the habit of the Court to decide questions of a constitutional

nature unless absolutely necessary to a decision of a case.”

**Cases referred to:**

(1) *Jamila Umma v. Mohamed* – 50 nLR 15

(2) *Karunaratne v. Commissioner of Co-operative Development* – (1979)

2 nlr 193

(3) *British Ceylon Corporation v. Weerasekera* – (1982) 1 SLR 185

(4) *Mudiyanse v. Christie Silva, Government Agent, Hambantota* –

(1985) 2 Sri L.R. 52

(5) *Abeydeera v. Dr. Stanley Wijesundara and another* – (1983) 2 Sri

l.r. 267

(6) *Farook v. Siriwardene* – (1997) 1 Sri L.R. 145

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(7) *Cardron v. Government Agent, Western Province* – 46 nLR 237

(8) *Gunathilaka v. Government Agent, Galle* – 47 nLR 549

(9) *Attorney General v. Kodeswaran* – 69 nLR 121

(10) *Burton v. United States* – 196 US Reports 296

**AppeAl** from the judgment of the Court of Appeal dated 20.7.2007.

*Janak de Silva,* Senior State Counsel for the Appellant

*Uditha Egalahewa f*or the Intervenient Respondent

*A.P. Niles* with *Champaka Ladduwahetti* and *Arosha Silva* for the Peti-

tioner – Respondent*.*

*Cur.adv.vult*

October 14st 2011

**GAmiNi AmArATuNGA J.**

This is an appeal with special leave to appeal granted

by this Court against the decision of the Court of Appeal

dated 20.07.2007 overruling the preliminary objection *in*

*limine* raised by the learned Senior State Counsel to the validity

of the application fled by the petitioner respondent seeking

writs of certiorari and mandamus against the appellant, the

Commissioner of Motor Traffc.

The facts relevant to the present appeal are briefy as

follows, The petitioner respondent (hereinafter called the

petitioner) is a bhikku, a Buddhist priest. He made an appli-

cation to the Commissioner of Motor Traffc (hereinafter called

the C.M.T) for a driving licence in his name and capacity of

a bhikku. It appears from document P5 fled in the Court of

Appeal by the petitioner, (a letter dated 24.05.2004 addressed

to the Secretary to the Ministry of Buddha Sasana by the

C.M.T) that the CMT whilst expressing the view that according

to the Motor Traffc Act there is no impediment for a bhikku

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to obtain a driving licence, has nevertheless inquired from

the said Secretary whether he has any objection to issuing a

driving licence to the petitioner as the petitioner is a bhikku.

It appears from the documents available in the record that

the petitioner has addressed several letters to the CMT and

to the Secretary to the Ministry of Transport explaining the

absence of any impediment for a bhikku to obtain a driving

licence. It also appears that the C.M.T has addressed a com-

munication in this respect to the Commissioner of Buddihst

Affairs.

The Commissioner of Buddhist Affairs by his letter dated

13.7.2004 has informed the C.M.T. that the petitioner’s letter

regarding his application for a driving licence has been

forwarded to the Samasthe Lanka Sasanarakshaka Mandala-

ya at its meeting on 06.07.2004 and that the said Mandalaya

has decided that it would not be appropriate to issue driving

licences to Bhikkus. Then the C.M.T. has addressed a letter

dated 27.07.2004 (marked and produced to the Court of

Appeal as P11) to the petitioner. In that letter it is stated

that he (the C.M.T.) had sought observation from the Com-

missioner of Buddhist Affairs regarding his (the petitioner’s)

request for a driving licence and that he (the C.M.T) has been

informed that it had been decided by Samastha Lanka Sasan-

arakshaka Mandalaya on 06.07.2004 that it would be inap-

propriate to issue driving licences to bhikkus, and as such it

is not possible to issue a driving licence to the petitioner.

Upon the receipt of this letter (P11) the petitioner fled

an application in the Court of Appeal seeking a writ of

certiorari to quash the decision of the C.M.T. not to issue a

driving licence to him, as set out in the letter dated 27.07.2004

marked P11 and a writ of mandamus directing the C.M.T to

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take steps according to law to issue a driving licence to him.

In the objections fled in the Court of Appeal on behalf of

the C.M.T a preliminary objection *in limine* has been taken to

the validity of the Petitioner’s application on the basis that a

necessary party, namely the Commissioner of Buddhist

Affairs has not been made a respondent to the petitioner’s

application. In the meantime, four persons have fled papers

in the Court of Appeal seeking permission to intervene in the

petitioner’s application. With regard to the application for

intervention there have been certain incidental proceedings

which fnally ended up in this Court, but for present purpose

it is suffcient to state that in view of the Order of the Court

of Appeal dated 22.05.2006 the question of intervention

remains to be considered after the ruling of the Court of

Appeal with regard to the objection on the failure to bring a

necessary party before Court by the petitioner.

After hearing the parties relating to the preliminary

objection, the Court of Appeal, by its order dated 20.07.2007

has rejected the preliminary objection and decided to hear

the petitioner’s application on its merits. Against the Order

of the Court of Appeal, the C.M.T has sought special leave

to appeal from this Court and after hearing both parties this

Court has granted special leave to appeal on the following

questions of law.

(a) Did the Court of Appeal err in law in failing to con-

sider the scope of Article 9 of the Constitution?

(b) Did the Court of Appeal err in law in failing to consider

that the statutory duties cast upon the petitioner un-

der the Motor Traffc Act is subject to the overriding

positive duty imposed upon the State, its Organs and

agents by Article 9 of the Constitution, namely that

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the Republic of Sri Lanka shall give to Buddhism the

foremost place and accordingly it shall be the duty of

the State to protect and foster the Buddha Sasana?

(c) Did the Court of Appeal err in law and/or fact in

concluding that the Commissioner of Buddhist Affairs

was not a necessary party to the application?

(d) Did the Court of Appeal err in law and in fact in

holding that the Commissioner of Buddhist Affairs

may seek permission of Court to be added as a inter-

venient party to the application having suffcient legal

interest in the matter under Article 9 of the Constitu-

tion while holding that the Commissioner of Buddhist

Affairs was not a necessary party to the application?

(e) Did the Court of Appeal err in law and in fact in

holding that there will be no breach of the rules of

natural justice in failing to hear the Commissioner of

Buddhist Affairs?

(f) Did the Court of Appeal err in law and/or in fact in

fxing the matter for argument on its merits when

the Court had by its order dated 22.05.2006, made

order that it will frst consider whether the Commis-

sioner of Buddhist Affairs is a necessary party in the

application for the respondent to proceed with it and

after deciding that question, the intervenients will

be permitted to make further submissions and an

appropriate order made thereafter?

At the hearing before us both learned Counsel for the

applicant and the petitioner and the learned Counsel for

the persons seeking intervention made their submissions in

addition to the written submissions fled by them.

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Before dealing with the questions of law on which leave to

appeal had been granted, it is pertinent to examine the func-

tions and the powers of the offcial known by the designation,

the Commissioner of Buddhist Affairs. The pleadings and

the written submissions fled on behalf of the C.M.T do not

refer at all to the provisions of law which set out the powers,

functions and the duties of the Commissioner of Buddhist

Affairs. The written submissions fled on behalf of the peti-

tioner states that the offce of the Commissioner of Buddhist

Affairs was created by the Buddhist Temporalities (Amend-

ment) Act no. 42 of 1981. Section 3 of the amending Act which

adds the defnition of the phrase “Commissioner of Buddhist

Affairs” to section 2 of the principal enactment merely states

that

*“Commissioner of Buddhist Affairs” means the person for*

*the time being holding the offce of the Commissioner of*

*Buddhist Affairs and includes any Deputy Commissioner”.*

We have not been referred by the parties to any provi-

sion of law which defnes the phrase “Buddhist Affairs. In the

absence of any such defnition, there is no legislative guidance

to ascertain the “Buddhist Affairs” over which he has lawful

powers, functions and obligations. In so far as the Buddhist

Temporalities Ordinance (Cap 318 C.L.E 1956 Revision) is

concerned, the amending Act no. 42 of 1981 in section 5(1)

provides that,

*“All rights, liabilities and obligations of the Public Trustee*

*and the Registrar General under the principal enactment*

*immediately prior to the date of commencement of this Act*

*shall be deemed to be the rights liabilities and obligations*

*of the Commissioner of Buddhist Affairs.”*

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Under the provisions of the Buddhist Temporalities

Ordinance, the Public Trustee had certain powers and

functions with regard to temple properties which came within

the purview of the said Ordinance and certain supervisory

powers over the trustees of temple properties. The Public

Trustee had certain powers and functions in respect of the

process of electing the Devalas. Under section 41 of the said

Ordinance, the Registrar General had the duty to maintain

the Register of Bhikkus. In view of the provisions of section

5 of Act no. 42 of 1981, all those rights, liabilities and

obligations of the Public Trustee under the principal enact-

ment are now deemed to be vested in the Commissioner of

Buddhist Affairs. We have not been referred by the parties

to any other law which confers powers and functions on the

Commissioner of Buddhist Affairs in addition to those

conferred on him by Act no. 42 of 1981.

The next matter to be considered is the role played by

the Commissioner of Buddhist Affairs in relation to the

petitioner’s application to the C.M.T. for a driving licence.

The role he has played in this affair becomes evident from

his letter dated 13.7.2004 addressed to the C.M.T. By that

letter the Commissioner of Buddhist Affairs communicated to

the C.M.T. the decision taken by the Samastha Lanka Sasa-

naarakshaka Mandalaya 0n 6.7.2004 that it would not be

proper to issue driving licences to bhikkus. That letter did not

contain any decision, recommendationor even an opinion of

the Commissioner of Buddhist Affairs regarding the propriety

of issuing driving licences to bhikkus. The C.M.T’s letter to

the petitioner (P11 dated 27.7.2004) clearly shows that the

C.M.T’s decision not to issue a driving licence to the petition-

ers had been based not on any decision or recommendation

given by the Commissioner of Buddhist Affairs but on the

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decision of the Samasthe Lanka Sasanakshaka Mandalaya

as communicated to the C.M.T. by the Commissioner of Bud-

dhist Affairs.

now I shall turn to the questions of law on which leave to

appeal had been granted. I shall frst deal with question no.

(c) as it directly puts in issue the correctness of the Court of

Appeal’s conclusion that the Commissioner of Buddhist Af-

fairs is not a necessary party to the petitioner’s application.

The frst rule regarding the necessary parties to an applica-

tion for a writ of certiorari is that the person or authority

whose decision or exercise of power is sought to be quashed

should be made a respondent to the application. If it is a body

of persons whose decision or exercise of power is sought to

be quashed each of the persons constituting such body who

took part in taking the impugned decision or the exercise of

power should be made respondent. The failure to make him

or them respondents to the application is fatal and provides

in itself a ground for the dismissal of the application *in limine.*

*Jamila Umma vs. Mohamed*,(1), *Karunaratna vs. the Commis-*

*sioner of Cooperative Development*(2); *British Ceylon Corpora-*

*tion vs Weerasekara*(3). If the act sought to be impugned had

been done by one party on a direction given by another party

who has power granted by law to give such direction, the

party who had given the direction is also a necessary party

and the failure to make such party a respondent is fatal to

the validity of the application. *Mudiyanse vs. Christie Silva,*

*Government Agent, Hambantota,*(4).

The second rule is that those who would be affected by

the outcome of the writ application should be made respon-

dents to the application, *Abeydeera vs. Dr. Stanley Wijesun-*

*dara and another* (5)*; Farook vs. Siriwardena*(6)*.*

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As set out earlier in this judgment, the Commissioner of

Buddhist Affairs has not made any decision or determina-

tion with regard to the petitioner’s application for a driving

licence. He has not made any recommendation or has not

expressed even an opinion with regard to the propriety of is-

suing a driving licence to a bhikku. The decision not to issue

a driving licence to the Petitioner was C.M.T’s own decision

based on the decision of the Samastha Lanka Sasanaraksha-

ka Mandalaya communicated to him by the Commissioner of

Buddhist Affairs. Having based his decision on the decision

of said Sasanarakshaka Mandalaya, what factual or legal

basis the C.M.T has to now contend that the Commissioner

of Buddhist Affairs is a necessary party to the application

fled to quash his decision not to issue a driving licence to the

petitioner? The C.M.T has also not demonstrated how the

Commissioner would be affected by the outcome of the

application for *certiorarai*.

A necessary party to an application for a writ of manda-

mus is the offcer or the authority who has the power vested

by law to perform the act or the duty sought to be enforced by

the writ of mandamus. All persons who would be affected by

the issue of mandamus also shall be made respondents to the

application. *Carron vs Government Agent, Western Province,* (7)*;*

*Goonetilleke Vs Government Agent, Galle,*(8)*; Abeydeera vs. Dr.*

*Stanley Wijesundara (supra)*.

The Commissioner of Buddhist Affairs has no statuto-

ry powers or duties under the Motor Traffc Act with regard

to issuing of driving licences. There is no material to indi-

cate how he would be affected by a writ of mandamus issued

to the C.M.T with regard to issuing a driving licence to the

*Wijeratne (Commissioner of Motor Traffc) v. Ven. Dr. Paragoda Wimalawansa*

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petitioner. It appears that the underlying theme of the C.M.T’s

argument that the Commissioner of Buddhist Affairs is a

necessary party to the petitioner’s application is based on the

mere fact that the designature “the Commissioner of Bud-

dhist Affairs” makes him a necessary party to an applica-

tion by a bhikku for a driving licence. The offcial designation

“Commissioner of Buddhist Affairs” does not make the holder

of that offce the repository of all powers relating to

Buddhism, Buddha Sasana or Buddhist Affairs in Sri Lanka

or with regard to the conduct of the Maha Sanga. The

Commissioner of Buddhist Affairs has only those powers

conferred on him by statute and nothing more. Much stress

had been laid on behalf of the C.M.T on Article 9 of the

Constitution which reads as follows.

“The Republic of Sri Lanka shall give to Buddhism the

foremost place and accordingly it shall be the duty of the

State to protect and foster the Buddha Sasana, while

assuring to all religions the rights granted by Article 10

and 14(1) (e).”

This Article sets out the policy of the Republic of Sri Lanka

relating to Buddhism. However this Article cannot be used to

argue that it confers undefned powers to the Commissioner

of Buddhist Affairs in respect of Buddhism, Buddha Sasana

and Maha Sanga in the Republic of Sri Lanka. The C.M.T has

not produced either to the Court of Appeal or to this Court an

affdavit from the Commissioner of Buddhist Affairs showing

that he has lawful powers and duties in respect of Buddhist

affairs other than those powers conferred on him by statute

and Rules made thereunder. The C.M.T cannot invoke Article

9 of the Constitution to contend that the Commissioner of

Buddhist Affairs is a competent authority in relation to all

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Buddhist affairs in addition to the specifc powers conferred

on him by statute.

For the foregoing reasons I hold that the Court of

Appeal was correct in fact and in law in holding that the

Commissioner of Buddhist Affairs is not a necessary party

to the petitioner’s writ application. I accordingly answer

question no. (c) in the negative and for the same reasons

answer question no. (e) also in the negative.

Questions of law (a) and (b) relate to the scope of

Article 9 of the Constitution and its impact on the stat-

utory power of the C.M.T to issue driving licences.

Article 9 is not relevant in deciding as a matter of law

whether the Commissioner of Buddhist Affairs is a

necessary party to the legal validity of the petitioner’s writ

application? The main matters to be decided in this appeal

are covered by the answers to questions (c) and (e). What

legal impact Article 9 of the Constitution has on the statutory

powers of the C.M.T under the Motor Traffc Act is a

question to be considered, if their Lordships of the Court of

Appeal are of the view that such consideration is necessary,

in dealing with the merits of the petitioner’s application and

the C.M.T’s substantive objections to it. Accordingly I hold

that it is not necessary to decide the questions of law (a) and

(b) for the present purpose. In this regard I adopt and quote

with respectful agreement what H.n.G Fernando CJ (in

*Attorney General vs. Kodeswaran*(9) at 138) has quoted

from the U.S. decision in *Burton vs. United States*(10), to the

effect that “it is not the habit of the Court to decide questions

of a constitutional nature unless absolutely necessary to a

decision of a case.”

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their Lordships of the Court of Appeal having decided

that the Commissioner of Buddhist Affairs is not a necessary

party to the application have stated that if the Commissioner

desires to be a party he may seek permission of Court to be

added as an intervenient party having suffcient legal interest

in the matter under Article 9 of the Constitution. Question

no. (d) had been framed on the basis whether this amounts

to an error of law. I answer this question in the negative for

the following reasons. When their Lordships held that the

Commissioner of Buddhist Affairs was not a necessary party

to the petitioner’s application what their Lordships meant

was that he was not a necessary party to the legal validity of

the petitioner’s application. However if the Commissioner of

Buddhist Affairs desires to be added as an intervenient party

having suffcient legal interest in the matter under Article 9 of

he Constitution, the opportunity has been left open for him to

seek intervention in the application. This manifests the Court

of Appeal’s readiness to give him a hearing if he satisfes Court

that he has a legal interest in the matter. The C.M.T instead

of complaining must be happy about this concession granted

to the Commissioner of Buddhist Affairs to come in not as a

necessary party but as a party having a legal interst in the

matter if he can satisfy the Court of Appeal of his legal inter-

est which up to now is not visible from the material available

to the Court of Appeal and this Court.

It is not necessary to answer question no. (f). It is open

to the persons seeking intervention to invite the attention

of the Court of Appeal to its Order dated 22.05.2006 and

move Court to hear them and decide their application for

intervention. If such an application is made the Court of

Appeal is hereby directed to hear and decide the matter relating

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to intervention before proceeding to hear the petitioner’s

application on the merits.

For all the reasons set out above the appeal is dismissed

and the Order of the Court of Appeal dated 20.07.2007 is

affrmed subject to the direction contained in the preceding

paragraph. I make no order for costs.

**SriPAvAN J. –** I agree.

**EkANAyAkE J.** – I agree.

*Appeal dismissed, the Order of the Court of Appeal dated*

*20.7.2007 affrmed*.

*City Properties (Pvt) Ltd. v. Edirisinghe*

SC 273

**CITY PROPERTIES (PvT) LTD. v. EDIRISINGHE**

supreme Court

TILAKAWARDAnA, J.

SRIPAvAn, J. AnD

IMAM, J.

S.v. (CHC) APPEAL nO. 34/2008

S.C.H.C.L.A 18/2008

COMMERCIAL HIGH COURT

CASE nO. HC (CIvLI) 47/2006 (01)

FEBRUARy 18TH, 2010

**Civil Procedure Code – Section 46(2) – Court may reject the plaint,**

**when the plaint having been returned for amendment within a time**

**fxed by the court is not amended within such time – Section 93 –**

**Wide discretion to Court to amend the pleadings**

The Plaintiff – Respondent based his action on an oral agreement which

he alleged to have been entered into with the Defendant – Petitioner.

When the matter was taken up for trial, the Petitioner objected to is-

sue no. 2 raised by the Respondent on the ground that the plaint did

not disclose either the date of the oral agreement or the identity of the

person with whom such agreement had been entered into. Thereupon

the learned High Court judge made the order marked ‘A6’ Wherein the

learned Judge rejected the proposed issue no. 2 as the date or the

approximate period during which the agreement was entered into or the

identity of the authorized representative of the Petitioner with whom

the oral agreement was entered into was not specifed with clarity in

the plaint.

The Respondent did not prefer an appeal against the said order, but

sought to amend his plaint. The Court allowed the amendment sought

by the Respondent. One of the requirement of ‘A6’ is the disclosure of

the name of the Petitioner’s purported representative with whom the

Respondent claims to have entered into an oral agreement. The Respon-

dent did not amend the plaint in accordance with the direction given

by Court.

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**Held:**

(1) A party who had failed to comply with the order made by Court,

cannot seek the protection of law thereafter on the same cause of

action. He has to face the consequence of non-compliance.

(2) The provisions contained in Section 93 of the Civil Procedure

Code grants a wide discretion to Court to amend the pleadings.

Its discretionary power must, however, be exercised subject to the

limitations set out in Section 46(2) of the Civil Procedure Code that

no amendment is to be made which has the effect of converting an

action of one character into an action of another or inconsistent

character.

(3) The Appellate Court would be hesitant to interfere with the exer-

cise of such a discretion by the trial Judge. This discretion could

be viewed from the perspective of the fexibility and the choice

granted to the trial Judge based upon a consideration of all factors

involved. This judicial discretion of the Court must be exercised so

as to do justice in a case that is being tried with the ascertainment,

declaration and enforcement of the rights and liabilities of the

parties as they exist or are deemed to exist at the time the proceed-

ings were instituted.

(4) It is the duty of the Court to consider the issues already raised and

to allow any fresh issues to be formulated based on the clarifca-

tion sought by Court only if such a course appears to Court to be

in the best interest of justice.

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

exercising Civil Jurisdiction.

*Harsha Amarasekera* with *Kanchana Pieris* for Defendant – Petitioner

*Kuvera de Soysa* for Plaintiff-Respondnet.

*Cur.ade. vult.*

June 2nd 2011

**SriPAvAN, J.**

The Plaintiff-Respondent (hereinafter referred to as the

Respondent) instituted an action in the District Court and

against the Defendant-Petitioner (hereinafter referred to as

*City Properties (Pvt) Ltd. v. Edirisinghe*

*(Sripavan, J.)* 275

the Petitioner) seeking to recover a sum of Rs. 12 Million as

Commission/brokerage fees due to the Respondent in respect

of a sale of a particular property. Upon an objection being

raised by the Petitioner to the jurisdiction of the Court, the

case was transferred to the High Court of the Western Prov-

ince exercising civil jurisdiction. The Petitioner fled answer

and took up the position that the Respondent did not act as

a broker and as such was not entitled to recover any monies

from the Petitioner.

It is noted that the Respondent based his action on an

oral agreement which he alleged to have been entered into

with the Petitioner. When the matter was taken up for trial

on 14-05-07, the Petitioner objected to issue no. 2 raised by

the Respondent on the ground that the plaint did not disclose

either the date of the oral agreement nor did it disclose the

identity of the person with whom such agreement had been

entered into. The Learned High Court Judge thereupon made

the following Order marked A6 (translated into English).

*“The Petitioner has objected to the Respondent’s issue No.*

*2 on the basis that the Respondent has no right to raise*

*such issue as he has not specifed the date on which the*

*oral agreement referred to in Paragraphs 4 and 5 of the*

*plaint was entered into. Further, the Respondent has not*

*disclosed the identity of the person of the Petitioner Com-*

*pany with whom the oral agreement was said to have*

*been entered .. …*

*Having considered the submissions, I feel it is necessary*

*to specify the date or the approximate period during which*

*the agreement was entered into. The Civil Procedure Code*

*requires the Respondent to annex a copy of the written*

*agreement to the p*laint where the cause of action arises

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*out of a written agreement. If this is not done, the Peti-*

*tioner would not have suffcient opportunity to prepare his*

*defence or establish his rights.*

*As the Petitioner is a Company, it is also necessary to*

*specify with clarity the identity of the authorized repre-*

*sentative of the petitioner with whom the oral agreement*

*was entered into.*

*Since this has not been disclosed, I reject the proposed*

*issue No. 2.*

*I grant a date to the Respondent to consider this and take*

*steps”*

The respondent did not prefer an appeal against this

Order marked A6. However, he sought to amend his plaint.

Though the Petitioner, objected to the said amendment, it

was allowed by Court after an inquiry. neither the funda-

mental character of the suit nor its nature and scope was

permitted by the amendment. Accordingly, the Respondent

fled a motion dated 21-06-07 and chose to fle an amended

plaint. The Petitioner fled amended plaint. The Petitioner

fled amended answer in response to the amended plaint and

both parties thereafter fled their amended issues. The matter

came up in Court on 13-05-2008 for consideration of issues

and trial.

The Learned Counsel for the Petitioner objected to Issue

no. 04 of the Respondent on the following basis:

(a) the name of the representative of the Petitioner Company

with whom the proposed agreement was said to have

been entered into had not been specifed in the amended

plaint,

*City Properties (Pvt) Ltd. v. Edirisinghe*

*(Sripavan, J.)* 277

(b) the said Issue must be rejected in view of the previ-

ous order marked “A6”, and for the same reasons set out

therein,

(c) the issue was not based on the pleadings contained in

the plaint, and

(d) that the issue was vague.

The Learned High Court Judge again made an order

marked A16, stating that it was the duty of the Court to frame

issues and directed the Respondent to disclose the name of

the employee with whom the Respondent entered into an oral

agreement. The Petitioner sought leave to appeal against the

said Order marked A16 and leave was granted by this Court

on 4th July 2008.

It is observed that the Respondent was given an oppor-

tunity to consider the steps he wished to take in respect of

the Order marked A6. Without appealing against the Order

marked A6, the Respondent sought to amend his plaint. Thus,

when the Respondent sought an amendment of the plaint, he

was duty bound to fle an amended plaint in terms of the Or-

der marked “A6”. It is of utmost importance to comply with

the directions given by Court in order to ensure that admin-

istration of justice in a particular case or matter be protected

in the interests of the society.

One of the requirement of A5 is the disclosure of the

name of the Petitioner’s purported representative with whom

the Respondent claims to have entered into an oral agree-

ment. The failure to disclose the name in the amended plaint

amounts to a failure to comply with the Order of Court marked

A6. A party who has failed to comply with the Order made by

Court, cannot seek the protection of law thereafter on the

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same cause of action. He has to face the consequences of

such non-compliance. Thus, when the Respondent decided

to amend the plaint and was not amended in accordance with

the order made by Court, I am of the view that the Court was

entitled to make an appropriate order for not complying with

its order.

It is signifcant to note that at the time of fling the

amended plaint, the Court did not exercise its discretion un-

der Section 46(2)(J) of the Civil Procedure Code to refuse to

entertain the same for not complying with its order , The pro-

vision contained in Section 93 of the Civil procedure Code

grants a wide discretion to Court to amend the pleadings. Its

discretionary power must, however, be exercised subject to

the limitations set out in Section 46(2) of the said Code that

no amendment is to be made which has the effect of con-

verting an action of one character into an action of another

or inconsistent character. A case must be tried upon the is-

sues on which a right decision could de arrived at, raising the

real question between the parties. The functions of pleadings

enable the Court to clarify the issues so that the real issues

between the parties may be tried at the trial.

The impugned order marked A16, directed the Respon-

dent to disclose the date and the name of the employee with

whom he entered into an oral agreement. The effect of the

clarifcation sought by Court was merely to fnd out the real

dispute between the correct parties which would facilitate the

task of administering justice and will not cause any injustice

to the petitioner. The appellate court would be hesitant to

interfere with the exercise of such a discretion by the trial

Judge. This discretion could be viewed from the perspective of

the fexibility and the choice granted to the trial judge based

*City Properties (Pvt) Ltd. v. Edirisinghe*

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upon a consideration of all factors involved. This judicial

discretion of the Court must be exercised so as to do justice in

a case that is being tried with the ascertainment, declaration

and enforcement of the rights and liabilities of the parties as

they exist or are deemed to exist at the time the proceedings

were instituted.

It must however, be emphasized that it is a prime duty of

the court to consider the issues already raised and to allow

any fresh issues to be formulated based on the clarifcation

sought by Court only if such a course appears to Court to be

in the best interest of justice.

For the foregoing reasons, I hold that the appeal fails.

Having regard to the facts and circumstances, I make no

order as to costs. The Registrar is directed to forward the

Case record to the High Court forthwith so that trial could be

proceeded with as expeditiously as possible.

**TilAkAWArDENA J.** - I agree

**imAm J.** - I agree

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**DON TILAkARATNE vS**

**INDRA PRIYADARSHANIE MANDAWALA**

supreme Court

SHIRAnEE TILAKAWARDAnE, J.

mArsoof, J. And

SRIPAvAn, J.

s.C. AppeAl no. 74/2007

S.C. (SPECIAL) L.A. nO. 102/2007

H.C. PAnADURA APP. nO. 23/05

M.C. HORAnA nO. 21978

deCember 18TH, 2008

**maintenance Act No. 37 of 1999 - Section 2(3) - A parent having**

**means neglects or refuses to maintain his or her adult offspring**

**- Section 2(5) - Where an order is made by Court for the payment**

**of an allowance, when such allowance be payable? - Section 4(1) -**

**Application for maintenance - Section 22 - Classifcations - Who is**

**an adult offspring for the purpose of the maintenance Act.**

The Respondent-petitioner-petitioner fled an application for mainte-

nance for her three children, viz, Upaka (22 years of age), Pushpika

(20 years of age) and Ireshika (17 years of age). The 1st and 2nd children

were classifed as 'adult offspring'. After inquiry, the Magistrate made

order directing the respondent-petitioner-petitioner to pay maintenance

to the above-mentioned three children. He appealed against the deci-

sion of the Magistrate to the High Court. The appeal was dismissed

on the basis that a proper appeal had not been fled in the High Court

against the judgment of the Magistrate. The petitioner thereafter fled

this appeal in the Supreme Court.

The Supreme Court granted leave to proceed on the following question

of law:-

(1) Whether an application under section 4(1)(b) of the Maintenance

Act no. 37 of 1999 made on behalf of an 'Adult offspring' should

state the reasons as to why the said 'Adult offspring' is incapable

of making such an application or should the said reasons be stat-

ed in evidence led in support of such an application and if such

reasons are not given in the application or in evidence, can the

court make an Order for the payment of maintenance in respect of

such 'Adult Offspring'?