

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 6**

**PAGES 141 - 168**

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**D I G E S T**

**Page**

**ARMY ACT** – Navy Act – Air Force Act – Police order – Constitution – 159

Fundamental Rights – Article 12(1) – Right to equality – Article 14(1) (d)

– Freedom to form and join a trade union – Article 15(8) – Restriction of

fundamental rights recognized by Articles 12(1), 13 and 14 shall, in their

application to the members of the Armed Forces, Police Force and other

Forces charged with the maintenance of public order, be subject to such

restrictions as may be prescribed by law? Force contemplated in Article

15 (8) Nature of service provided ? Active server.

**Kahagalage and 5 Others v. Wijesekera and 5 Others**

**(**Continued in Part 7)

**CIvIL LAW ORDINANCE NO. 5 OF 1865 –** Laws of England to be observed 149

in commercial matters and with regard to Banks and Banking transac-

tions – “justa causa” - a requirement for contracts to be valid under

Roman – Dutch Law.

**Indian Bank v. Acuity Stock Brokers (Pvt) Limited 149**

**SUPREME COURT RULES –** Leave to appeal – Failure to comply with Rules 141

– Rules 8(3), 27(3) and 27(8) – to ensure that all necessary parties are

properly notified on the matter which is before the Supreme Court – Rule

8 – to ensure that all parties are notified in order to give a hearing.

**Sudath Rohana and Another v. Mohamed Zeena and Another**

*Sudath Rohana and Another v. Mohamed Zeena and Another*

SC *(Dr. Shirani A. Bandaranayake, J.)* 141

appeals. Whilst applications for special leave to appeal are

from the judgments of the Court of Appeal, the leave to

appeal applications referred to in the Supreme Court Rules

are instances, where the Court of Appeal had granted leave to

appeal to the Supreme Court from any fnal order, judgment,

decree or sentence of the Court of Appeal, where the Court

had decided that it involves a substantial question of law. The

other appeals referred to in section C of Part I of the Supreme

Court Rules are described In Rule 28(1), which is as follows:

*“Save as otherwise specifcally provided by or under any*

*law passed by Parliament, the provisions of this rule*

*shall apply to all other appeals to the Supreme Court from*

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

*Appeal* ***or any other Court or tribunal”*** *(emphasis added).*

The High Court of the Provinces (Special Provisions)

Act, No. 19 of 1990 and High Court of the Provinces (Special

Provisions) (Amendment) Act, No. 54 of 2006 do not contain

any provisions contrary to Rule 28(1) of the Supreme Court

Rules, 1990 thus establishing the fact that section C of Part I

of the Supreme Court Rules, which deals with other appeals

to the Supreme Court, should apply to the appeals from the

High Courts of the Provinces.

Rule 28 accordingly deals with the procedure that has to

be followed when fling an application against the judgment

of a High Court of the Provinces established under and in

terms of Article 154P of the Constitution. Similar to Rule 8(3),

Rule 28(3) refers to the necessity of tendering notices to the

Registrar. The said Rule 28(3) reads as follows:

*“The appellant shall tender with his petition of appeal*

*a notice of appeal in the prescribed form, together with*

142 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

*such number of copies of the petition of appeal and the*

*notice of appeal as is required for service on the respon-*

*dents and himself, and three additional copies, and shall*

*also tender the required number of stamped addressed*

*envelopes for the service of notice on the respondents by*

*registered post.”*

It is important to note that Rule 28(7) provides for the

applicability of Rule 27 of the Supreme Court Rules, which

are applicable under the category of leave to appeal to

appeals which come within the category of other appeals

and similar to Rule 8(5), Rule 27(3) requires the petitioner to

attend at the Registry in order to verify that notice has not

been returned undelivered and in the event if such notice has

been returned the steps that should be taken by him. The

said Rule 27(3) is as follows:

*“The appellant shall not less than two weeks and not*

*more than three weeks after the notice of appeal has*

*been lodged, attend at the Registry in order to verify*

*that such notice has not been returned undelivered, the*

*appellant shall furnish the correct address for the service*

*of notice on such respondent. The Registrar shall there*

*upon dispatch a fresh notice by registered post and may in*

*addition dispatch another notice, by ordinary post; he*

*may, if he thinks ft, and after consulting the appellant*

*substitute a fresh date for the attendance of parties at the*

*Registry. . . .”*

The purpose of the Rule 8(3) as well as Rule 27(3) is to

ensure that all necessary parties are properly notifed on the

matter which is before this Court, so that all parties could

participate at the hearing. Referring to the provision in Rule

*Sudath Rohana and Another v. Mohamed Zeena and Another*

SC *(Dr. Shirani A. Bandaranayake, J.)* 143

8 of the Supreme Court Rules 1990, in *A.H.M. Fowzie and 2*

*others v. Vehices Lanka (Pvt.) Ltd.*(1), I had stated that,

“. . . . the purpose and the objective of Rule 8 of the

Supreme Court Rules of 1990, is to ensure that all

parties are properly notifed in order to give a hearing to all

parties. The procedure laid down in Rule 8 of the

Supreme Court Rules, 1990 clearly stipulates the process

in which action be taken by the Registrar from the time

an application is lodged at the Registry of the Supreme

Court. It is in order to follow the said procedure that it

is imperative for a petitioner to comply with Rule 8 of the

Supreme Court Rules 1990 and in the event that there is

a need for a vacation or a extension of time, the petition-

er could make an application in terms of Rule 40 of the

Supreme Court Rules of 1990.”

The same position applies to Rules 28(3) and 27(3) as

both Rules contain provisions similar to that of Rule 8 of

Supreme Court Rules 1990.

Accordingly it is quite clear that, in terms of the

Supreme Court Rules, the petitioner should have tendered

notices along with his petition of appeal and the other required

documents to the Registrar of the Supreme Court for the

service of notice on the respondents by registered post. There-

after in terms of Rule 27(3), he should have verifed from the

Registry that such notice has not been returned undelivered

and if the said notice had been returned undelivered, steps

should have been taken according to the said Rule 27(3) to

dispatch a fresh notice to be respondent.

The Original Record of this application clearly reveals

that none of the aforementioned steps had been followed by

144 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

the learned Instructing Attorney-at-Law for the petitioners.

Instead of following the procedure laid down in terms of the

Rules, learned Instructing Attorney-at-Law for the petitioners

had, as stated earlier, fled a motion on 23.04.2010 moving

that the case be called on any one of the dates specifed by

the learned Instructing Attorney-at-Law for the petitioners

and the notice of the said motion was sent by the learned

Instructing Attorney-at-Law for the petitioners by registered

post. Admittedly there was no service of notice through the

Registrar in terms of the Supreme Court Rules, 1990.

Considering the aforementioned there are two important

issues that needs examination. Firstly, as the respondent

had received the motion of 23.04.2010 sent by the learned

Instructing Attorney-at-Law for the petitioners, whether that

could be taken as suffcient notice being given to that party.

Secondly, since the learned Instructing Attorney-at-Law for

the petitioners has not followed the procedure laid down in

Supreme Court Rules, whether it is possible to accept such

motion as due compliance with the Supreme Court Rules.

Undoubtedly, the said questions are based on as to

the necessity to follow the procedure referred to in the

Supreme Court Rules of 1990. The legal system of the country

consists of substantive law as well as procedural law, As

clearly and accurately stated by Dr. Amerasinghe, J., in

*Fernando v. Sybil Fernando and others*(2), procedural law

is not secondary; the two branches are complementary.

When it is stated that the substantive law and procedural

law are complementary, it signifes the importance of proce-

dural law in a legal system. Whilst the substantive law lays

*Sudath Rohana and Another v. Mohamed Zeena and Another*

SC *(Dr. Shirani A. Bandaranayake, J.)* 145

down the rights, duties, powers and liberties, the procedural

law refers to the enforcement of such rights and duties. In

other words the procedural law breathes life into substan-

tive law, sets it in motion, and functions side by side with

substantive law.

Rules of the Supreme Court are made in terms of Article

136 of the Constitution, to regulate the practice and proce-

dure of this Court. Similar to the Civil Procedure Code, which

is the principal source of procedure which guides the Courts

of civil jurisdiction, the Supreme Court Rules thus regulates

the practice and procedure of the Supreme Court.

Learned Counsel for the petitioners referring to the

decision in *Fernando v. Sybil Fernando and others (supra)* and

*Dulfer Umma v. U.D.C., Matale* (3) stated that an application for

leave to appeal cannot be dismissed on a mere technicality

taken up by the respondents.

It is not disputed that the aforementioned decisions have

referred to technicalities and had stated that merely on the

basis of a technical objection a party should not be deprived

of his case being heard by Court.

As I had stated in *Samantha Niroshana v. Senarat*

*Abeyruwan*(4) and *A.H.M. Fowzie v. Vehicles Lanka (Pvt). Ltd.*

*(supra)*, I am quite mindful of the fact that mere technicalities

should not be thrown in the way of the administration of

justice and accordingly I am in respectful agreement with

the observations made by Bonser, C.J., in *Wickramatillake v.*

*Marikar* (5) referring to Jessel, M.R. in *Re Chenwell* (6) that,

“It is not the duty of a Judge to throw technical diff-

culties in the way of the administration of justice, but

146 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

when he sees that he is prevented receiving material or

available evidence merely by reason of a technical objec-

tion, he ought to remove the technical objection out of the

way upon proper terms as to costs and otherwise.”

Be that as it may, it is also of importance to bear in mind

that the procedure laid down by way of Rules, made under

and in terms of the provisions of the Constitution, cannot be

easily disregarded. Such Rules have been made with purpose

and that purpose is to ensure the smooth functioning of the

legal machinery through the accepted procedural guidelines.

In such circumstance, when there are mandatory Rules that

should be followed and objections raised on non-compliance

with such Rules such objections, cannot be taken as mere

technical objections. When such objections are considered

favorably, it is not that a judge would use the Rules as a

juggernaut car which throws the petitioner out and then runs

over him leaving him maimed and broken on the road (per

Abraham C.J., in *Dulfer Umma v. U.D.C., Matale (supra)* ). As

correctly pointed out by Dr. Amerasinghe, J. in *Fernando v.*

*Sybil Fernando and others (supra)*, ‘Judges, do not blindly

devote themselves to procedures or ruthlessly sacrifce

litigants to technicalities, although parties on the road to

justice may choose to act recklessly.’

Rules 28(3) and 27(3) quite clearly give specifc instruc-

tions as to the method in tendering notices to parties. The

language used in both Rules clearly shows that the said

provisions are mandatory and the notice has to be served

through the Registry of the Supreme Court. In such circum-

stances, it is apparent that the motion, which was sent by

the learned Instructing Attorney-at-Law for the petitioners

*Sudath Rohana and Another v. Mohamed Zeena and Another*

SC *(Dr. Shirani A. Bandaranayake, J.)* 147

to the respondent is not suffcient to satisfy the provisions

laid down in Rule 28(3) and therefore this has to be taken as

non-compliance with Rule 28(3) of the Supreme Court Rules,

1990.

When there has been non-compliance with a mandatory

Rule such as Rule 28(3), there is no doubt that this would

lead to serious erosion of well established Court procedures

maintained by our Courts, throughout several decades and

therefore the failure to comply with Rule 28(3) of the Supreme

Court Rules would necessarily be fatal.

As pointed out earlier the provisions in Rule 28(3) is

similar to that of Rule 8(3); the only difference being that Rule

8(3) applies to applications for special leave to appeal and

Rule 28(3) for all other appeals to the Supreme Court from an

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

any other Court or tribunal.

A long line of cases of this Court had decided that non-

compliance with Rule 8(3) would result in the dismissal of

the application (*K. Reaindran v. K. Velusomasundram* (7) *N.A.*

*Premadasa v. The People’s Bank* (8), *Hameed v. Majibdeen*

*and others*(9) *K.M. Samarasinghe v. R.M.D. Ratnayake and*

*others*(10) *Soong Che Foo v. Harosha K. De Silva and others* (11)

*C. A. Haroon v. S.K. Muzoor and others*(12)*Samantha Niroshana v.*

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

*Vehicles Lanka (Pvt.) Ltd. (supra)*, *Woodman Exports (Pvt.) Ltd.*

*v. Commissioner–General of Labour* (13).

Since Rule 28(3) has been framed on the lines of Rule

8(3) and both Rules are dealing with the same matter

that governs the service of notice to the parties, the

148 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

decisions taken in the matters referred to above should apply

to instances where there is non-compliance with Rule 28(3) of

the Supreme Court Rules of 1990.

In the circumstances, for the reasons aforementioned,

I uphold the preliminary objection raised by the learned

Counsel for the respondent and dismiss the petitioners’

application for leave to appeal for non-compliance with the

Supreme Court Rules, 1990.

I make no order as to costs.

**EkanayakE, J.** – I agree.

**Imam, J. -** agree.

*Preliminary objection upheld. Application dismissed.*

*Indian Bank v. Acuity Stock Brokers (Pvt) Limited*

SC 149

**INDIAN BANK v. ACUITY STOCK BROKERS (PvT) LIMITED**

SUPReMe COURT

TILAkAWARDANe, J.

AMARATUNgA J. AND

SUReSH CHANDRA, J.

S.C. APPeAL NO. 11/2011 (CHC)

CASe NO. 181/97(1)

AUgUST 4TH, 2010

***Civil Law Ordinance No. 5 of 1865 – Laws of England to be ob-***

***served in commercial matters and with regard to Banks and***

***Banking transactions – “justa causa” – a requirement for con-***

***tracts to be valid under Roman – Dutch Law – What is a Banking***

***transaction?***

Sivasubramaniam, was a customer of the Claimant – Bank (Appellant),

who maintained a current account with the Bank. He was also a

customer of there respondent, who carried on business as a stock

broker. The Respondent bought and sold shares on behalf of the

said M. Sivasubramaniam. On or about 21st January 1994, the said

Sivasubramaniam requested the Bank to provide him an overdraft

facility to buy shares. By the promise and/or contract and/or agreement

in writing dated 21st January 1994 the Respondent had held out and

assured the Appellant that (a) the Respondent held the shares listed

therein and (b) that the Respondent shall credit all the sale proceeds of

these shares to the current account of Sivasubramaniam held with the

appellant Bank. The Bank accordingly provided an overdraft facility to

the said Sivasubramaniam but he had failed and neglected to repay a

sum of Rs. 6,385,077/42 which was due and owing to the Appellant.

As a result of the Respondent’s wrongful and unlawful breach of the

agreement, it had caused the Appellant to suffer loss and damage in a

sum of Rs. 5,558,841.

After trial the Commercial High Court dismissed the Appellant’s

action and assumed that it is the english Law that apples, stating that

150 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

‘consideration’ is a requisite of a contract and concluded that a perusal

of the letter dated 21st January 1994 shows that there is total lack of

consideration and hence the said document was not enforceable.

**Held:**

(1) The Civil Law Ordinance No. 5 of 1865 introduced the english Law

relating to Banks and Banking. But there are many transactions,

where the Banks are parties, which do not come within the realm

of Banking transactions and regarding which the Roman Dutch

law applies.

(2) Under the Roman Dutch Law there should be *justa causa* for a

contract to be valid.

Per R.k.S. Suresh Chandra, J. –

“In the present case the undertaking given by the Respondent

would satisfy the requirement for a valid contract as it was an

undertaking given with all seriousness.”

**appEal** from the judgment of the Commercial High Court.

**Cases referred to:**

*(1) Lipton v. Buchanan –* 8 NLR 49

*(2) Jayawickrame v. Amarasuriya –* 20 NLR 289

*(3) Edward Silva v. De Silva –* 46 NLR 510

*Prasanna Jayawardene* with *A. Siriwardane* for Plaintiff – Appellant.

*Kushan De Alwis* with *Hiran Jayasuraiy* and *Chamath Fernando* for

Defendant-Respondent.

*Cur.adv.vult*

February 18th 2011

**SurESH CHandra J.**

This is an appeal from the judgment of the Commercial

High Court whereby the action of the Plaintiff-Appellant was

dismissed.

*Indian Bank v. Acuity Stock Brokers (Pvt) Limited*

SC *(Suresh Chandra, J.)* 151

The Plaintiff-Appellant instituted action in the Commer-

cial High Court against the Defendant Respondent to recover

a sum of Re. 5,558,841/- with legal interest thereon.

In it’s plaint the Appellant stated inter alia that one

M. Sivasubramaniam was a customer of the Bank and

maintained a current account and that he was also a

customer of the Respondent who carried on business as a

stockbroker, that the Respondent bought and sold shares on

behalf of the said M. Sivasubramaniam and the Respondent

held such shares on behalf of and for the account of the said

Sivasubramaniam. On or about the 21st of January 1994 the

said Sivasubramaniam had requested the Appellant to lend

and advance monies to him by way of an Overdraft facility

granted on his current account. That by the promise and/

or contract and/or agreement in writing dated 21st January

1994 the Respondent had held out and assured the Appellant

that (a) the Respondent held the shares listed therein and (b)

that the Respondent shall credit at the sale proceeds of these

shares to the current account of M. Sivasubramniam with

the Appellant Bank.

Upon the basis of this assurance given by the Respon-

dent, the Appellant had lent and advanced monies to the said

Sivasubramaniam by way of an Overdraft Facility granted upon

the said current account. That the said Sivasubramaniam

had failed and neglected to repay a sum of Rs. 6,385,077/42

which was due and owing to the Appellant upon the said

overdraft facility, that the Appellant requested the Respon-

dent to ensure that the sale proceeds of the shares were

credited to the aforesaid current account. On or about the

21st of December 1994, the Appellant had become aware that

the Respondent had acted in breach of the agreement and

152 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

undertaking given by them and that the respondent had failed

and neglected and was unable to credit the sale proceeds

of the shares to the aforesaid current account. The monies

remained due and owing to the Appellant. Had the Respon-

dent acted in accordance with the undertaking given by them,

the Appellant would have received a sum of Rs. 5,558,841/-

being the market value of the shares in reduction of the

monies which remained due and owing and unpaid to the

Appellant. That the Respondent’s wrongful and unlawful

breach of the agreement and undertaking had caused the

Appellant to suffer loss and damage in a sum of Rs. 5,558,841

and that the Respondent was liable to pay the said sum.

The Respondent took up the position in its answer

that the letter dated 21st January 1994 was issued on the

specifc instructions of the said Sivasubramaniam, that

on or about 25th March 1994 they received instructions

from the said Sivasubramaniam that the shares held in his

favour with the Respondent be sold and the monies be remitted

to Seylan Merchant Bank, consequent upon which a tripar-

tite agreement was entered into between Seylan Merchant

Bank, M. Sivasubramaniam and the Respondent. That the

instructions given by the said M. Sivasubramaniam to the

Respondent to credit the said account maintained at the

Appellant Bank by the said Sivasubramaniam with all sales

proceeds of the said shares and/or stocks was countermand-

ed and/or revoked with effect from 25th March 1994, that the

purported promise and/or agreement and/or contract relied

on by the Appellant was unenforceable against the Respon-

dent and that the said writing was not a promise and/or

agreement and/or contract.

After trial the Commercial High Court by its judgment

dated 11th May 2001 dismissed the action of the Appellant

*Indian Bank v. Acuity Stock Brokers (Pvt) Limited*

SC *(Suresh Chandra, J.)* 153

on the ground that the Respondent was bound to act on the

instructions of M. Sivasubramaniam, that the letter dated

21st January 1994 (P3) cannot be considered as a legally

enforceable document as there was an absence of consid-

eration and that the Respondent credited monies being the

sales proceeds of shares held by M.Sivasubramaniam to his

account held at the Appellant Bank until M. Sivasubramaniam

countermanded such instructions. The learned High Court

Judge has assumed that it is the english Law that applies

by stating that ‘consideration’ is a requisite of a contract and

concluded that a perusal of document P3 shows that there is

a total lack of consideration and hence unenforceable.

The main argument of learned Counsel for the Appellant

was based on the legality of the document dated 21st January

1994 (P3). His contention was that the Roman Dutch Law

applied and that the said document P3 was enforceable

against the Respondent and that even under the english Law

as developed in later times it would be so. The argument of

the learned Counsel for the Respondent was that the said

agreement was unenforceable as according to english Law

there had to be consideration and since that element was

lacking the said agreement was not enforceable.

The Agreement (P3) on which the Appellant rests its case

was an undertaking given by the Respondent to the Appel-

lant on the basis of instructions given to them by M. Siva-

subramaniam. The said undertaking had been given with all

seriousness as was seen from the fact that when they

had quoted the Account number of the client erroneously

they acknowledged the corrected number of the account

subsequently. The Respondent was a stockbroker and held the

they had been given specifc instructions regarding the sale

and the acts to be performed on the sale of such shares.

154 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

The Respondent having undertaken to remit the proceeds

of the sale of shares to the Appellant had subsequently

entered into a tripartite agreement with the said Sivasubra-

maniam and Seylan Bank which had the effect of not being

able to proceed with the undertaking given to the Appellant

Bank. Although this agreement had been entered into by the

Respondent, they did not take steps to inform the Appel-

lant Bank that their client Sivasubramaniam had counter-

manded the said agreement with the Appellant by giving new

instruction. Without informing the Appellant Bank of the new

agreement, they had sold the shares and remitted the monies

to Seylan Bank. The Respondent had informed the Appel-

lant Bank about the countermanding of the agreement only

after the Appellant Bank had sent letter dated 17th Decem-

ber 1994 (P8) requesting the Respondent to sell the shares

and remit the proceeds to the Appellant Bank as agreed in

P3. In reply to this request in P8 the Respondent had for the

frst time informed the Appellant Bank by letter dated 21st

December 1994 (P9) that their client Sivasubramaniam had

entered into a tripartite agreement with another Bank and

that action had been taken according to the said agreement

and that there were no shares held by Sivasubramaniam in

his share trading accounts. The Respondent had therefore

failed to inform the Appellant Bank about the position taken

up in P9 although they knew about in on 26th March 1994 as

they were one of the parties to the said tri-partite agreement.

It is thereafter that the Appellant sought to take steps to

recover the monies due to them by sending a letter of demand

on 11th January 1995 (P10) and instituting action thereafter.

The aforesaid conduct on the part of the Respondent was

defnitely a breach on the part of the Respondent of the

undertaking given to the Appellant Bank in P3. This breach

*Indian Bank v. Acuity Stock Brokers (Pvt) Limited*

SC *(Suresh Chandra, J.)* 155

was confrmed by the Respondent was defnitely a breach

on the part of the Respondent of the undertaking given to

the Appellant Bank in P3. This breach was confrmed by

the Respondent by the aforesaid letter P9 when the Respon-

dent stated very clearly and assertively that the earlier in-

struction were **countermanded and/or revoked.** Counter-

manding means cancelling or reversing a previously issued

command, instruction or order. The *Legal Thesaurus defnes*

countermand as a contrary command cancelling or reversing

a previous command. even though the said letter was sent

by the Respondent’s Lawyers it was a situation of conveying

the instructions given to them by their client. even if the

Lawyers choose to use language which had serious overtones

the client (the Respondent) had to take the responsibility for

same. Not only does the said document state about counter-

manding, it goes further to state. . and/or revoking the earlier

instructions which to my mind had a double cancellation

effect or a very strong assertion of such cancellation. There-

fore there is no doubt that the Respondent is in breach of the

undertaking given in P3.

The question then arises as to whether the Appellant

could recover the monies it claimed on the basis of the breach

of the said undertaking in P3. Although the Respondent had

transacted with the Appellant Bank, does the said trans-

action become a banking transaction merely because the

Appellant was a Bank. What is a Banking transaction? There

is no clear cut demarcation of the transactions that one has

with a Bank being classifed as Banking Transactions. It is

usual to consider lodging money into a bank account, with-

drawing money, adding interest to an account, direct debits,

deducting bank charges, basically any sort of activity involv-

ing a change of money in an account is a banking transac-

156 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

tion which are usually listed in a bank account statement.

The transaction embedded in the agreement P3 is a pure and

simple contractual undertaking given by the Respondent.

The Civil Law Ordinance No. 05 of 1865 introduced the

english Law relating to Banks and Banking. But there are

many transactions where the Banks are parties which do not

come within the realm of Banking Transactions and regarding

which the Roman Dutch Law applies. In my view it is the

Roman Dutch Law that would apply to the transaction

engulfed in the document P3. Would the said transaction

amount to an enforceable contract? Under the Roman Dutch

Law there should be justa causa for a contract to be valid. In

the present case the undertaking given by the Respondent

would satisfy the requirement for a valid contract as it was an

undertaking given with all seriousness.

In *Lipton v. Buchanan*(1) Wendt J stated that “Causa

denotes the ground, reason, or object of a promise giving

such promise a binding effect in law. It also has a much

wider meaning than the english term “consideration” and

comprises the motive or reason for a promise and also

pure moral consideration.” Further “Nude pacts made in

earnest and with a deliberate mind/give rise to actions,

equally with contracts.”

In*Jayawickreme v. Amarasuriya*(2) Lord Atkinson observed

that under the Roman Dutch Law a promise deliberately

made to discharge a moral duty or to do an act of generos-

ity or benevolence can be enforced at law, the *justa causa*

*debendi* suffcient according to the Roman Dutch Law to

sustain a promise being something far wider than what the

english Law treats as good consideration for a promise.

*Indian Bank v. Acuity Stock Brokers (Pvt) Limited*

SC *(Suresh Chandra, J.)* 157

In *Edward Silva v. De Silva* (3) Soertsz J. stated that for all

that appears to be required to support a promise and to make

it enforceable is that “the agreement must be a deliberate,

serious act, not one that is irrational or motiveless.”

Therefore on a consideration of these authorities it is

my view that P3 was an enforceable contract and that the

Respondent had breached same and that the learned High

Court Judge was in error in assuming that english Law

applied without considering the nature of the transaction

between the parties and dismissing the action of the

Appellant.

Learned Counsel for the Appellant in his written

submission has adverted to the fact that even in the developed

english Law there have been instances where the english

Courts have been fexible in dealing with the concept of

consideration rigidly and that if there is evidence that the

parties had acted upon the faith of a written document that

the Courts would prefer to assume that the documents

embodies a defnite intention to be bound and will strive to

implement its terms. I consider it not necessary to delve into

the development of the concept of consideration in english

Law as I have stated above that the Roman Dutch Law would

apply to the transaction in question.

A further matter that transpired according to the

evidence led in the case and which was sought to be used by

the Respondent was that after giving the undertaking in P3,

that they had honoured the undertaking to some extent by

remitting certain monies by cheques V2 to V5 as being the

sale proceeds of the shares held by the Respondent during the

period 21st January 1994 to 25th March 1994. These cheques

158 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

had been received by the Appellant from Sivasubramaniam

and not from the Respondent, and the Respondent was

unable to establish that these were monies from the sale

proceeds which were given to Sivasubramniam to deposit

in terms of the undertaking in P3. This brings to light two

aspects, frstly it is an acceptance of the obligation under-

taken by them in P3 and secondly that they had acted in

furtherance of that obligation. If that was the objective of

the Respondent, then their argument that P3 was not an

enforceable contract has necessarily to fail. It is to be observed

that the learned High Court Judge too fell into this error by

recognizing that the Respondent had credited monies with

the Appellant Bank.

This action had commenced in December 1997 and the

High Court had concluded same in May 2001. Since then,

almost ten years had lapsed before it was taken up for fnal

hearing. In these circumstances it would be reasonable to

limit the legal interest that would otherwise accrue to the

beneft of the Appellant. In the above circumstances the

judgment of the Commercial High Court is set aside and

judgment is entered in favour of the Plaintiff-Appellant in a

sum of Rs. 5,558,841/- together with a fat rate of interest at

6% per annum until payment in full and the Plaintiff will also

be entitled to Rs. 21,000/- as costs.

**TIlakawardanE J.** – I agree.

**amaraTunga J.** – I agree.

*Appeal allowed. Judgment of the Commercial High Court set*

*aside.*

*Kahagalage and 5 Others v. Wijesekera and 5 Others*

SC 159

**KAHAGALAGE AND 5 OTHERS v. WIJESEKERA**

**AND 5 OTHERS**

SUPReMe COURT

J.A.N. De SILVA, CJ.,

AMARATUNgA, J. AND

ekANAyAke, J.

S.C. (FR) APPLICATION NO. 18/2009

JUNe 11TH 2010

***Army Act – Navy Act – Air Force Act – Police order – Constitu-***

***tion – Fundamental Rights – Article 12(1) – Right to equality –***

***Article 14(1) (d) – Freedom to form and join a trade union – Article***

***15(8) – Restriction of fundamental rights recognized by Articles***

***12(1), 13 and 14 shall, in their application to the members of the***

***Armed Forces, Police Force and other Forces charged with the***

***maintenance of public order, be subject to such restrictions as***

***may be prescribed by law? Force contemplated in Article 15 (8)***

***Nature of service provided ? Active server.***

The Petitioners who were guards attached to the Railway Protection

Force (RPF) alleged that their fundamental rights, guaranteed by

Articles 12(1) and 14(1)(d) of the Constitution had been violated by the

Respondents. The main complaint was that the members of the ‘RPF’

were not allowed to form or to become members of any Trade Union.

The position taken up by the 1st Respondent was that the ‘RPF’ is also a

force contemplated by Article 15(8) of the Constitution and accordingly,

the restriction of the right of the members of ‘RPF’ to join or to form a

trade union is in accordance with the law.

The functions of the Railway Protection Force are limited to the

protection of railway property and its workers and commuters who use

the railway as their mode of conveyance. Its functions are limited to

the activities of the Railway Department including the protection of the

commuters.

**Held:**

(1) The service operating within the Railway Department under the

name “Railway Protection Force” is not a ‘Force” within the meaning

160 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

of Article 15(8) of the Constitution and as such the Standing

Order No. 47 which prohibits the members of the Railway Protec-

tion Force from forming or joining a trade union is contrary to

Article 14(1) (d) of the Constitution.

(2) The Petitioners and other members of the Railway Protection

Force are entitled to the freedom to form an join a trade union as

declared and recognized in Article 14(1) (d) of the Constitution.

(3) The failure and/or the refusal of the Railway authorities to pay

overtime to the members of the Railway Protection Force is a

violation of the fundamental rights guaranteed to the Petitioners

by Article 12(1) of the Constitution.

(4) The normal period of duty of a member of the Railway Protection

Force is eight hours per day and if they have to work for more

than eight hours per day due to exigencies of service, they are

entitled to be paid overtime. If overtime payment is denied to them

it amounts to forced labour.

Per gamini Amaratunga, J. –

“. . . . . It is the responsibility of the 1st Respondent to seek

budgetary allocations for the payment of overtime to the members

of the RPF. . . . . .”

**applICaTIon** under Articles 17 and 126 of the Constitution for

infringement of the fundamental right of equality.

*Uditha Egalahewa* with *Hemantha Gardihewa* for the Petitioners*.*

*Indika Demuni de Silva,* Deputy Solicitor general for the Respondents.

*Cur.adv.vult.*

May 13th 2010

**gamInI amaraTunga, J.**

This is an application fled under and in terms of Articles

17 and 126 of the Constitution by six petitioners who are

security guards attached to the Railway Protection Force

*Kahagalage and 5 Others v. Wijesekera and 5 Others*

SC *(Gamini Amaratunga, J.)* 161

(hereinafter referred to as the RPF) alleging infringement of

their fundamental rights guaranteed by Articles 12(1) and

14(1)(d) of the Constitution by the respondents. This court

has granted leave to proceed for the alleged violation of the

petitioners’ fundamental rights guaranteed by the aforemen-

tioned Article of the Constitution.

There are two complaints addressed to us by the petition-

ers in their application. The frst and the major complaint

of the petitioners is that the members of the RPF are not

allowed to form or to be members of any Trade Union in

view of Standing Order No. 47 marked and produced by the

petitioners as P27 with their application. The general Manager

of Railways who is the 1st respondent to this application,

in paragraph 24 of his affdavit of 2nd March 2010 fled in

this Court has specifcally admitted the existence of the said

Standing Order which prohibits the members of RPF from

becoming a member of any trade union or to form a trade

union. This is a clear admission that the members of RFP are

not entitled in view of the said Standing Order No. 47 to form

or join a trade union.

The petitioners allege that this is a violation of their

fundamental right guaranteed by Article 14(1) (d) of the

Constitution which reads as follows.

*14(1) Every citizen is entitled to –*

*(d) the freedom to form and join a trade union;*

Fundamental rights guaranteed by Article 14 are subject

to the limitation set out in Article 15(8) of the Constitution

which reads as follows.

*“The exercise and operation of the fundamental rights*

*declared and recognized by Articles 12(1), 13 and 14*

162 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

*shall, in their application to the members of the Armed*

*Forces, Police Force and other Forces charged with the*

*maintenance of public order, be subject to such restric-*

*tions as may be prescribed by law in the interest of*

*proper discharge of their duties and the maintenance of*

*discipline among them.”*

The position taken up by the 1st respondent and the

learned Deputy Solicitor general who appeared for the

respondents is that the Railway Protection Force is also a

Force contemplated by the aforementioned Article 15(8) of

the Constitution and accordingly the restriction of the right

of the members of RPF to join or to form a trade union is in

accordance with the law.

The 1st respondent in paragraph 24 of his affdavit re-

ferring to Standing Order No. 47 has stated that “having

regard to the duties, functions and responsibilities of the

Railway Protection Force and the reasons which compelled the

government to raise, train and equip this new Force, that it

had been decided to have the said Force function in the same

manner as any other Force in Sri Lanka and to enforce the

said Standing Orders in like manner.”

In view of the position taken up by the 1st respondent it is

necessary to consider the manner in which the body known

as the Railway Protection Force was formed and its functions.

The Railway Protection Force was established consequent to

a decision taken by the Cabinet of Ministers on 01.4.1987.

The Cabinet Memorandum dated 27.02.1987 presented to

the Cabinet of Ministers by the then Minister of Transport

has been made available to this Court by the 1st respondent

as annexure 1R2A to his affdavit. That Cabinet Memoran-

*Kahagalage and 5 Others v. Wijesekera and 5 Others*

SC *(Gamini Amaratunga, J.)* 163

dum carries the heading “Restructuring the Railway Security

Service”. In that Cabinet Memorandum the Minister has

stated that, in view of severe damage to Railway property

during the past three years due to escalation of terrorist

activities in the North and east it had become necessary to

provide para-military training to the members of the Railway

Security Service. However due to a judgment given by the

Supreme Court in a fundamental rights application fled by

some members of the Railway Security Service against the

proposed training it had become diffcult to press Railway

Security Service personnel to perform duties qualitatively

different from their normal duties for which they had been

recruited.

In his Cabinet Memorandum the Minister had pointed

out that in the same case the Supreme Court had made the

observation that the Government had suffcient authority if

is so desired to raise, train and equip a new Railway Security

Force to meet the greater demands made on the authorities.

Relying on the aforementioned observation of the

Supreme Court, the Minister had proposed to abolish the

existing Railway Security Service and to create a new service

to be known as the Railway Protection Force.

After considering the proposal contained in the Minis-

ter’s Memorandum the Cabinet of Ministers on 01.04.1987

granted its approval to form a new service known as the

“Sri Lanka Railway Protection Force.” That was the manner

in which the service now known as the “Railway Protection

Force” came to be established within the Railway Depart-

ment.

At the hearing before us the learned Deputy Solicitor

general who appeared for the respondents stated that the

164 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

Railway Protection Force is also a Force contemplated in

Article 15(8) of the Constitution. The learned Deputy Solicitor

general laid much emphasis on the fact that the Cabinet of

Ministers had approved the creation of a new service known

as the Railway Protection Force and the Railway Protection

Force is therefore a Force which falls within Article 15(8) of

the Constitution and as such Standing Order No. 47 which

prohibits the members of RPF from joining or forming a trade

union is a law by which the fundamental right declared and

recognized by Article 14(1)(d) can be legitimately restricted.

The learned Counsel for the petitioners countered this

argument by pointing out that although the english version

of the Cabinet Memorandum of the Minister and the Cabinet

decision thereon used the term Railway Security Force, the

Sinhala version of the Cabinet Memorandum and the Cabinet

decision have used the words

Which means that it is not a Force but a service.

Nomenclature itself is not a decisive factor. Let me now

examine the words used in the Cabinet Memorandum. The

proposal of the Minister in his Cabinet Memorandum was to

“form a new Service to be known as the Railway Protection

Force.” The approval granted by the Cabinet was also to form

a new service to be known as the Railway Protection Force.

In the Cabinet Memorandum the Minister never sought the

approval of the Cabinet to create a new force similar to the

Armed Forces and the Police Force.

In the circumstances set out above it is necessary to

examine the nature of the service the Railway Protection

Force is expected to perform. According to paragraph 7 of the

1st respondent’s affdavit, the offcers of the Railway Protec-

*Kahagalage and 5 Others v. Wijesekera and 5 Others*

SC *(Gamini Amaratunga, J.)* 165

tion Force are required to protect the commuters, workers

and the property of the Railway Department and also to en-

sure uninterrupted operation of rail services and to protect

booked consignments of goods, wagons and goods sheds.

Thus the functions of the Railway Protection Force are limited

to the Protection of railway property and its workers and the

commuters who use the railway as their mode of convey-

ance. Its functions are limited to the activities of the Railway

Department including the protection of the commuters.

In terms of Standing Order 312(3) issued by the general

Manager of Railways (Document P3) each offcer is required

to work eight hours per day. A day is divided into three shifts

of eight hours duration and the offcers are deployed for duty

on the basis of a roster which allows three offcers to serve in

the three shifts of the day. However in the event of the fail-

ure of an offcer to report for work to take over the duty from

an offcer who has completed his duty shift of 8 hours, the

person who has completed his eight hours duty turn has

to remain on duty until another person comes to take over

duties from him. Such situations are exceptions to the

normal eight hour duty period. Such arrangements are usual

methods of continuing an uninterrupted service during the

twenty four hours of the day despite the absence of one

person to take over duties from the person who has

completed his roster duty period of eight hours.

Let me now turn to the duty periods set out in the Army

Act. (Cap 357 of the CLe, 1956 Revision) Section 18 of the

Army Act provides that the Regular Force shall at all time be

liable to be employed on active service. Section 15 of the Navy

Act (cap. 358, CLe, 1956 Revision) also provides that “The

Regular Naval Force shall at all times be liable to be employed

166 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

on active service”. Section 19(2) of the Air Force Act (Cap 359,

CLE, 1956 Revision) provides that “All offcers and airmen

of any such part of the Air Force as is called out in active

service. . . . shall be deemed to be on such service until the

governor general terminates such service by Proclamation.”

Thus it is clear that when personnel of the Army, Navy

and the Air Force are called upon to be on active service there

is no provision for specifc duty hours and that they have to

be on duty during twenty four hours of the day and perhaps

for more than one day.

The provision of the Police Ordinance (Cap 53 C.L.e.

1956 Revision) is more specifc. Section 56 of the Police

Ordinance provides that “Every police offcer shall for all

purposes in this Ordinance contained be considered to be

always on duty. . . .”

The provisions of law I have quoted above show that

when the members of the Armed Forces are employed on

active duty they have no set duty hours. A Police offcer is

on duty for 24 hours of the day and 365 days for an year.

A member of the Railway Protection Force has a set duty

period of eight hours. On that basis alone I can conclude that

the service operating within the Railway Department under

the name “Railway Protection Force” is not a “Force” within

the meaning of Article 15(8) of the Constitution.

However I base my decision on an analysis of Article

15(8) itself. I have already quoted that Article in the earlier

part of this judgment. I again quote the same article below for

convenience of reference.

*“The exercise and operation of the fundamental rights*

*declared and recognized by Article 12(1), 13 and 14 shall,*

*Kahagalage and 5 Others v. Wijesekera and 5 Others*

SC *(Gamini Amaratunga, J.)* 167

*in their application to the members of the Armed Forces,*

*Police Force and other Forces charged with the mainte-*

*nance of public order be subject to such restrictions as may*

*be prescribed by law. . . . . .. “ (emphasis added)*

According to this Constitutional provision the fundamen-

tal rights declared and recognized by Articles 12(1), 13 and

14 shall, be subject to such restrictions as may be prescribed

by law in their application to the members of the Armed

Forces, the Police Force and the other Forces charged with

the maintenance of public order.

The question is whether the service known as the Railway

Protection Force is a Force charged with the maintenance of

public order? In view of the functions of the Railway Pro-

tection Force I have set out in the earlier part of this judg-

ment, my answer to the above question is in the negative. The

Railway Protection Force has no role to play with the

maintenance of public order. Accordingly I hold that the

service designated by the name Railway Protection Force

is not a “Force” within the meaning of Article 15(8) of the

Constitution and as such the Standing Order No. 47 which

prohibits the members of the Railway Protection Force from

forming or joining a trade union is contrary to Article 14(1)(d)

of the Constitution. The said Standing Order No. 47 which

stands valid even today constitutes a continuing violation of

the petitioner’s fundamental rights guaranteed by Articles

12(1) and 14(1)(d) of the Constitution. Accordingly I grant

the relief prayed for by the petitioners in paragraph (C) of

the petition dated 6.1.2009 and declare that the said Stand-

ing Order No. 47 is null and void. The petitioners and the

other members of the Railway Protection Force are entitled to

the freedom to form and join a trade union as declared and

recognized in Article 14(1)(d) of the Constitution.

168 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

The next grievance placed before this Court by the

petitioners is that the Railway Department does not pay their

overtime claims for duties performed outside their normal

duty hours for a day. It appears that the Railway Department

in its annual estimates of expenditure had not sought funds

necessary for paying overtime to the members of the Railway

Protection Force. The failure to seek annual budgetary

allocation of funds for the payment of overtime to members of

the RPF appears to be the result of the mistaken view of the

Railway authorities that the RPF is a Force like the Armed

Forces and the Police Force. This view is no longer valid.

It is an admitted fact that the normal period of duty of a

member of RPF is eight hours per day. If they have to work for

more than eight hours per day due to exigencies of service,

they are entitled to be paid overtime. If overtime payment is

denied to them it amounts to forced labour. A former

general Manager of Railways had recommended payment of

overtime to members of the RPF for work done outside their

normal duty hours and during Sundays and public holidays.

(Vide document P12). Documents P14, 15, 20 and 21 clearly

establish their entitlement to be paid overtime for duties

performed outside their normal duty hours and on Sundays

and public holidays. Paragraphs 19, 20 and 21 of the 1st

respondent’s affdavit clearly indicate the recognition of the

right of the members of the RPF to be paid overtime for work

done outside their normal working hours due to exigencies

of service. I therefore hold that the failure and/or refusal of

the Railway authorities to pay overtime to the members of the

RPF is violative of the petitioner’ fundamental right guaran-

teed by Article 12(1) of the Constitution.

It appears to me that the failure and/or refusal of the

Railway Department to pay overtime to the members of the