

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 7**

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RPF was the result of the failure of the railway authorities to

seek funds in their annual budgetary estimates submitted to

the relevant government authorities responsible for allocating

annual budgetary provisions for the Railway Department.

The learned Deputy Solicitor General in her written

submissions dated 02.08.2010 has stated that this appli-

cation should be dismissed *in limine* for the failure of the

petitioners to cite a necessary party. i.e. the Secretary to the

Treasury who should have been heard with regard to the

allocation of funds for paying overtime claims of the members

of the RPF.

With all due respect to the learned Deputy Solicitor

General I am not inclined to agree with this submission

for two reasons. The frst reason is that this objection has

not been taken up before or at the hearing of this applica-

tion. The second and the more compelling reason is that the

Attorney General who is the Principal Law Offcer of the State

who represents all public offcers including the Secretary to

the Treasury in all fundamental rights applications (except

in cases where the Attorney General declines to appear for

any public offcer who is alleged to have acted in violation

of fundamental rights) is a respondent to this application

from the beginning and as such the Attorney General had an

opportunity to present to this Court the views of the

Secretary to the Treasury with regard to the payment of

overtime to the members of the Railway Protection Force.

I have already decided that the failure and or the refusal

of the railway authorities to pay overtime to the members of

the RPF is a violation of the fundamental right guaranteed to

the petitioners by Article 12(1) of the Constitution.

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However the right to claim and obtain payment for

overtime work is subject to the provisions of the Estab-

lishment Code and the Financial Regulations. The Railway

Department has the authority to formulate the rules, in

accordance with the law, for the payment of overtime to the

members of the RPF.

The petitioners have sought a direction from this Court

directing the 1st to 3rd respondents or any one or more

of them to pay over time to the petitioners and the other

members of the RPF for duties performed by them outside

their normal working hours in the past years. As I have

already pointed out, there were no budgetary allocations for the

payment of overtime to the members of the RPF. Accordingly

this Court cannot direct the Railway Department to pay the past

overtime claims of the petitioners and the other members of

the RPF. As set out in the Establishment Code (Chapter VIII

Rule 1:2) payment of overtime depends on the availability

of funds. It is the responsibility of the 1st respondent to seek

budgetary allocations for the payment of overtime to the

members of the RPF. I trust that the relevant Government

Authorities responsible for the allocation of funds for the

Railway Department will bear in mind that if the Government

gets its subjects to work for the Government, there is a

legal and a moral duty to properly remunerate them for their

labour. I make no order for costs.

**J.A.N. de SilvA, C.J.** – I agree.

**ekANAyAke, J.** – I agree.

*Application allowed.*

*Dr. Perera v. Hon Attorney General and 66 Others*

SC 171

**DR. PERERA v. HON ATTORNEY GENERAL AND 66 OTHERS**

SuPREmE COuRT

J.A.N. DE SILVA, CJ.

AmARATuNGA, J. AND

SRIPAVAN, J.

S.C.F.R. No. 221/2009

APRIl 27TH, 2011

***Protection of the Rights of Persons with Disabilities Act No. 28***

***of 1996 – New public buildings or public places to comply with***

***specifed design requirements.***

The Supreme Court recognized that people have different levels of

ability to move freely, and that many – specially, the growing number of

Seniors, Disabled Persons and Pregnant mothers are restricted in their

movement.

**Held:**

(1) No person should be discriminated against on the ground of

disability and their mobility restricted in a manner which

precludes or impedes them from enjoying equally their inherent

right for access, safety and accommodation in day – to - day life at

man – made public buildings, public places and facilities provided

there.

(2) Parts of all new public buildings or public places, specially

toilet and wash facilities, as defned in the Accessibility Regulations

No. 1 of 2006 made under the Protection of Persons with

Disabilities Act No. 28 of 1996, as amended, hereafter shall be

designed and constructed in accordance with the ‘design require-

ments’ specifed in the regulations in force.

(3) Compliance with this Court order is mandatory in order to gain

approval of building plans, to certify the buildings on comple-

tion and to issue the certifcate of conformity and hence, together

with owners who are equally responsible, all authorities that are

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empowered to do so shall refrain from doing so in respect of all

new constructions violating this order.

**AppliCAtioN** against discrimination of disabled persons.

*Dr. Ajith C. S. Perera* Petitioner appears in person

*Ms. Indika Demuni De Silva,* Deputy Solicitor General for Respondent.

*Cur.adv.vult.*

April 27th 2011

**J.A.N. de SilvA CJ.**

This case is called for the purpose of clarifying the order

that was recorded on 14.10.2009.

After hearing the submissions, the Court replaced the

order made on 14.10.2009, with the following order:

This Court recognizes that people have different levels of

ability to move freely, and that many – specially, the growing

number of Seniors, Disabled Persons and Pregnant mothers

are restricted in their movement.

This Court further recognizes that in terms of the

protection of the Rights of Persons with Disabilities Act No.

28 of 1996, as amended, and the regulations made there-

under, no person should be discriminated against on the

ground of disability and their mobility restricted in a manner

which precludes or impedes them from enjoying equally their

inherent right for access, safety and accommodation in day –

to – day life at man-made public buildings, public places and

facilities provided there.

Accordingly, this Court orders that Parts of all NEW

public buildings or public places, specially toilet facilities,

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SC *(J.A.N. De Silva, CJ.)* 173

as defned in the Accessibility Regulations No. 01 of 2006

made under the Protection of Persons with Disabilities Act

No. 28 of 1996, as amended, hereafter shall be designed and

constructed in accordance with the ‘design requirements’

specifed in the regulations in force.

The Court further orders that compliance with this Court

order is mandatory in order to gain approval of building

plans, to certify the buildings on completion and to issue the

certifcate of conformity and hence all authorities that are

empowered to do so shall refrain from doing so in respect of

all constructions which would violate this order.

Failure to comply with this Court order shall be a serious

punishable offence and shall attract punitive repercussions

as set out in the law.

These proceedings are terminated. In case of any viola-

tion a fresh action could be fled to deal with that situation.

**AmArAtuNgA J.** – I agree.

**SripAvAN J.** – I agree.

*Application allowed.*

*Directives issued.*

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**ROHANA ALIAS LOKU v. HON. ATTORNEY GENERAL**

SuPREmE COuRT

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

AmARATuNGA, J AND

RATNAyAkE, J.

S. C. APPEAL NO. 89A/2009

S.C. SPl. l.A. 02/2009

H. C. ANuRADHAPuRA No. 149/2003

mARCh 29TH, 2011

***Rape – Section 364(2) – Penal Code – Amendment 22 of 1995 –***

***Rape of woman under eighteen years of age – Statutory***

***Rape – Mandatory minimum sentence 10 years? – Court***

***exercising its discretion with regard to the sentence. – Section***

***354 – Penal Code – Abducting a minor below 16 years of age from***

***the custody of her lawful guardian – Constitution - Article 4(c).***

***Article 11, Article 12(1).***

The Accused – Appellant was indicted in the High Court of

Anuradhapura, for committing the offences of abduction and rape of a

minor below 16 years of age. The frst charge was for an offence pun-

ishable under Section 354 of the Penal Code and the second charge

was for committing the offence of rape under Section 364(2) (e) of the

Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995.

There is a mandatory minimum sentence of 10 years prescribed by law

which prevents the Court from exercising its discretion with regard to

the sentence.

The learned High Court Judge, after trial, held that the Accused was

guilty of the offence punishable under Section 364(2) (e) of the Penal

Code and sentenced him to 10 years rigorous imprisonment, the

mandatory minimum period of imprisonment prescribed by law. The

Accused appealed against the conviction and sentence to the Court of

Appeal.

The Court of Appeal, after considering the facts and circumstances

of the case, and particularly the fact that the prosecutrix urged the

Accused to take her away from her home and threatened to commit

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suicide in the event of his failure or refusal to comply with her request,

had set aside the period of 10 years rigorous imprisonment imposed

by the High Court, and imposed a period of 5 years rigorous imprison-

ment.

The Accused appealed against the sentence imposed by the Court of

Appeal to the Supreme Court.

**Held:**

(1) The Accused is technically guilty of the offence described in

Section 364(2) (e) of the Penal Code. However upon considering the

facts of the case and the submissions of the Counsel, this is not a

case where the Accused has to suffer a custodial sentence.

Per Gamini Amaratunga, J. –

“The unanimous opinion of the Court in that determination

(S.C. Reference 3/2008, HC Anuradapura Case No. 333/2004,

SCm 15. 10. 2008) was that the minimum mandatory sentence

in Section 362(2)(e) is in confict with Articles 4 (c), 11 and 12(1)

of the Constitution and that the High Court is not inhibited from

imposing a sentence that it deems appropriate in the exercise of

its judicial discretion norwithstanding the minimum mandatory

sentence”.

**Case referred to:**

SC Reference 3/2008, hC Anuradhapura Case No. 333/2004, SCm

15.10. 2008 - 2008 B.L.R. - Part III - BASL Law Journal (2008) Vol

XIV - 160

**AppeAl** from a judgment of the high Court.

*A.S.M. Perera, P.C.* with *Neville Ananda* for the Accused – Appellant

*Dileepa Peiris,* Senior State Counsel for the Attorney – General

*Cur.adv.vult.*

may 12th 2011

**gAmiNi AmArAtuNgA, J.**

The accused appellant hereinafter referred to as the

accused, was indicted in the High Court of Anuradhapura,

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for committing the offences of abduction and rape. The frst

charge was that on 29.4.1999 at Thalawa he abducted R. m.

Anusha Priyadarshani, a minor below 16 years of age from

the custody of her lawful guardian, an offence punishable

under Section 354 of the Penal Code. The second charge was

for committing the offence of rape on the said Anusha Priya-

darshani, an offence punishable under Section 364(2)(e) of

the Penal Code as amended by Penal Code (Amendment) Act

No. 22 of 1995. The punishment prescribed for the offence

falling within Section 364 (2)(e) is rigorous imprisonment for

a term not less than ten years and not exceeding twenty years

and a fne plus compensation to the victim of rape. Thus there

is a mandatory minimum sentence of ten years prescribed by

law which prevents the Court from exercising its discretion

with regard to the sentence.

When the accused pleaded not guilty to the charges

framed against him the trial commenced on 25.4.2006, almost

seven years after the date of the offence. The prosecutrix was

ffteen years and three months old at the time of the offence.

According to the evidence given by the prosecutrix at the

trial, she was a student studying in Grade 11 in the school.

She had a love affair with the accused. When her mother

discovered this she (the mother) was not in favour of this love

affair and wanted the prosecutrix to put an end to it. When

the prosecutrix continued her association with the accused,

her mother’s attitude became hostile and she began to scold

and harass the prosecutrix. The life at home became intoler-

able to the prosecutrix. one day when she left home in her

school uniform she met the accused on her way to the school.

She asked the accused to take her away and threatened that

she would take poison and commit suicide in the event of the

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accused’s refusal or failure to take her away from her home.

The accused then took her to his uncle’s house which was

within walking distance from her house. In that house she

stayed with the accused in a room for two days and during

those two days they shared the natural sexual intimacy,

natural to a man and a woman isolated in a room as willing

partners. From the accused’s uncle’s house they moved into

the accused’s sisters house where they spent two more days

before the police stepped in and arrested the accused.

Even in the history given by the prosecutrix to the

Judicial medical Offcer she has stated that “ I went with him

on my own free will and lived together with him.”

After the prosecution led the evidence of the other

witnesses and closed its case, the accused did not give or

offer evidence on his behalf. He did not even make an

unsworn statement from the dock.

In terms of Section 363 of the Penal Code, as amended

by Penal Code (Amendment) Act No. 22 of 1995 sexual

intercourse with a woman under sixteen years of age is rape

irrespective of the consent of the woman.

Accordingly, the learned trial Judge, by his judgment

dated 31.10.2006 quite rightly held that the accused was

guilty of the offence punishable under Section 364 (2) (e)

of the Penal Code and sentenced him to ten years rigorous

imprisonment, the mandatory minimum period of impris-

onment prescribed by law, and a fne of Rs. 2,500/- with a

default term of imprisonment for one year. There was no

fnding on the charge of abduction.

The accused appealed to the Court of Appeal against the

conviction and sentence. Whilst this appeal was pending, a

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Judge of the High Court in the course of the proceedings in

a case where the accused in that case was charged under

Section 364 (2) (e) of the Penal Code, (identical offence with

which the accused was charged) submitted a reference to this

Court in terms of Article 125(1) of the Constitution. In that

reference the learned high Court Judge has posed the ques-

tion whether Section 364(2) of the Penal Code as amended by

Penal Code (amendment) Act No. 22 of 1995 has removed the

judicial discretion when sentencing an accused convicted for

an offence punishable under Section 364(2) (e) of the Penal

Code.

This reference was taken up for determination before

a Bench of Three Judges of this Court on 29.07.2008 with

notice to the Attorney General and after considering the

submissions of the learned Senior State Counsel who

appeared as *amicus curiae* on behalf of the Attorney General,

this Court pronounced its determination on 15.8.2008 on the

question submitted to it.(1).

The unanimous opinion of the Court in that determina-

tion was that “the minimum mandatory sentence in Section

362 (2) (e) is in confict with Article 4 (c), 11 and 12(1) of the

Constitution and that the High Court is not inhibited from

imposing a sentence that it deems appropriate in the exer-

cise of its judicial discretion notwithstanding the minimum

mandatory sentence.”

This determination removed the knot of mandatory

sentences which upto that time tied the hands of the trial

Judges with regard to the appropriate sentence to be imposed

in the circumstances of the particular case tried by them.

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SC *(Gamini Amaratunga, J.)* 179

The accused’s appeal against his conviction and sentence

came up for hearing in the Court of Appeal on 24.11.2008

and it appears from the judgment of the Court of Appeal

dated 24.11.2008, that their lordships of the Court of

Appeal were aware of the determination of the Supreme Court

dated 15.10.2008 freeing the trial Judges from the shackles

of mandatory sentences prescribed by ordinary law which

prevent trial Judges from deciding the appropriate sentence

to be imposed in the light of the facts and the circumstances

of the case.

At the hearing before the Court of Appeal, the learned

Counsel who appeared for the accused has quite rightly not

challenged the correctness of the conviction. He has only

urged for the reduction of the sentence.

Their lordships of the Court of Appeal having taken into

consideration the fact, that the accused had a love affair with

the prosecutrix, and that the prosecutrix urged the accused

to take her away from her home and threatened to commit

suicide in the event of his failure or refusal to comply with

her request, have set aside the period of ten years rigorous

imprisonment imposed by the trial Judge and substituted

therefore a period of fve years rigorous imprisonment.

The accused, not being satisfed with the reduction of the

sentence granted to him by their lordships of the Court of

Appeal, fled an application for special leave to appeal against

the judgment of the Court of Appeal on the question of the

sentence. This Court granted leave to appeal on the question

of the sentence.

At the hearing before us, the learned President’s Counsel

for the accused submitted that it was the prosecutrix who had

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prevailed upon the accused to take her away. The accused

did not invite her to come with him. When the prosecutrix

threatened to commit suicide, the accused, as a young lover,

had acted under the impulse of his emotions. In that moment

of indiscretion his reason had given way to his emotions.

The learned President’s Counsel invited us to consider

the conduct of the accused. He took the prosecutrix to his

uncle’s house where the couple was accommodated for two

days. Thereafter the couple moved into the house of the

accused’s sister and spent two more days there. The learned

President’s Counsel submitted that this conduct of the

accused shows that he intended to keep the prosecutrix as

his partner in life with the blessings of his kith and kin.

At the time the prosecutrix gave evidence at the trial she

was a mother of a child by her marriage to another person.

The High Court record shows that the prosecutrix was a

reluctant witness against the accused. The evasive answers

given by her to the questions put to her by the prosecut-

ing counsel clearly demonstrate her reluctance to testify

against the accused. However the prosecutor had slowly and

gradually extracted from this reluctant witness all the details

he had to establish to prove the charge against the accused.

I do not think that the accused’s case in mitigation of

the sentence was placed before their lordships of the Court

of Appeal in the same way the learned President’s Counsel

placed his case before this Court.

There is no doubt whatsoever that the accused is

technically guilty of the offence described in section 364 (2) (e)

of the Penal Code. However after considering the facts of

the case and the submissions of the counsel I hold that this

*Rohana alias Loku v. Hon. Attorney General*

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is not a case where the accused has to suffer a custodial

sentence.

I accordingly set aside the sentence of fve years rigorous

imprisonment imposed on the accused by the Court of

Appeal and substitute therefor a sentence of two years

rigorous imprisonment suspended for a period of ten

years from the date of the judgment of the high Court of

Anuradhapura (31.10.2006). The fne and the default term

ordered by the trial Judge is affrmed.

The accused is on bail pending appeal. The learned High

Court Judge of Anuradhapura is hereby directed to notice

the accused to appear before the High Court and comply, in

his presence before Court, with the stipulations set out in

Section 303 of the Code of Criminal Procedure Act as amended,

with regard to suspended sentences.

**J.A.N. de SilvA C.J.** – I agree.

**rAtNAyAke J.** – I agree.

*The sentence imposed on the Accused by the Court of Appeal*

*set aside. The fne and the default term ordered by the trial*

*Judge affrmed.*

*Two years rigorous imprisonment imposed suspended for 10*

*years from the date of the judgment of the High Court.*

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**L. B. FINANCE LTD v. WELIGAMAGE AND OTHERS**

SuPREmE COuRT

J.A.N. DE SILVA, CJ.

AmARATuNGA, J. AND

RATNAyAkE, J.

S.C. APPEAL NO. 19/2009

S.C. (SPECIAL) L.A. APPLICATION NO. 157/2008

COuRT OF APPEAL NO. CA 246/97 (F)

D.C. COLOmBO CASE NO. 95406/mhP

2ND DECEmBER 2009

***Consumer Credit Act – Section 18 (1) – Owner to provide 2 weeks***

***notice to the hirer as a condition precedent to the act of termina-***

***tion – Section 19 – Consequences of the termination of the agree-***

***ment. – Strict observance Necessary? What is Notice?***

The Plaintiff entered into a hire purchase agreement with the

Defendant. The Plaintiff instituted this action on the basis that the

Defendant had defaulted the payments under the said agreement. The

main issue was the application of Section 18 of the Consumer Credit

Act as to whether actual notice is suffcient in terms of Section 18 or

whether strict observance of the Section is necessary. Section 18(1)

positively requires the owner to provide two weeks’ notice in writing as

a condition precedent to the act of termination and the said notice of

termination to be given to the hirer in writing.

**Held:**

(1) The notice of termination referred to is not a precursor to a fresh

period of notice, but the culmination of the process of termination

of the hire purchase agreement and hence the word ‘notice’ must

be understood as being synonymous with “inform”.

Per J.A.N. De Silva. CJ. –

“in my view Section 18(1) requires the owner to give the hirer a

clear 14 day period. That is, an explicit statement in no uncertain

terms as to the date of commencement of period of notice and the

date of expiry, the time interval being 14 days.”

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(2) The proviso to Section 18(1) provides the hirer with a right to pay

back the arrears without facing rejection and ensuing termina-

tion. The owner at the same time is prevented from terminating

the agreement. These rights and disabilities only exist during the

pendency of the notice period. At its expiration the hirer looses the

right and the option of termination is available to the owner.

(3) By deprivation of a full notice period of two weeks, the owner

has deprived the hirer the full extent of his rights of repayment

and has created unto himself the entitlement to terminate the

agreement earlier than at a date he would have been entitled to

originally. Therefore it is clear that the owner has encroached

upon the right of the hirer.

J. A. N. De Silva, CJ. –

“It is pertinent to note that the said section (Section 18(1)) does

not prevent the hirer remedying his failure by setting in motion the

steps provided in Section 18 without prejudice to either party”.

**AN AppeAl** from a judgment of the Court of Appeal.

*Harsha Amarasekera* for Plaintiff – Respondent – Petitioner

*Hemasiri Withanarachchi* for 1st Defendant – Appellant – Respondent.

*Cur.adv.vult.*

April 01st 2010

**J.A.N. de SilvA CJ**

This is an appeal from a decision of the Court of Appeal

dismissing the application of the Plaintiff–Respondent–

Appellant (hereinafter referred to as the Plaintiff). The

circumstances relating to the dispute in question is as

follows. The Plaintiff, a well known fnance company, entered

in to a hire purchase agreement with the Defendant-Appel-

lant – Respondent (hereinafter referred to as the Defendant).

The Plaintiff instituted Action on the basis that the Defendant

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defaulted upon payments under the agreement and sought

recovery of such sums. The Plaintiff according to his reading

of the Consumer Credit Act 29 of 1982, claims to have served

notice on the Defendant by letter dated 16-11-1984 (marked

P7). Thereafter the Plaintiff further claims termination of

the agreement by letter dated 03-01-1985 (marked P8). The

Defendant argues that the termination was contrary to the

provisions of the said Act and therefore bad in law.

When this matter was supported for special leave the

Supreme Court granted leave on the following two question

suggested by the counsels for the Plaintiff – Appellant and

Defendant- Respondent.

(a) Do the documents “P7” and “P8” when read together

satisfy the requirement of section 18 sub section (1)

of the Consumer Credit Act No. 18 of 1982?

(b) Whether the time to be specifed in the notice of

intention to terminate the hire purchase agreement is

mandatory and whether actual notice of termination

given later would cure the defect in the frst notice?

The central question at issue is as to the precise applica-

tion of section 18 of the Consumer Credit Act.

Section 18 of the Act reads as follows:

*18 (1) Where a hirer makes more than one default in the*

*payment of hire as provided in a hire-purchase agreement*

*then, subject to the provisions of section 21 and after giving*

*the hirer notice in writing of not less than –*

*(a) one week, in a case where the hire is payable at*

*weekly or lesser intervals; and*

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*(b) two weeks in any other case,*

*the owner shall be entitled to terminate the agreement by*

*giving the hirer notice of termination in writing:*

*Provided that if the hirer pays or tenders to the owner the*

*hire in arrear together with such interest thereon as may be*

*payable under the terms of the agreement before the expiry of*

*the said period of one week or two weeks, as the case may be,*

*the owner shall not be entitled to terminate the agreement.*

*(2) If a hirer -*

*(a) does any act with regard to the goods to which the*

*hire-purchase agreement relates which is inconsistent*

*with any of the terms of the agreement; or*

*(b) breaks any express condition of the agreement which*

*provides that on the breach thereof the owner may*

*terminate the agreement,*

*The owner shall be entitled to terminate the agreement by*

*giving the hirer not less than 30 day’s notice in writing*

*specifying the particular breach or act which entitles him*

*to terminate the agreement:*

*Provided, however, that in case where the breach or act*

*specifed in the notice is capable of being remedied by the*

*hirer, it shall be the duty of the owner to require the hirer*

*by such notice to remedy the breach or act complained*

*of, before the expiry of the said period of thirty days, the*

*owner shall not be entitled to terminate the agreement.”*

upon a plain reading of the above provision it is clear

that section 18 requires two notices to be given. The objective

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behind this period can be found in the proviso to the said

section. It allows the defaulting hirer an opportunity to tender

the hire in arrears together with any interest payable under

the terms of the agreement. Sec 19 reveals the consequences

of section 18. Section 19 reads thus,

*19. Where a hire-purchase agreement is terminated under*

*this Act, then the owner shall be entitled*

*(a) to retain the hire and the initial deposit which have*

*already been paid and to recover the arrears of hire*

*due:*

*(b) subject to the provisions of section 16 and section 21*

*and subject to any contract to the contrary to repos-*

*sess the goods;*

*(c) subject to the provisions of section 20 and section 21 to*

*recover possession of the goods by action in court;*

*(d) without prejudice to the provisions of subsection (2)*

*of section 13 and of section 14 to damages for non-*

*delivery of the goods, from the date on which termi-*

*nation is effective to the date on which the goods are*

*delivered to or repossessed by the owner.*

Therefore the consequences are quite substantial from

the point of view of the hirer. Hence it is vital that statutory

notice be granted to the hirer.

In the instant case a letter 16-11-1984 (marked P7)

informing the Defendant of a notice period ending 30-11-1984

had been issued. However due to what appears to be an error

on the part of the Plaintiff the Defendant received less than

two weeks notice. Despite this fact the letter of termination

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dated 03-01-1985 (marked P8) was sent to the Defendant,

and it is clear that a period far greater than two weeks was

available to the hirer to tender the arrears.

The real question then before us is as to whether actual

notice is suffcient in terms of section 18 or whether strict

observance of the statutory provision is necessary.

Closer scrutiny of section 18 makes for interesting read-

ing. Section 18 (1) positively requires the owner to provide two

weeks’ notice in writing as a necessary condition precedent to

the act of termination. The said section also requires *notice* of

termination to be given to the hirer in writing.

The word notice occurs twice in section 18(1). It was

never contended that the words refer to one specifc notice,

and I do not think it is possible to do so. However a valid

question can be asked as to whether the words import the

same meaning. Bindra’s interpretation of statutes 9th edition

page 645 states that *“words are generally used in the same*

*sense throughout in a statute unless there is something repug-*

*nant in the context”.*

The frst notice is one that is required to be given where

hirer makes more than one default. The subsequent sentence

refers to the content of the notice. The hirer is informed of

a two week period within which he is expected to pay the

amount overdue.

The word notice fgures once more in the sentence

immediately preceding the proviso to section 18. It requires

the owner to give the hirer notice of termination. The inclu-

sion of the word “notice” instead of communication is some-

what curious as it imports a meaning which is slighter than

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the bringing of fnality to the agreement. If the word notice

were to be given the same meaning it was given in the frst

instance, the document would have the effect of a word of

caution or warning of impending termination. I do not think

the legislature intended this, as it would then render the

frst notice futile. Therefore the second document cannot be

understood in the sense of being a mere notice.

The phrase “shall be entitled to terminate the agreement”

is signifcant. The wording may be interpreted using one of

two approaches. It could either be inferred that the entitle-

ment devolves, upon giving the hirer notice of termination.

This requires the word notice being given the meaning of

termination *per se*.

Alternatively, the entitlement to terminate could be

understood to devolve from the two notices already given.

Consequently the fnal limb of the sentence is construed as a

direction as to the mode in which termination should occur.

This requires the term notice be given a meaning synony-

mous with the word inform.

An argument that can be offered to ensure that the word

notice is given its ordinary meaning is that though notice of

termination is granted by the second letter, the hirer would

not receive the right contained in the proviso in respect of

the second notice period. In other words, during the two

week notice, the hirer enjoys the right of repayment. however

during the time interval between notice of termination and

actual termination the hirer enjoys no such right.

I fnd this argument to be rather tenuous. I think it can

be safely presumed without being unduly charitable to the

genus of owners that they would prefer repayment over ter-

mination and therefore the existence of a right of repayment

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being available to the hirer would be of little importance. I do

not foresee an owner rejecting repayment, having already sent

notice. Therefore the distinction sought is rather illusory.

Furthermore construing the *notice of termination* as

termination s*trictu sensu* would not prevent the owner

sending a second *notice* (in the sense of a warning) on his own

accord which would result in the same legal consequences as

above. This would then mean the legislature has attempted to

statutorily compel the owner to issue a second notice without

compelling him to accept repayment. I do not think the legis-

lature would grant protection to the hirer during one period

of notice and then not do so in the subsequent period. This

is clear since the proviso only applies to the period of two

weeks.

Hence it is my conclusion that the *notice of termination*

referred to is not a precursor to a fresh period of notice, but

the culmination of the process of termination of the hire

purchase agreement and hence the word notice must be

understood as being synonymous with inform.

Returning to section 18(1), it is my view that the said

letters are only connected in a limited way. That is, the said

section in no way requires the second notice to be made

immediately at the end of the 14 day period. However it

cannot be sent until the effuxion of that period. The relation-

ship between the letters ends there.

Now I move onto the question of the notice that is

required to be given in writing upon default (frst *notice*). In

my view section 18(1) requires the owner to give the hirer

a clear 14 day period. That is, an explicit statement in no

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uncertain terms as to the date of commencement of period of

notice and the date expiry, the time interval being 14 days.

The need for such explicitness is found in the proviso to

section 18(1). The proviso concurrently creates a right for the

hirer as well as a disability on the part of the owner. The hirer

is provided with a right to pay back arrears without facing

rejection and ensuing termination. The owner at the same

time is prevented from terminating the agreement. These

rights and disabilities only exist during the pendency of the

notice period. At its expiration the hirer looses the right and

the option of termination is available to the owner.

It is pertinent to note that the existence of these rights

and disabilities are dependent on the dates specifed by the

owner in the letter of notice. When in a contract rights and

duties are delineated by a party, such enabling section must

be read mandatorily as well as strictly in order to avoid the

abuse of use of such power.

Therefore in considering section 18 this court must an-

swer three questions.

1. Was a letter of notice specifying two weeks’ notice is-

sued to the hirer?

2. Was the said period available in full to the hirer?

3. Was the letter (notice) of termination received by the

hirer after the expiry of the notice period?

In the instant case questions 1 and 3 can be answered in

the affrmative. however question 2 must be answered in the

negative. As noted earlier by this deprivation of a full notice

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period of two weeks, the owner has deprived the hirer the full

extent of his rights of repayment (irrespective of whether he

had such intention or not) and has created unto himself the

entitlement to terminate the agreement earlier than at a date

he would have been entitled to originally. Therefore it is clear

that the owner had encroached upon the right of the hirer.

I was tempted to include a fourth question, namely as to

whether the hirer suffered material prejudice due to the act

or omission of the owner. however I am frmly of the belief

that where rights have been meddled with, a prejudice to the

hirer had already occurred and thereafter looking in to the

consequences of such prejudices would set a bad precedent.

Furthermore it is also pertinent to note that the said sec-

tion does not prevent the hirer remedying his failure by set-

ting in motion the steps provided in section 18 without preju-

dice to either party.

For the above reasons this appeal is dismissed without

costs.

**AmArAtuNgA J.** – I agree.

**rAtNAyAke J.** – I agree.

*Appeal dismissed.*

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**PERERA v. FERNANDO AND ANOTHER**

SuPREmE COuRT

J.A.N. DE SILVA, CJ.

AmARATuNGA, J. AND

SuRESh ChANDRA, J.

S. C. APPEAL NO. 8A/2009

W.P./HCCA/KAl 132/2001 (F)

D. C. PANADuRA No. 845/l

JANuARy 21ST, 2011

***Trusts Ordinance – Section 83 – Where it does not appear that the***

***transferor’s intention was to dispose of benefcial interest?***

The main issue before the Supreme Court was whether the two deeds

referred to in the plaint, were absolute transfers or conveyances creat-

ing constructive trusts. The District Court held in favour of the plaintiff

and held that the two deeds were not absolute transfers. on appeal to

the Civil Appellate high Court, the judgment of the District Judge was

set aside and judgment was entered in favour of the Defendants.

**Held:**

(1) When the owner of a property transfers it without intention to

dispose of the benefcial interest therein, then a constructive trust

is created and the transferee must hold such property in trust for

the beneft of the transferor according to the principles laid down

in Section 83 of the Trusts ordinance.

Per Suresh Chandra, J. –

“. . . . It would be necessary to conclude that both transfers did

not convey absolute title to the transferees and that they held the

property in trust for the transferor as the transferor in both in-

stances had not intended to convey the benefcial interest in re-

spect of the property. This is in line with the principle laid down in

Section 83 of the Trust ordinance”

(2) The Civil Appellate High Court was in error in concluding that

the Plaintiff had failed to establish that he reserved the benef-

cial interest when effecting the conveyances, where as the learned

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District Judge had arrived at the conclusion on the abundance of

evidence placed before Court that the transactions effected by the

Plaintiff had been loan transactions.

**Cases referred to:**

(1) *Muttamma v. Thiagaraja* (1961) 62 NlR 559

(2) *Dayawathie v. Gunasekera* (1991) 1 SlR 115

**AppeAl** from the judgment of the Provincial high Court of Appeal of the

Western Province Holden at Kalutara.

*H. Withanachchi for the Plaintiff – Respondent – Appellant*

*Ranjan Suwandaratne for the Defendants – Appellants – Respondents*

*Cur.adv. vult*

may 09th 2011

**SureSH CHANdrA J.**

This is an appeal from the judgment of the Provincial

High Court of the Western Province holden at Kalutara.

The Plaintiff instituted action seeking a declaration that

the 1st Defendant was holding under a constructive trust in

favour of the Plaintiff the property which was the subject

matter of the case, for a direction on the Registrar of the

court to execute such deed in the event of the 1st Respondent

refusing to execute such deed and for a declaration that Deed

No. 3742 dated 31.05.1993 was null and void.

The Plaintiff in this Plaint had averred that,

(i) the original owner of the subject matter namely P.h.

Rodrigo had caused an amalgamation and a subdivision

of the property and that after his death lot No. 1 in the

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subdivided plan devolved on his widow Bathilda Rodrigo

and daughter Swarna Kumari Seneviratna respectively.

(ii) the said two persons by Deed No. 14046 conveyed the

said lot No. 1 to the Plaintiff.

(iii) in may 1987 the Plaintiff when in need of a sum of Rs.

50,000 had obtained a loan from Weda maline Dhamal-

atha but on condition that an outright transfer be made

to her which the Plaintiff had agreed had executed Deed

No. 147 dated 05.05.1987.

(iv) by the said transaction the Plaintiff did not convey the

benefcial interest and that the transferee had the prop-

erty in trust till the sum of Rs. 50,000 was repaid with

interest at 24%.

(v) in December 1987 Dharmalatha had wanted her money

back and the Plaintiff too needed more money. He had

negotiated with the 2nd Defendant who had agreed to

advance the sum of Rs. 75,000 at an interest of 36% on

condition that a transfer was effected in favour of his son

the 1st Defendant.

(vi) the Plaintiff had thereafter executed Deed No 581 as

agreed on 16.12.1987 with Dharmalatha signing as the

transferor and the Plaintiff signing as a witness to signify

the subsistent constructive trust.

(vii) the possession of the said property had remained with

the Plaintiff throughout.

(viii) after the said transaction the Plaintiff had constructed

a house thereon worth Rs. 600,000 and the value of the

land alone was estimated at Rs. 400,000 as at 1987.

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(ix) in order to negate the said constructive trust the 1st

Defendant had by Deed No. 3742 dated 31.05.1993

purporting to convey once 1/6th share to the 2nd

Defendant.

The Defendants fled their answer and stated that the

Plaintiff had by Deed No. 147 transferred the property to

Weda malini Dharmalatha who in turn had by Deed No. 581

conveyed the same to the 1st Defendant for valuable consider-

ation, that the Plaintiff was permitted to occupy the land and

the said deeds been outright transfers there was no construc-

tive trust.

The pivotal issue in the case was whether the deeds 147

and 581 were subjected to a constructive trust or whether

they were absolute transfers. The learned District Judge

held in favour of the Plaintiff and held that the said deeds

were not absolute transfers. on appeal to the Civil Appellate

High Court the Judgment of the District Court was set aside

and judgment was entered in favour of the Defendants.

on an application by the Plaintiff seeking leave this Court

had granted leave on the following questions:

(i) Did the Civil Appellate High Court misdirect itself by

concluding that there was no evidence to establish a con-

structive trust from Weda malini or the Defendants?

(ii) Did the High Court err in law by failing to take into

consideration that the District Court was satisfed with

regard to the attendant circumstances surrounding the

transaction between the parties?

(iii) Has the said High Court misdirected itself in law by

drawing an inference from the alleged failure to deposit

the money in Court to establish the bona fdes of the

Appellant?

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The facts relating to this case as per the evidence led by

the parties needs consideration in answering the above ques-

tions of law on which leave was granted.

It is not in dispute that prior to 1987 the Plaintiff was the

owner of the said land. The Plaintiff by Deed No. 147 dated

1987 had conveyed the said property which on the face of

it appears as an absolute transfer. However the evidence

before the District Court was to the effect that it was not an

absolute transfer as it had been executed for the granting

of a loan of Rs. 50,000 with interest at 24%. The Plaintiff in

his evidence before Court stated that since Dharmalatha the

transferee on Deed No. 147 had wanted her money back and he

too had wanted more money had made arrangements with the 2nd

Defendant to obtain a sum of Rs. 75,000 at 36% interest on

the basis of a transfer of the property being effected in favour

of the 2nd Defendants son the 1st Defendant. It is in that light

that Deed No 581 had been executed on 16.12.1987 by the

said Dhamalatha with the Plaintiff signing as a witness to the

said deed. The said Deed No. 581 on the face of it appears to

be an absolute transfer. Right throughout these transactions

the Plaintiff had not parted with possession of the property

nor had the transferees on the said deeds 147 and 581

obtained possession. He had in fact constructed a house on

the said land, obtained a subsidy for coconut cultivation on

the land and had even taken an electricity supply to the house.

The Plaintiff had produced a letter dated 15.07.1992 (P9)

purported to have been sent by the 2nd Defendant asking the

Plaintiff to see him and fnalise the matter. The Plaintiff had

also been charged in the magistrates Court on a complaint

made by the 2nd Defendant regarding a cheque for Rs. 50,000

given by the plaintiff in which case the plaintiff had been

disparaged. The plaintiff had also got to know that the 1st

Defendant had also transferred an undivided 1/6th share

of the land to the 2nd Defendant by Deed no 3742

dated 31.05.1993. The Plaintiff had also stated in evidence

that he had allowed his sister in law to occupy the house