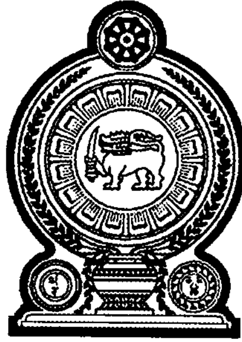

THE

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

[2007] 1 SRI L.R. – PARTS 5- 6

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President's Counsel submitted that reserving of 2% of the vacancies for persons who return from abroad results in an incongruity where places may have to be kept vacant for such persons denying facilities to children who have had continued residence within the country. These vacancies are later filled in a surreptitious way. It appears that there is no end to the list. The maximum of 40 for a class is exceeded by far and at times a whole new class is established to accommodate those who are favoured. 350

Since the challenge to the validity of the Circular has far reaching implications, I have to examine the grounds urged from the ambit of the fundamental right to equality guaranteed by Article 12(1) of the Constitution.

The Preamble of the Constitution states the "immutable republican principles" on which it is based as being "Representative Democracy" and the assurance to all people "Freedom, Equality, Justice, Fundamental Human Rights and the independence of the judiciary". These principles partake of Democracy and Socialism being the components of the name of 360 the Republic.

The principle of equality acquires a functional dimension as the fundamental right to equality guaranteed by Article 12 of the Constitution. Sub Article (I) sets out the positive element of the right, that "all persons are equal before the law". The other provision in Sub Article (1) which guarantees "the equal protection of law" and the bar against discrimination on grounds of race, religion, language, caste, sex, political opinion or place of birth contained in Sub-Article (2), are the safeguards that assure equality before the law. Taken in the context of the republican 370 principle of equality and the functional guarantee thereof, the phrase "the law" as appearing in Article 12 has to be interpreted in a wider connotation than the terms "law" and "written law" defined in Article 170 of the Constitution, to encompass any binding process of regulation. Since the jurisdiction of this Court in terms of Article 126 and the right as contained in Article 17 to invoke such jurisdiction is in relation to executive or administrative action, the guarantee of the right to equality in Article 12 should extend to any binding process of regulation laid down by the executive or the administration which affects persons in its application. 380

It is necessary at this point to ascertain "the law", including any binding process of regulation, from the perspective of which the alleged infringement has to be judged.

The law in its primary sense of an Ordinance or Enactment of the legislature relating to Education, is contained in the Education Ordinance originally proclaimed in 1939, prior to the granting of independence. A perusal of the provisions of the Ordinance reveals that these provisions have fallen into disuse. A similar observation has to be made as regards the exhaustive regulations that have been made under the Ordinance. They are contained in nearly 200 pages in the Volume of Subsidiary Legislation. 390

I have to digress at this point to state albeit briefly the sequence of events in which the Education Ordinance as amended and the Regulations made thereunder fell into disuse.

The Ordinance established the Department of Education as the Central Authority for Education which functioned under the general direction and control of the Minister. There was a Central Advisory Council to advise the Minister and Local Advisory Committees in different parts of the country at the level of Municipal Councils, Urban Councils, Town Councils and Village 400 Councils. These Advisory Committees looked into the educational needs of the particular areas. The Government functioned as the regulator of education and standards were laid down and enforced through a system of School Inspectors, Directors and the like. The schools were separately managed by religious and non religious bodies and received assistance from the Government. Hence there were mainly the "Assisted Schools" and a few Private Schools. The education system thus structured including the Central Colleges became a model for the whole Region and the country achieved the much acclaimed high levels 410 of literacy and of academic excellence. There have been drastic changes in the system commencing from 1961 when the management of "Assisted Schools" was taken over by the Government. Thereby, the Government became the manager of virtually all schools and shed its role as the regulator and supervisor. The well structured law and the comprehensive Regulations became mere pages in the Statute books.

Then, we come to the 13th Amendment to the Constitution which *inter alia*, provided for the devolution of power to Provincial Councils. In terms of section 3 of List 1 in the 9th Schedule to the 13th Amendment, "Education and Educational Services" to the extent set out in Appendix III are devolved to Provincial Councils. Section 1 of Appendix III states that the provision of facilities to all State schools, other than specified schools shall be the responsibility of the Provincial Council. It is there provided that specified schools will be "National Schools". The concept of "National Schools" derives solely from its single reference to it in Appendix III. Almost all leading Government schools have been declared as being "National Schools". The Education Ordinance has not been amended to provide for the newly emerged situation and there is no law that is operative as regards National Schools or for that matter, as far as I could discover in regard to any school.

The alarming situation is that Education being the foremost responsibility of Government has been operating for a long period of time in a legal vacuum. Where there is no law it is anarchy that prevails. In this vacuum shorn of the carefully structured regulatory and supervisory system, with Advisory Councils at different levels, self styled experts exercising the freedom of the wild ass have dangerously tampered with the process, to bring about chaos. The resultant tragedy is revealed in a survey carried out by the National Education Commission, according to which reportedly 18% of the Grade VI students are illiterate. It is unnecessary for the purpose of this judgment to delve into the other alarming revelations of this survey.

It appears that the impugned Circular P1 itself is referable to the opening line of List II (Reserve List) in the 13th Amendment which states that "National Policy on all subjects and functions" will come within the Central Government. Hence we have a situation where the law as contained in the Education Ordinance and the elaborate system of regulations having fallen into disuse and the matter of admission to schools being regulated by a Circular purporting to be a statement of National Policy. It is plain to see that the Circular does not have any of the general characteristics that pertain to policy. It has a classification of 7 categories, a scheme of weighted marking and a related identification of documents that

could be received in evidence. From a functional perspective it is the binding process of regulation laid down by the executive as regards the matter of admission to Government Schools. On the reasoning stated above it would constitute "the law" within the purview of Article 12(1) of the Constitution in reference to which the alleged infringement of the right to equality has to be judged. 460

I have now to revert to the right to equality guaranteed by Article 12(1) and the basis on which its content would be applied to judge an alleged infringement. Dr. Wickremaratne (Fundamental Rights in Sri Lanka - 2006 Second Edition at page 286) citing from the renowned exponent of Socialism, Harold Laski (A Grammer of Politics), C.G. Weeramantry and the Judgment of Brewer J., sums up the concept of equality and the manner in which the equal protection of law applies, as follows:

> "*Equality, as Laski stated, does not mean identity of treatment. 'There can be no ultimate identity of treatment so long as men are different in want and capacity and need'. Men are unequal in strength, talent and other attributes. While some of these are natural, others are referable to the society in which they live. Some are born with advantages. Other factors and combinations of factors may favour some people and place others at a disadvantage. To quote Weeramantry:* 470
>
> *"As the myriads of constituent units of a society keep thus shifting their positions relative to each other, absolute equality among (men) even in one characteristic of for a moment of time is patently an impossibility. Far greater is the impossibility of preserving general equality for any period, however short. A permanent state of equality is only the remotest dream."* 480
>
> *Equal protection does not mean that all persons are to be treated alike in all circumstances. It means that persons who are similarly circumstanced must be similarly treated. The State is however permitted to make laws that are unequal and to take unequal administrative action when dealing with persons who are placed in different circumstances and situations. Thus the State has the right to classify persons* 490

and place those who are substantially similar under the same rule of law while applying different rules to persons differently situated. "A classification should not be irrational or arbitrary. It must be reasonable and based on some real and substantial distinction, which bears a reasonable and just relation to the act in respect of which the classification is proposed and can never be made arbitrary and without any such basis." 500

The requirement stated by Brewer J., in the case of *Gulf Colarado and Santa Railway Co* v *Ethis*(1) cited above, has been subsequently stated as the "Basic standard" to be satisfied in a permissible clarification. The classic formulation of the "basic standard" is that stated in the case of *Royster Guano Co.* v *Commonwealth of Virginia*(2) at 415. It reads as follows:

"..... classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 510

Therefore in applying what has been described as the "Royster formulation" to test the validity of classification we have to first look at the object of the law and then consider whether the classification could be reasonably related to achieve the object. As noted above the law as contained in the Ordinance and Regulations have fallen into disuse. The constitutional scheme for devolution of power in the subject of education has been defeated to a great extent by recourse to a single reference to "National Schools" in Appendix III. We are confronted with a jurisprudential paradox of a Circular purporting to be a statement of National Policy being is the only binding process of 520 regulation as regards admission of students to Government Schools. The Circular has been issued in the exercise of the power reserved to the Government to formulate "National Policy" on all subjects and functions.

There is no provision in the 13th Amendment that defines the ambit of Government action that would come within the broad phrase, 'National Policy'.

Maxwell on The Interpretation of Statutes, under the heading "An Act is to be regarded as a whole" (12th Ed. Page 58) states that

"....... one of the safest guides to construction of sweeping general words which are hard to apply in their full literal sense is to examine other words of like import in the same instrument, and see what limitations must be imposed on them......." 530

The relevant principle of interpretation with particular reference to the interpretation of provisions in a Constitution is set out in Bindra's Interpretation of Statutes – 9th Ed. page 1182 as follows:

"The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that not one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument." 540

In applying these principles of interpretation I am of the view that the broad phase "National Policy" appearing at the top List II should be interpreted together with the relevant provisions in Chapter VI of the Constitution which contains the "Directive Principles of State Policy." 550

The limitation in Article 29 which states that the provisions of Chapter VI are not justiciable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution. Article 27 of Chapter VI lays down that the 'Directive Principles of State Policy' contained therein shall guide "Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society." Hence the restriction added at the end in Article 29 should not detract from the noble aspirations and objectives contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert. 560

As regards education, the policy objective is stated in section 27(2) (h) as follows:

"The state is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include –

....

(h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels." 570

This objective as to equal access to education has gained recognition in section 3(2) of the Tertiary and Vocation Education Act No. 20 of 1990.

Equal opportunity in the matter of education was held by the Supreme Court of the United States to be a requirement of the Equal Protection Clause (similar to Article 12) of the Fourteenth Amendment to the Constitution. In *Brown* v *Board of Education Topika*(3) - Chief Justice Warren delivering the opinion of the Court stated as follows: (at 493):

> *"Today, education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."* 580 590

Hence both from the perspective of the application of the equal protection of the law guaranteed by Article 12(1) and from the perspective of national policy, the objective of any binding process of regulation applicable to admission of students to schools should be that it assures to all students equal access to education.

On the reasoning stated above the question before this Court narrows down to whether the classifications of students for admission in the impugned Circular P1 and the criteria laid down 600

therein can be reasonably related to the objective of providing equal access to education.

The preceeding analysis reveals that the classification in P1 is not based on the suitability and the need of a particular child to receive education in a national school or any other State School. The classification is based on wholly extraneous considerations such as the residence of the parents to be ascertained from the ownership of property; whether the parent is a past pupil and if so for what period and his achievements; whether the child to be admitted has a brother or sister in the school and if so the brother's or sister's achievements or whether the parent has been transferred in the manner that has been referred to above. The suitability and the need of the particular student to receive education in the school is not ascertained in the process, nor is there any method and criteria specified to ascertain such matters.

Similarly, the system of weighted marking referred to above as contained in the Circular completely defeats the objective of providing equal access to education.

For the reasons stated above we hold that the Circular P1 applicable in the matter of admission of students is inconsistent with the fundamental right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution, in so far as it relates to the admission of students to Grade I of national schools and other schools to which the Circular has been made applicable.

We are mindful of the resultant position, that there would be no binding process of regulation in the matter of admission of students to Grade I. This would not normally be the consequence of a declaration of invalidity of executive or administrative action since fresh action can be taken under the applicable law. In this instance, as noted above law and written law relevant to education have fallen into disuse resulting in a legal vacuum.

Since the jurisdiction of this Court in terms of Article 126(4) of the Constitution empowers the court to make "directives as it may seem just and equitable in the circumstances," we consider it appropriate to indicate a course of action which in our view may alleviate the situation that has come to an impasse.

The authorities have failed over the decades that elapsed to provide an effective to legal machinery to manage, regulate and supervise education. The Ministry of Education appears to have formulated P1 as the purported National policy outside the framework of the law, which fact by itself would suffice to declare invalid. Section 2 of the National Education Commission Act No. 19 of 1991, empowers the President to declare from time to time the national Education Policy which shall be conformed to by all authorities and institutions responsible for education in all its aspects. The policy is formulated on the recommendations and advice of the Commission and in terms of section 2(2) includes, *inter alia*: 640 650

"......... methods and criteria for admission of students"

This in our view is the proper guideline for the formulation of a policy. The Ministry fell into error by laying down classifications, quotas and a system of weighted marking being elements completely antithetic to the guarantee of equality before the law whereas the focus should be on appropriate methods and criteria that would apply in the process of effecting admissions.

In the situation that has arisen we are of the view that it is appropriate for immediate action to be taken in terms of the National Education Commission Act for the formulation of a policy setting out methods and criteria for admission of students. 660

Counsel submitted that leading private schools in Colombo have adopted different methods to be applied in the admission of students. The methods have been in certain instances structured to include interviews with parents and children and a suitable test which should be faced by the children seeking admission. These tests not being written tests are based on the methodology that is adopted in pre-school education. It has now been established by clear scientific evidence that all the elements that go to develop character and personality are in place by the time a child reaches the age of 5 years. Detailed studies have been done in the United Kingdom in this regard under a separate Ministry in charge of the subject of Children. In the circumstances there is a wealth of experience, both in this country and outside on the basis of which a suitable methodology and criteria could be adopted for admission of children particularly to Grade 1. 670

The National Education Commission may if it is considered appropriate seek the assistance of child psychologists and competent pre-school educators in formulating the appropriate methods and criteria. The process of interviews and tests to be included have to be transparent and all safeguards should be put in place to minimize allegations of favourism.

The present situation has resulted in a gross abuse of the process of admission of students. In the circumstances it would be necessary to devise a new process in which the participation of authorities who have brought about the tragic situation be excluded and the process to be administered directly under the purview of the President as provided in the National Education Commission Act.

The demand for education in leading schools in Colombo and other urban centers result from the lack of appropriate facilities in the outer areas. In the circumstances the national policy should also encompass a suitable program to develop a minimum of two schools in each Divisional Secretariat Division so that with the passage of time these schools would reach the same standard as that of national schools.

The final matter to be addressed is in relation to the other applications pending before this Court and the Court of Appeal. Further litigation is not warranted in view of the finding of illegality as to the Circular P1 in respect of admission to Grade 1. In the circumstances suitable administrative relief should be granted to the persons affected. Since the availability of places in schools is a variable factor which cannot be addressed in Court, a Committee may be established to ascertain the grievances of the persons who have already invoked the jurisdiction of Court and to grant administrative relief, if it is established that any student concerned is suitable for admission to a particular school. This process would be available only to persons who have already invoked the jurisdiction of Court considering the administrative difficulties that would otherwise arise if the floodgates are opened at this stage for another series of applications for relief in the matter.

Considering the directions that are made in this Judgment, the Registrar of this Court is directed to send a copy of this judgment

to the Secretary, to His Excellency the President to facilitate action as stated above.

The national policy on school admission to be formulated may be submitted to Court for the policy to be examined from the perspective of the fundamental right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution. 720

S.C.(FR) Applications 10 to 13/2007 are allowed and the petitioners are granted the declaration that their fundamental rights guaranteed by Article 12(1) of the Constitution have been infringed by executive and administrative action.

It is further declared that the Circular marked P1 is inconsistent with Article 12(1) of the Constitution and is invalid and of no force or avail in law in respect of admission of students to Grade 1 in the schools to which the Circular is addressed.

No costs. 730

DISSANAYAKE, J. – I agree.

SOMAWANSA, J. – I agree.

Relief granted.

National Policy on school admission to be formulated and submitted to the Supreme Court

KUMARA FERNANDO AND OTHERS
v
COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
IMAM, J.
SRISKANDARAJAH, J.
CA 2282/02
CA 1070/03
CA 1080/03
NOVEMBER 29, 2006
JANUARY 23, 2007

Termination of Employment of Workmen (Special Provisions) Act 45 of 1971 (TEW Act) – S2 (1), S2(1) b, S2 (2), S5, S6 – move to merge two Banks – Termination of services of employees – Industrial Disputes Act – S48 – Absolute discretion vested in the Commissioner of Labour – Bona fides – Natural Justice – Bias – Retrenchment only on a voluntary basis – Method of selection – Arbitrary? Writ of Certiorari futile?

In August 2000 the Standard Chartered Bank (SCB) acquired the Banking operations of ANZ Grindlays Bank Ltd., and subsequent to the acquisition ANZ Grindlays Bank Ltd., changed its name to Standard Chartered Grindlays Bank Ltd. (SCGB)

The two Banks made a application under S2 (1) (b) of the TEW Act seeking the approval of the Commissioner to terminate the services of certain employees. This was approved.

The petitioners in the three applications sought to quash the order of the Commissioner of Labour made under S2 (1) (b) of the TEW Act, approving the termination of their services.

It was contended by the petitioners that TEW Act can be resorted to generally in a situation where the business of the employer is closed down and not in a situation where the employees become excess staff as a result of a prospective merger and the business still continues.

It was also contended that TEW Act should be read together with the express condition imposed by the Central Bank to the effect that employees should be retrenched purely on a voluntary basis and in the circumstances, the orders made by the Commissioner of Labour – are illegal, *ultra vires* – and they should be reinstated.

Held:

(1) S2(2)b read with S2(1)b of the TEW Act constitutes the Commissioner of Labour as the sole authority to declare whether to grant or refuse permission to terminate upon an application made by the employer.

(2) S2 (2)b – provides by express and unequivocal statutory language that approval to terminate may be granted or refused by the Commissioner – in his absolute discretion.

(3) S2(2)(e) when dealing with the power of the Commissioner to grant relief when he has decided to grant approval to terminate also renders his decision on this relief well protected, as it also expressly refers to absolute discretion.

(4) In S2(2)(f) the intention of the Act is manifestly clear which is to effect finality of litigation/ disputes by providing that such an order is final and conclusive.

(5) S 20 establishes primacy of this statute over any other written law.

Per Imam, J.

"The Court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended, decisions which are extravagant or capricious cannot be legitimate, but if the decision is within the confine of reasonableness, it is no part of the Court's function to look further into its merits".

(6) In accordance with the prevailing laws – TEW Act which is *sui generis* and prevails over all other laws with the Commissioner's jurisdiction not being fettered by any other state agency – Central Bank.

(7) The petitioners have failed to point out any part of the order which exhibits bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice or Chairman as the case may be would or did favour one side unfairly at the expense of the other. The Court will not inquire whether he did in fact favour one side, certainly, suffice it that reasonable people might think he did.

Held further

(8) An employer has the right to *bona fide* retrench his employees, on the ground that such employees are redundant to his business. Once the necessity for retrenchment is established the employer is

free to decide on the number of employees who would become surplus to his requirement. Retrenchment is a right of the management and is a necessary incident of the industry, so long as it is exercised bona fide, the employer's decision should be accepted.

'In Sri Lanka there is no requirement for last in first out (LIFO). The employer has a discretion to decide the method of selection for retrenchment.'

Per Imam, J.
"In this case some positions of the employees retrenched are no longer in existence and the status quo cannot be resumed, there will be utter disaster and mayhem, if the workmen claim a return to work".

APPLICATION for Writs in the nature of *Certiorari.*

Cases referred to:

(1) *Barsi Light Railway Co.* v *Joglekar* – 1957 1 (LLJ)243

(2) *Eksath Kamkaru Samithiya* v *Commissioner of Labour* – 2001 2 SLR p 137.

(3) *Nestles Limited* v *The Consumer Affairs Authority* 2005 – 2 SLR 188

(4) *Dr. S. U. S. Perera* v *The University of Colombo.*

(5) *Metropolitan Properties (FGC) Ltd.* v. *Lannon* (1969) 1QB 577.

(6) *Vishwamitra Press* v *Workers of Vishvamitra Press* (1952) LAC 20.

Shibly Azeez PC with *Shirley Fernando* PC, *Farman Cassim* and *Nishantha Sirimanne* for petitioner

Ms. M.N.B. Fernando DSG for 1st and 2nd respondents

Sanjeewa Jayawardane with *Ms. Priyanthi Gunaratne* for 3rd and 4th respondents.

May 9, 2007

IMAM, J.

The petitioner in CA. writ applications No. 1070/03, 1080/03 and 2282/02 respectively, being at all times material, employees belonging, to the "Clerical" "Management" and "Support" staff categories of the 3rd and 4th respondents namely Standard Chartered Bank (henceforth known and referred to as "SCB") and Standard Chartered Grindlays Bank Limited, (henceforth know and referred to as "SCGB") respectively, seek mandates in the nature of 01

writs of certiorari seeking to quash the 3 orders made by the 1st respondent the Commissioner of Labour approving the termination of the petitioner's services in respect of applications bearing Nos. TE/96/2001, TE/97/2001 and TE/82/2001 as prayed for in their respective petitions, in accordance with section 2(1)(b) of the Termination of Employment of Workmen Special Provisions Act No. 45 of 1971 (hence forth referred to as "TEW" Act.) 10

The facts in the aforesaid cases are as follows. On or about August 2000 the 3rd respondent bank "SCB" acquired the Sri Lanka Banking operations of a Foreign Commercial Bank also operating in Sri Lanka called and know as ANZ Grindlays Bank Limited. Subsequent to the said acquisition ANZ Grindlays Bank Limited changed it's name to Standard Chartered Grindlays Bank Limited ("SCGB"), namely the 4th respondent in this case. 20

The petitioners in all of the aforesaid Writ Applications have sought to quash by way of *Writs of Certiorari,* the orders made by the Commissioner of Labour made in respect of the inquiries conducted by the 2nd respondent (Inquiring Officer exercising delegated authority) into the said applications for the termination of the petitioners services.

CA.(Writ) Application No. 1070/03 was instituted by 19 Clerical Staff category of employees in respect of the order made by the Commissioner of labour in Application for termination bearing No. TE/96/2001. CA (Writ) Application No. 1080/03 was instituted by 12 Managerial Staff category of employees in respect of the order made by the Commissioner of Labour in Application for termination bearing No. TE/97/2001, whereas CA. (Writ) Application No. 2228/02 was instituted by 54 Support Staff category of employees in respect of the order made by the Commissioner of Labour in Application for termination bearing No. TE/82/2001. 30

Consequent to the aforesaid writ applications being instituted 01 petitioner out of a total of 19 in CA. 1070/03, 1 petitioner out of a total of 19 in CA. 1070/03, 1 petitioner out of a total of 12 in CA. 1080/03 and 21 petitioners out of a total of 54 in CA. 2282/02 withdrew the respective compensation amounts deposited to their credit with the Commissioner of Labour, resulting in 23 petitioners out of the total number of 85 petitioners in the aforesaid 3 cases having accepted 40

the respective compensation awarded to them. The petitioners contend that the remaining 62 petitioners have not as stated in the written submissions tendered on behalf of the petitioners accepted the substantial compensation awarded to them by the Commissioner of Labour, and the petitioners contend that despite the severe financial constraints faced by them since being terminated from service over 3 years ago for no fault of theirs seek reinstatement in service. 50

Learned President's Counsel who appears for the petitioners submitted that the petitioners are dissatisfied and complain against the orders made by the Commissioner of Labour *inter alia*, for the following reasons. The petitioners allege that,

i) The Orders made by the Commissioner of Labour, are illegal, *ultra vires* and perverse.

ii) The Inquiring Officer (2nd respondent) and the Commissioner of Labour have aced in total violation of the principles of Natural Justice, and have failed to offer the petitioners a full and fair hearing at the respective Inquiries. 60

iii) The Commissioner of Labour could not have proceeded to hear and determine the 3 applications made by the banks to terminate the petitioner's services in the aforementioned 3 cases as the conditions for retrenchment imposed by the Central Bank were not adhered to by the Commissioner.

iv) The Respondents have shown an utter lack of *bona fides* towards the petitioners.

v) The Inquiring officer and the Commissioner of Labour were wrongfully and/or unlawfully influenced by the banks and thus the orders of the Commissioner of Labour demonstrate a clear bias in favour of the banks which has resulted an injustice being caused to the rights and interests of the petitioners. 70

vi) The actions of the banks and the Commissioner of Labour have cumulatively violated the legitimate expectations of the petitioners *inter alia*, to be retrenched entirely on a voluntary basis and not against their wishes.

vii) The petitioners were not afforded a full and fair opportunity to present their respective cases before the Commissioner of Labour and/or the 2nd respondents. 80

viii) No accepted rational or logical methods have been adopted by the banks when they purported to identify the petitioners for retrenchment, and hence the said acts of the banks are arbitrary and discriminatory.

ix) The petitioners who were identified were subsequently singled out by being transferred to a common pool, were not allocated any work for over 1 year, but were only paid their monthly salaries and were informed that they could report to work if they so desired. Thus the banks were wrongfully indulging in acts to isolate, degrade and destroy the morale of the petitioners, thereby compelling them to accept the compensation and retire prematurely. 90

x) The banks outsourced the service of at least 136 personnel when the inquiries into the termination of the petitioner's services were pending before the Commissioner of Labour, in order to carry out the functions previously performed by a fewer number of petitioners. Thus the Banks' contention that the petitioners were excess staff was a stratagem employed by the bank. 100

xi) The Commissioner of Labour and the Inquiring Officer have failed to properly evaluate the evidence placed before them and hence failed to draw the necessary inferences at the said Inquiries.

xii) The compensation awarded by the Commissioner of Labour was in any event inadequate to compensate the petitioners for their loss of employment.

The petitioner's aver that the banks Applications made to the Commissioner of Labour under section 2(1)(b) of the "TEW" Act for termination of the petitioner's services have clearly been made on the basis that the petitioners were surplus or excess staff, allegedly as a result of the move on the part of the 2 Banks to merge. It was contended by the petitioners that a situation where employees become excess and the business of the employer still continues is 110

clearly distinguishable from a situation where the entire business of the employer is closed down, which is referred to as "closure". The petitioners referred to section 48 of the Industrial Disputes Act (IDA) where "retrenchment" is defined as "retrenchment" means the termination by an employer of the services of a workman or workmen on the ground that such workman or workmen is or are in excess of the number of workmen required by such employer to carry on his industry". 120

The petitioners submit that the "TEW" Act refers specific situations in which the scheduled employment of workmen can be terminated, such as the term "closure" found in section 6A of the TEW Act refers to such a given specific situation in which the "TEW" Act can be utilized. Thus, the "TEW" Act can be resorted to generally, in a situation where the business of the employer is closed down (closure), and not in a situation where the employees become excess staff merely as a result of a prospective merger and the business still continues. 130

The petitioners cited "The Legal Framework of Industrial relations in Ceylon" by S.R. De Silva where the term closure' has been defined as follows.' It has been held by the Supreme Court of India in *Barsi Light Railway Co* v *Joglekar*[1] that retrenchment does not cover a case where the business itself is closed down, since it is the essence of retrenchment that the employer should continue to carry on his industry after the termination of the services of the workmen. In other words, the closure of a business is not a discharge of surplus labour. "The petitioners thus aver that term" closure contemplates a situation where the business of the employer ceases to exist completely; therefore the question of excess/ surplus staff does not arise and the employees can be longer make any claim for re-instatement in service. 140

The petitioners further allege that by resorting to the provisions of section 2(1)(b) of the "TEW" Act in order to terminate the services of the petitioners for no fault of theirs on non-disciplinary grounds is clearly contrary to the intention of the legislature, and also constitutes a clear abuse of process,. in as much as, *inter alia* the petitioners have been treated as excess staff not because there was a loss of business or lack of it, (on the Contrary the accounts of the Banks 150

show that their profits were soaring), but solely due to a merger of SCB and SCGB which is not a ground for termination as contemplated by the legislature and in any event the merger cannot be considered a good ground for termination under and in terms of the "TEW" Act. The petitioner in this context referred to "The contract of employment" by S. R. De Silva at page 230, with regard to the rationale for the promulgation of the "TEW Act" of 1971. At page 230 it is stated as follows, " The substantial reason for the Act was the need felt at that time by the State to exercise a greater degree of control over retrenchment and lay off of employees in the private sector on grounds of loss of business, lack of raw materials and so on, and in those instances where such grounds are found to exist, to keep the number of persons so retrenched to the minimum. The Act was not intended to preclude termination on good grounds, but was intended to prevent resort to retrenchment and lay off in circumstances not warranting it and to ensure that employees would receive relief expeditiously, if laid off or terminated. The need felt by the State to exercise a greater degree of control over non disciplinary terminations became urgent at that time in the context of increasing unemployment in the country..." (WS1) The petitioners aver that under these circumstances the banks could not have made Applications to have the services of the petitioners terminated under the "TEW" Act, and the Commissioner of Labour could not have entertained the said Applications, nor thereafter, heard and determined the same. It is submitted by the petitioners that when section 2(1)(a) of the "TEW" Act read together with the express condition imposed by the Central Bank to the effect that employees should be retrenched purely on a voluntary basis, and with section 5 of the "TEW" Act, the applications made by the banks and the orders made by the Commissioner of Labour are illegal, *ultra vires*, unlawful, perverse, null and void, are of no force in law, and liable to be set aside by this Court.

Learned President's Counsel appearing on behalf of the petitioners cited *Eksath Kamkaru Samithiya* v *Commissioner of Labour*[2] where His Lordship U.De Z. Gunawardene, J dealt in detail *inter alia,* with the provisions of sections 5 and 6 of the "TEW" Act, and the discretion vested with the Commissioner of Labour under section 6 in instances where the termination is found to be illegal. His Lordship held that "Manifest purpose of section 5 is to wholly protect

the workman against the termination of his service contrary to the provisions of the relevant Act, and to keep the contract of employment intact notwithstanding such illegal termination." (WS-2) Thus the petitioners contend that if the order of the Commissioner of Labour to grant the Banks approval for the termination of the petitioners service is found to be illegal, an overriding duty would be imposed on him to order the employer to continue the petitioners in service, as if no termination had taken place at all, and therefore the Commissioner would have no discretion to do/act otherwise under section 6 of the "TEW" Act. The petitioners submit that the 1st respondent could not have approved the termination of the petitioner's services, as the same was illegal and therefore, could not have proceeded to award the petitioners compensation in lieu of reinstatement, but a mandatory duty was cast on him to order the banks to continue to employ the petitioners. 200

Counsel for the 3rd and 4th respondents raised a preliminary objection on 26. 07. 2004 to the effect that the reliefs prayed for by the petitioners were misconceived in law and that the Petitioners applications were futile. This Preliminary Objection together with several other Preliminary Objections raised on behalf of the 3rd and 4th respondents were determined by this Court prior to the hearing into the merits of these writ applications, and the aforesaid objections were overruled by this Court on 09. 12. 2004 including the objection relating to the reliefs prayed for being misconceived in law. Counsel for the 3rd and 4th respondents submitted that although the petitioners sought interim relief to prevent the termination of their services by the employer before this court in December 2002 in CA. 1325/2002, this interim relief which was heard by Their Lordships N.E.Udalagama, J and Edirisuriya, J after a complete interpartes hearing was refused. This order it is submitted was not challenged in the Supreme Court. The Award of The Commissioner of Labour in 2282/02 is the highest ever total award in the history of Labour Law in Sri Lanka being Rs. 82,158,582/- in regard to 55 petitioners, which amounts to an average of Rs.1,493,792/- per person, submits counsel for the 3rd and 4th respondents. Counsel went on to elaborate the total awards made by the Commissioner in CA. 1070/03 and CA. 1080/03 respectively too. Counsel stated that the Awards in each case was as follows. 210 220

Case	Award	No of Petitioners	Average per person
a) CA. 2282/02	Rs. 82,158,582/-	55	Rs. 1,493,792/-
b) CA. 1070/03	Rs. 29,437,931/-	19	Rs. 1,549,365/-
c) CA. 1080/03	Rs. 35,658,198/-	11	Rs. 3,241,654/-
		Total	**Rs. 147,254,711/-**

Counsel for the 3rd and 4th respondents contend that the aforesaid Applications of the petitioner's cannot succeed, as there exist several impediments in law, both preliminary and substantive. Counsel avers that in the prayer for relief in CA. 2282/02 the petitioners have prayed for a writ of prohibition against the 3rd and 4th respondents, preventing them as employers, from terminating the services of the petitioners. The petitioners themselves, by praying for such a writ of prohibition have accepted the vital importance of preventing the employer from terminating the services of the petitioners with the intention of pursuing the writ application. The petitioners, according to Defence counsel have also conceded that the act of termination is exclusively vested in the employer. Learned counsel avers that letters of termination were formally issued, the terminations duly effected and compensation deposited. The stay order sought for by the petitioners was refused by Their Lordships N.E.Udalagama, J and Edirisuriya, J in CA. 1325/02 in December 2002, and hence according to learned Counsel for the 3rd and 4th respondents as no appeal was filed the terminations stand which is the status quo.

It is pointed out by learned counsel for the 3rd and 4th respondents that the Writ of prohibition is no longer a live issue at all and cannot be granted as prohibition would lie only to prevent the occurrence of an event which has not yet taken effect, whereas in this instance termination of employment of the services of the petitioners in CA. 2282/02 have occurred more than 4 years before the application.

Counsel for the 3rd and 4th respondents submit that the only remedy that can be granted theoretically is the *Certiorari* to quash the document marked X2 being the approval of the Commissioner of Labour for termination. Counsel submits that however if the Writ of

Certiorari is granted, then the order of the Commissioner of Labour would be annulled. However learned Counsel points out that serious complications would result in respect of issuing such a writ, which would be as follows, *inter alia*.

1) More than 4 years have elapsed since the termination of employment of the petitioners. 270

2) The termination has been acted upon by all parties including the petitioners who have accepted all terminal benefits thereby accepting the termination, with some of the petitioners having accepted the compensation package.

3) The Bank and its structure has subsequent to the merger undergone a significant change with the status quo which prevailed being no longer in existence.

4) Judicial authorities expound the principle that re-instatement means the resumption of the *status quo ante*, which means 280 re-installing the workman to the same post, same conditions and terms that prevailed prior to termination, and if this is not possible, then the only alternative is compensation. The resumption of the *status quo ante* is not possible even if all parties including the bank are amenable to it due to the restructuring which the bank has undergone, its downsizing, its streamlining, advanced computerization of functions and the introduction of new technologies.

Learned counsel for the 3rd and 4th respondents referred to relevant provisions of the "TEW" (Special Provisions) Act, namely 290 section 2(1) which reads as follows.

"No employer shall terminate the scheduled employment of any workman without

a) The prior consent in writing of the workman; or

b) The prior written approval of the Commissioner."

Section 2 (2) states as follows

"The following provisions shall apply in the case of the exercise of the powers conferred on the Commissioner to grant or refuse his approval to an employer to terminate the scheduled employment of any workman." 300

Section 2(2) sub paragraph (b) states as follows:

"The Commissioner may, in his absolute discretion decide to grant or refuse such approval."

Section 2(2) sub paragraph (e) states as follows:

"The Commissioner may, in his absolute discretion, decide the terms and conditions subject to which his approval should be granted, including any particular terms and conditions relating to the payment by such employer to the workman of a gratuity or compensation for the termination of such employment."

Section 2(2) subparagraph (f) states as follows. 310

"any decision made by the Commissioner under the preceding provisions of this subsection shall be final and conclusive, and shall not be called in question whether by way writ or otherwise:

i) In any Court or

ii) In any Court, tribunal or other institution established under the Industrial Disputes Act."

Learned Counsel submits that these statutory provisions which do not find any parallel in any other law, have been advisedly devised by the legislature to provide a greater degree of immunity in respect of orders made by the Commissioner of Labour under this statute to 320 ensure expeditious conclusiveness to proceedings under the Act. Counsel submits that in a series of judgments delivered recently by the Court of Appeal including *Nestles Limited* v *The Consumer Affairs Authority* (3) and *Dr. S.U.S. Perera* v *The University of Colombo*(4) it was held by Their Lordships Justices Sripavan and Basnayake that Courts cannot, through a perceived or subjective process of so called Judicial Activism, refuse to give effect to the statutory word when it is plain, clear and unambiguous. Counsel submits that section 2(2)(b) read with 2(1)(b) of "TEW" (Special Provisions) Act constitutes the Commissioner of Labour as the sole authority to decide whether to 330 grant or to refuse permission to terminate, upon an application to terminate made by an employer. Counsel avers that the Commissioner's order consists of only the permission to terminate excess employees by way of the "Written approval of the Commissioner". However counsel submits that the termination

proper has been effected by the 3rd and 4th respondents by deciding to terminate the contract of employment and consequently issuing formal letters of termination to each of the petitioners. It is averred by counsel that even if the Commissioner's order is quashed by way of a *Writ of Certiorari*, the consequent act of termination by the employer, namely the factum of termination would remain intact and thus cannot be changed. Counsel contends that the petitioners cannot contend that if an order of approval is quashed, then all consequential acts thereafter are also invalid as the termination Act is *sui generis* and extraordinary in its specialty as it provides expressly for terminations to be rendered illegal and for punitive sanctions to be imposed for illegal terminations. Counsel submits that in CA. 2282/02 the petitioners in the Prayer to the petition have not specifically prayed to be re-instated, and as a Court cannot grant more than what has been prayed for, the Writ Application CA. 2282/02 should be dismissed. Counsel states that in the aforesaid case all the petitioners have taken their Gratuity, Leave pay entitlement, EPF and ETF, and as all the petitioners have obtained their terminal benefits, there exists an unequivocal acceptance that their services are terminated.

Counsel submits that several of the petitioners have withdrawn the Compensation awarded by the Commissioner and deposited with the Commissioner of Labour by the 3rd and 4th respondents which clearly indicate their acceptance of their termination as well as the Commissioner's order of compensation upon termination.

The numbers of petitioners who have taken their Compensation payments in each of the cases are as follows.

CA. 1070/03 - 6 Petitioners.
CA. 1080/03 - 3 Petitioners.
CA. 2282/02 - 21 Petitioners.

Counsel avers that this is in addition to all having taken their other terminal dues as well, which enhances the fact fact the even the workmen have accepted their termination of employment. It is pointed out by counsel that in the event of the petitioners being reinstated in service a tremendous practical difficulty would arise, as the sums which have already been given to the petitioners would entail an enormous difficulty in recovering the same. For the

aforesaid reasons counsel for the 3rd and 4th respondents submits that the petitioners cannot be reinstated to their original posts, and urges that these 3 writ applications be dismissed.

Order of the Commissioner

I have examined the 3 writ applications of the petitioners, the objections of the respondents, the written submissions and other material tendered by both sides, and the law applicable to these applications. In December 2002 the 55 petitioners sought interim relief in CA. 1352/02 to prevent the termination of their services by the employer, which application was refused by Their Lordships N.E.Udalagama, J and Edirisuriya, J subsequent to a complete inter parties hearing. It is pertinent to note that this order was not challenged in the Supreme Court. In CA. 2282/02 the petitioners in the prayer to the petition have not specifically prayed to be re-instated in service.

Section 2(2)(b) read with section 2(1)(b) of the "TEW" (Special Provisions) Act constitutes the Commissioner of Labour as the sole authority to decide whether to grant or refuse permission to terminate, upon an application made by the employer. Significantly section 2(2)(b) provides by express and unequivocal statutory language that approval to terminate may be granted or refused by the Commissioner in his absolute discretion. Section 2(2)(e) of the "TEW" Special Provisions Act when dealing with the power of the Commissioner to grant relief when he has decided to grant approval to terminate also renders his decision on this relief well protected, as it also expressly refers to "absolute discretion". The words "absolute discretion" have rarely been used by the Legislature in an Act of Parliament. These 2 provisions pertaining to "absolute discretion" must be considered in view of the fact that the Act is a Special Act promulgated to make special provision in respect of the termination of workmen in non-disciplinary situations. In section 2(2)(f) of the aforesaid Act the intention of the legislature is manifestly clear which is to effect finality of litigation / disputes by providing that such an order is "final and conclusive" and shall not be called in question whether by way of Writ or otherwise. Section 20 of the aforesaid Act establishes primacy of this Statute over any other written law, for in the event of any inconsistency between the provisions of this Act and the provisions of any other written law, the provisions of this Act shall prevail.

When there is a possibility of multiple conclusions being arrived at, the decision must be one made within *vires* i.e. within the power to make decisions and not exceeding it. In this context it is relevant to cite Professor H.W.R. Wade with regard to the proper application of the Wednesbury principle of reasonableness, which is as follows. "the doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the Court must not usurp the discretion of the Public Authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds it acts *ultra vires.* The Court must therefore resist the temptation to draw the bounds too tightly merely according to its own opinion. When a Divisional Court yielded to that temptation by invalidating a Secretary of State's decisions to postpone publication of a report by Company Inspectors, the House of Lords held that the judgments illustrate the danger of Judges wrongly thought unconscientiously substituting their own views for the view of the decision maker who alone is charged and authorized by Parliament to exercise a discretion. The Court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate, but if the decision is within the confines of reasonableness, it is no part of the Court's function to look further into its merits." There is no *ultra vires* as far as the Commissioner is concerned, as the Commissioner has been invested with the exclusive power to decide the question of whether to grant or refuse approval for as application made by an employer to terminate the services of its workman under section 2(1) of the "TEW" (Special Provisions) Act. Thus, in my view the aforesaid orders of the Commissioner of Labour are legal, within vires and non perverse.

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Natural Justice

With regard to the complaint of the petitioners that there was a violation of the principles of Natural Justice by the Inquiring Officer namely the 2nd respondent and the Commissioner of Labour by failing to afford the petitioners a full and fair hearing at the respective inquiries, the inquiry before the Commissioner which was under section 02 of the "TEW" Act was very long where Sudheera

Wijetileke and Bharata Ganawickrema who were office bearers of the Union gave evidence. None of the affected workmen gave evidence nor claimed reinstatement. Mr. Anura Silva the witness of the Bank was cross-examined by learned President's Counsel Mr. Shirely Fernando who appeared on behalf of the Union on 9 days, and the inquiry exceeded one year, with 25 dates of inquiry. However the principles of immunity expressly resorted to by the legislature in its wisdom as clearly set out in sections 2 (2)(b), 2(2)(e) and 2(2)(f) of the "TEW" (Special Provisions Act) read in conjunction with the textual authority of professor Wade and the dicta of Lord Denning, show that the order of the Commissioner of Labour cannot be interfered with, unless he has made an order which is so perverse that it shocks conscience of Court. The order of the Commissioner as well as the reasons thereof (X2 and 1R1) are comprehensive containing the detailed reasoning of the Commissioner, wherein the main issues are dealt with in an objective manner. The aforesaid order is not tainted with *mala fides,* and as the order does not shock the conscience of Court, it is my view that there is no violation of the principles of Natural justice. Hence I see no reason to interfere with the aforesaid order of the Commissioner.

Conditions Imposed By The Central Bank

Learned President's counsel for the petitioners averred that one of the principal complaints of the petitioners was that the clear conditions for retrenchment imposed by the Central Bank were not followed, and hence the Commissioner of Labour could not have proceeded to hear and determine these 3 Writ Applications. A condition imposed by the Central Bank as stated in paragraph 2 (iv) of its letter dated 23.01.2001 (X7) refers to "purely on a voluntary basis" in respect of the retrenchment of the Petitioners. The Central Bank reiterated this condition consequent to a discussion which the Central Bank had with the then CEO of "SCGB" Mr. Frank Gamble, in the letter addressed (X7) to Mr. Frank Gamble by the Director of Bank Supervision of the Central Bank dated 23.01.2001 which states that "With regard to item (iv) above, as discussed at the meeting you had with us on 17.01.2001, we wish to reiterate that the releasing of employees should be carried out purely on a voluntary basis and in a fair and equitable manner for employees of both banks and in accordance with the prevailing laws. No employee should be

removed from one bank to the other until the merger of the 2 banks is finalized. In case of retrenchment of staff, you mentioned that each bank would offer compensation packages to its employees and that comprehensive information on those packages would be furnished to the CBSL". In my view "<u>and in accordance with prevailing laws</u>" refers to the "TEW" (Special Provisions) Act, which is *'sui generis'* and prevails <u>over all other laws</u>, with the Commissioners jurisdiction not being fettered by any other state agency. In this context section 12 of the Banking Act was clearly satisfied, the Ministers approval also obtained, and hence the bank has complied with the Law. In the event of a workman having been removed from one Bank to the other before the merger was complete the workman could have given evidence to this effect at the inquiry before the Commissioner, which no workman did. For the aforesaid reasons, I am of the view that the conditions of the Central Bank have been complied with by the 'SCGB' and the approval of the Central Bank is not a matter in issue in this case.

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<u>Lack of Bona Fides towards the Petitioners</u>

From an examinations of the inquiry before the Commissioner it is apparent that the petitioners themselves delayed the inquiry. During the pendency of the inquiry, the Bank paid the petitioners their salaries and other benefits in full. For instance in CA. 2282/2002 the inquiring Officer had observed on 31.05.2002 that it was the 12th day of inquiry and that the witness of the Bank was under cross examination for the last 8 days of inquiry (as per proceedings of 31.05.2005 at page 156 of the brief) stated that the inquiry should be concluded on 31.07.2002, and fixed several more dates of inquiry. However notwithstanding this direction learned President's Counsel for the petitioners continued to cross examine the Bank's witness for a further 3 days namely 06.06.2002, 15.06.2002 and 12.07.2002.

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The petitioner made an application bearing No. CA. 1325/02 to this court, where their Lordships N.E.Udalagama, J with Edirisuriya, J agreeing held that the petitioners should lead their evidence without delay, state their case when the inquiry commences, and directed the Commissioner to conclude the inquiry as expeditiously as possible. The Commissioner fixed the inquiry for a further 9 days of inquiry giving the petitioners sufficient time to present their case. Even in CA.1070/03 the relevant application was lodged with the

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Commissioner-General of Labour on 19.12.2001 consequent to which 13 dates were fixed for inquiry upto 24.09.2002. On 24.09.2002 the inquiring Officer noted that the Bank's witness had been under cross examination for 13 dates spanning a period of 9 months (page 119 of the Brief in Case No. CA 1070/03). Under these circumstances the inquiring Officer consented to grant the petitioners a further four months in which to present and conclude their case. Thus in this case to the proceedings were delayed by the petitioners during which period the petitioners were paid their monthly salaries. The sums paid as salaries during the year long inquiry were as follows: 530

CA. 2282/02	-	Rs. 13.2 Million
CA. 1070/03	-	Rs. 5.22 Million
CA. 1080/03	-	Rs. 9.1 Million

Amounting tc a total of approximately 27.25 million.

For the aforesaid reasons in my view there is no material or evidence to suggest that the respondents demonstrated a total lack of *bona fides* towards the petitioners, and hence I reject the proposition tendered on behalf of the petitioners and hold that there was no lack of *bona fides* towards the petitioners by the respondents. 540

<u>Allegations of Bias-Meeting with the Commissioner</u>

This allegation of the petitioners was comprehensively dealt with by DSG Ms. Murdu Fernando, who submitted that there was no proof in any manner that the Commissioner was influenced in any way. The petitioner's contention was that the inquiry into the Bank's Applications for termination was expedited by the inquiring Officer (the 2nd respondent) after the then CEO of SCGB (Mr. Wasim Saifi) and the witness for the Bank's Mr. Anura Silva who was at such time under cross-examination had met the Commissioner of Labour on 30.05.2002 without any of the petitioners representatives being present and without even their own legal counsel being present, during the course of the inquiry in May 2002, and had admittedly discussed matters relating to expending the inquiry with the Commissioner (pages 43 and 44 of the proceedings in the CA. 1070/03 Brief. The petitioners are unaware of what other matters were surreptiously discussed between the said parties. It was also admitted during cross-examination by the bank's said witness 550 560

Mr. Anura Silva that the said meeting was held just one day before the next day fixed for inquiry into Application No. TE/82/2001 {CA. 2282/02}, (Page 44 of the proceedings in the CA. 1070/03 Brief). The Petitioners submit that this surreptitious meeting directly resulted in the inquiring Officer's sudden and arbitrary decision taken on the very next day namely on 31.05.2002 to drastically curtail the duration of the inquiry and restrict the employees' Counsel's opportunity to present the entire case on behalf of the employees (pages 156 to 164 of the proceedings in the CA., 2282/02 Brief).

His Lordship Lord Denning in *Metropolitan Properties (FGC) Ltd v Lannon*[5] as reproduced at pages 456 and 457 of Wade on Administrative Law (8th edition) held that "Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would or did favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking the Judge was biased. "Wade further states that the aforesaid decision reasserted" justice must be done' as the operative principle. The petitioners allege that a clear and demonstrable likelihood of bias can be inferred from the surreptitious conduct of the respondent Banks' Senior Representatives and the Commissioner of Labour. The petitioners accept that up to date they are unaware of the full and/or actual extent of discussion the Banks' CEO and Mr. Anura Silva the witness had with the Commissioner of Labour on 30.05.2002. However, from the inquiring Officers reaction immediately thereafter which became evident, *inter alia* from the inquiry being expedited, the petitioners allege that the obvious inference of bias needs to be drawn.

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The petitioners have failed to point out any part of the order of the Commissioner which exhibits bias on the petitioner. The petitioners themselves accept that they are unaware of the actual extent of the discussion the Banks CEO and Mr. Anura Silva the witness of the Bank had with the Commissioner of Labour on 30.05.2002. Lord Denning in the aforesaid Judgment held that

"Nevertheless there must be a real likelihood of bias. Surmise or conjecture is not enough ....." Due to the aforesaid reasons and the inability of the petitioners to point out in which manner there was bias in the order of the Commissioner, I am compelled to reject the allegation of bias on the part of the petitioners and thus hold that the Commissioner was not biased in the delivery of his order. 600

Total lack of Bona fides on the part of the respondent Bank Flagrant Violation of the terms and conditions of the Collective Agreements

This complaint of the petitioner is applicable only to the cases of the "Support Staff" and "clerical staff" employees since the "Managerial Staff employees are not parties to any Collective Agreements with the aforesaid 2 Banks. The respondent Banks clearly state in their applications for termination that it is, *inter alia*, the introduction of new Technology that has prompted the bank to treat the petitioners as surplus employees. 610

SCGB has expressly agreed at clauses 7 and 8 of the schedule 2 of the Collective Agreement dated 26.07.2001 (p 385 of the CA. 1070/03 Brief) read with clause 24 of the main agreement, that it will not retrench staff who become redundant as a result of the introduction of new technology. SCB too has agreed to be bound on very similar terms in the Collective Agreement dated 15.5.2000 (Clause 29 of the Agreement at page 413 read together with clauses 7 and 8 of the 3rd Schedule to the said Agreement at pages 426 and 427 of the CA. 1070/03 Brief). Hence the petitioners entertained a legitimate expectation that they would not be retrenched because new technology was being introduced. Mr. Baratha Gunawickrama, the witness who gave evidence on behalf of the employees in respect of the inquiry into Application No. TE 82/2001 has stated at paragraph 16 of the affidavit submitted by him as evidence in chief (page 183 of CA. 1070/03 Brief), that *inter alia,* Frank Gamble, the then CEO of SCGB (in March 2001), had categorically indicated to the said employees that they would be re-trenched purely on a voluntary basis. The petitioners aver that the employees relied on the aforesaid representation made by the then CEO, and accordingly did not seek alternative employment or pursue other avenues of employment, and have been severely prejudiced as a result of the violation of the said undertaking. The petitioners submit that the Banks are estopped in law from acting contrary to the said holding 620 630

out and/or from denying the same. The "TEW" (Special Provisions Act) deals with situations of "Non-disciplinary" termination. As stated by S.R. De Silva in "Legal Framework of Industrial relations in Ceylon" at pages 501 and 502 it was held that "An employer has the right to *bona fide* retrench his employees, on the ground that such employees are redundant to his business. Such redundancy may arise from the fact that the employer wishes to reorganise his business, either due to the losses sustained by him or even for the purpose of enhancing his profits. Once the necessity for retrenchment is established, the employer is normally free to decide on the number of employees who would become surplus to his requirements. These principles have been established in a number of decided cases.

In the case of *Vishwamitra Press* v *Workers of Vishwamitra Press*(6) where retrenchment was effected as a result of reorganization of the Company's business he states "It is the *prima facie* right of the Management to determine it's labour force and the Management would be the best Judge to determine the number of workmen who would become surplus on the ground of rationalization, economy or other reasons on which retrenchment can be sustained." It was also stated that in Ceylon these principles have been enunciated in a number of cases and accepted. "Retrenchment is a right of the management and is a necessary incident of an industry. So long as it is exercised *bona fide*, the employers' decision should be accepted." As stated at pages 316 and 317 of "A commentary on the Industrial Disputes Act" by Nigel Hatch, retrenchment has been justified on the grounds of losses occasioned by strike and reorganization of a business due to losses. Retrenchment is also justified where it is consequent on the closure of a section of the business."

In the present instance reorganization of the business was as a result of the merger and integration of 2 banks which also resulted in a streamlining and introduction of new technologies and processes. The original application for termination (P1 in 228/02, X1 in 1070/03 and 1080/03 categorically states that: "......The integration of the operations and staff of the two institutions has been coupled with a streamlining of the operational aspect of both institutions and introduction of new technology ...." Obviously, the integration and

streamlining of operations have made an impact on manpower levels. For instance all divisions which independently functioned in the 2 Banks earlier have now integrated which has consequently resulted in 2 divisions becoming a single division for the purposes of operations. In addition, technological developments have also contributed towards a reduced requirement in cadre levels. "As stated by Mr. Ravi Jayasekara in his affidavit of 07.01.2002 at paragraphs 10, 11 and 12 there of appearing at page 42 of the brief in CA. 2282/02. 680

"10. Subsequent to the acquisition, SCB sought and received approval from the Central Bank of Sri Lanka to integrate the hitherto separate operations of the SCB and Grindlays Bank into a single operation.

11. Accordingly, the 2 Banks have now combined its operations and technology platforms into one. During the integration process new technologies and more efficient processes were introduced. 690

12. Subsequent to the integration of operations, functions carried out previously by 2 Departments are now handled by one Department ..." The mechanics of the diminution and downsizing was referred to in the application for termination dated 09. 11. 2001 (P1) and the supporting affidavit of Mr. Ravi Jayasekera (page 42 of the brief) where he specifically states with reference to numbers, categories post that there was a downsizing due to the merger. These were not effectively challenged. Hence this clearly reveals that the scope of the application before the Commissioner for termination was on the basis of the merger as well as excess due to streamlining. 700 In accordance with section 2(4) of the "TEW" (Special Provisions) Act, the employer has a right to retrench and the jurisdiction of the Commissioner is in respect of "non disciplinary terminations" i.e. for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary actions. For the foresaid reasons it is my view that the Banks are not estopped from acting contrary to the said holding out as alleged by the petitioners.

The Employees were denied a full and fair hearing

The petitioners complain that although this Court made an order in CA. Writ Application No. 1325/02 that the inquiry before the 710 Commissioner of Labour should resume not later than 02.09.2002

and be concluded before 30.11.2002, the 2nd respondent however commenced the inquiry on 17.09.2002 and concluded the same on 28.11.2002. Thus the petitioners allege that the 2nd respondent by resuming the Inquiry 15 days after the specified date has unlawfully and unjustly limited the opportunities for the petitioners to fully present their case before the 2nd respondent. The petitioner also contend that the employees were prevented from summoning Mr. Wasim Saifi the then CEO of SCGB as a witness by the 2nd respondent in view of the unreasonable order made by the 2nd respondent, resulting in the rules of fairplay being flagrantly violated by the 1st and/ or 2nd respondents. 720

Although the 2nd respondent commenced the Inquiry 15 days after 02.09.2002, the 2nd respondent concluded the Inquiry before the 30.11.2002, namely on 28.11.02, thus before the deadline imposed by the Court of Appeal. It is unfair for the petitioners to complain that they were unable to fully present their case before the 2nd respondent. The 2nd respondent had fixed the Inquiry for numerous dates, and the learned President's Counsel Mr. Shirley Fernando who appeared for the petitioners cross-examined the witness of the bank on 13 dates and Inquiry proper constituted numerous dates during which occasions the 2nd respondent endeavoured to complete the Inquiry as expeditiously as possible, which he achieved by concluding the same on 28.11.2002. 730

It is significant to note that the very same Petitioners alleged bias by the 2nd respondent on the basis that Mr. Wasin Saifi and the witness for the Banks Mr. Anura Silva met the Commissioner of Labour on 30.05.2002 without any of the petitioners' representatives being present and without their own counsel being present.

No established rational or logical methods have been adopted by the banks when they purported to identify the petitioners for Retrenchment. 740

With regard to the above complaint of the petitioners, in each of the cases namely CA. 228/02, CA. 1070/03 and 1080/03 the numbers which were excess in each category of support staff, clerical staff and managerial Staff respectively, were clearly stated and the reasons for them being excess, also revealed. In all the cases the following issues were addressed in the evidence of the 3rd

and 4th respondents.

a) Whether there was an excess of staff. 750
b) If so how many persons were excess and in which categories.
c) How many persons had left voluntarily
d) How many persons remained excess thereafter.

For example in CA. 2282/02 which was in respect of Support Staff, paragraphs 10 to 22 of Mr. Ravi Jayasekara appearing at pages 42 and 43 of the Brief are of significance.

He stated the following:

"The Support Staff cadre in 'SCB' consists of Peons, Drivers, Technicians and Labourers.

The support staff cadre in the SCGB consist of peons, Drivers 760 and Technicians. At the time of acquisition of Grindlays Bank by SCGB, SCB had a support staff of 23. SCB carried out its internal administrative operations as an independent commercial Bank with these 23 Support Staff. With the acquisition of Grindlays Bank, the Support Staff Cadre increased from 23 to 68. The integration of the 2 banks operations, introduction of new technology and streamlining of operations reduced the requirement for Staff in the "Support Staff". The reasons why some staff had to be retrenched was adverted to in detail, in respect of each of the categories at paragraphs 27 to 33 of the said Affidavit. Similar evidence appears in CA. 1070/03 in the 770 Affidavit of Mr. Anura Silva, and in CA. 1080/03 too in the affidavit of Mr. Anura Silva. (page 6 of the brief of 1080/03).

Manner of Selection.

The manner in which such staff was selected was set out during the course of evidence.

Q. In Your evidence today you stated that the identification of the redundant staff was a complicated process?

Can you please explain ?

A. In respect of support staff we applied LIFO ("Last in first out"). We could do that because the nature of these jobs was not 780 complex. But in the case of the other jobs what we followed was a professional selection process. The four steps were to

decide the future combined organization structure and then drawing up of personal specifications for each and every job. Then for each of these jobs we identified suitable candidates, mostly current incumbents of those jobs. Then we conducted an interview which was done with a panel with representatives from SCB, SCBG, and an independent Human Resources person. The objective was to find the best candidate for the job, and the ones who were not selected were identified as excess. 790 (pages 157 and 158 of the brief in case No. 1080/03). Thus although the petitioners stated that the manner in which selection was effected had not been stated, evidence had in fact been led to the contrary. For example the following evidence demonstrated the method in which Downsizing was revealed in evidence:

Q. Would you agree with me that in view of the merger operation the management took certain decisions in relation to the operational departments of the Bank?

A. Yes. 800

Q. There were some changes made?

A. Yes.

Q. One change was a decision made by the management to discontinue the Internal Control Department?

A. Yes.

Q. And that was the department that you were functioning in at that time?

A. Yes. (Pages 194 and 195 of 1080/03)

The need to chose one of 2 persons for a single position was revealed at pages 206, 207 and 208 of the Brief of 1080/03. It was 810 revealed that SCGB had a Compliance officer whilst SCB had a single person (the head of legal) to handle the legal and Compliance functions.

Referring to the function of Compliance.

Q. Do you agree that it requires a person to have a good knowledge of the laws?

A. Definitely.

Q. Consequent to the Merger exercise the Head of Legal also took over as Head of Compliance?

A. Yes. 820

Q. The Head of Legal . . . was functioning as Head of Legal at SCB?

A. She was Head of legal and Compliance at SCB?

Q. And now she functions Head of Legal and Compliance for both banks?

A. Yes.

The LIFO method of Selection

It was elicited during the course of the inquiry (as stated above) that in respect of Support staff, the "last in first out" (LIFO) method had been adopted in the selection of staff for retrenchment. In 830 respect of the other categories however, a Professional Selection Process was adopted in selecting the redundant staff in view of the fact that they were more senior and had more specialized functions. This evidence was not effectively contradicted by the petitioners.

Although the Petitioners sought to contend that the LIFO system should have been followed in respect of all categories, it is well established that in Sri Lanka there is no compulsion to follow the said method on selecting persons for recruitment. Although this system is indeed adopted, the employer has a discretion to decide the method of selection. This is however, different to the position in Indian Labour 840 law where the LIFO systems has been statutorily recognized and incorporated into the Industrial Disputes Act of India. However In *Industrial Law – P.L. Malik* (16th Edition) at page 1105, it is stated however, that even in the Indian law, there are many situations of departure from this principle. "Departure from the 'last come first go' rule is permissible on valid and justifiable grounds." It was held by the Supreme Court of India " that the employer may take into account consideration of efficiency and trustworthy character of the workmen, and if he is satisfied that a person with a long service is inefficient, unreliable or habitually irregular in the discharge of his duties he may 850 be retrenched." "The Law of Dismissal" by Chakravarthi also speaks of departing from the LIFO rule in an appropriate case.

In Sri Lanka there is no requirement for "LIFO" but the respondent Banks followed it out of prudence in CA. 2282/02 and in order to establish it's *bona fides*. Hence this complaint of the petitioners is baseless as the respondents Banks established logical methods in identifying the petitioners for retrenchment.

<u>The petitioner were not allocated any work for over 1 year in a calculated bid to compel them to accept the VRS packages offered to them.</u> 860

The petitioners complain that the 3rd and 4th respondents illegally and unlawfully transferred the petitioners to a common pool where they were not allocated any work but were only paid their monthly salaries. The petitioners allege that the "caging" of these employees took place over a year prior to the conclusion of the inquiries pending before the 1st respondent (i. e. on or about January 2002) and therefore, the said illegal transfers were effected during the course of the inquiry into the applications made for the termination of the petitioners' services. It was submitted that whilst not allocating any work to the petitioners, the 3rd and 4th respondent 870 Banks outsourced the services of 136 Personnel to carry out the work previously carried on by some of the petitioners. The said illegal transfers were brought to the notice of the Banks, and the Banks were requested to desist from doing so and to recall all employees who had already been sent on special leave. (Document marked "E11" with the petition in CA. 1070/03 at page 435 of the brief). The petitioners allege that the said transfers were effected by the banks to isolate, frustrate and demoralize the petitioners thereby weakening their resolve to resist the aforesaid wrongful and unlawful actions as well as to compel the petitioners to accept the Voluntary Retirement 880 Scheme (VRS) packages and retire. The petitioners averred that apart from being totally wrongful, unlawful and illegal, the said acts of the banks are similar to a situation of 'non employment' as contemplated by the TEW (Special Provisions) Act, but does not constitute 'Non-employment' because the said employees were paid their salaries.

A similar course of action which was followed by the 3rd and 4th respondents Indian counterparts, has been held by the Indian Industrial Tribunal (Mumbai) to be illegal. The aforesaid decision has been upheld by the High Court of Mumbai, India. (Document 890

annexed "Z1" and "Z2" with the Petition in C.A. Application No. 1070/03). 900

It is only after excess staff were identified and after a formal application had been made to the Commissioner by the 3rd and 4th respondents in terms of the law for approval to terminate these persons, whilst all the time paying their salaries, that some of the petitioners were sent to a different department. All these persons who were said to the "caged" were paid their full salary and received all benefits during this period. At the conclusion of the inquiry and consequent to the Commissioner's order for compensation (which was the highest ever award in the annals of Labour Law in the 910 country as stated by the Commissioner in his objections) the 3rd and 4th respondents immediately deposited the same with the Commissioner. There was absolutely no attempt to avoid reparating these persons, and steps had been taken in terms of the applicable law. (Unlike in the Indian case) to terminate them lawfully. The said Indian Judgment may be clearly distinguished on the facts, as in that case the employees were transferred to a different location, arbitrarily, and no further action taken to terminate them legally. Hence the Indian Judgment referred to is irrelevant and distinguished, and has no bearing whatsoever to the present 920 Application. Moreover the provisions of law available under the "TEW" (Special Provisions Act) which had been invoked in case of the 3rd and 4th Respondents, were not available in the Indian case.

Although the petitioners sought to contend that there was 'outsourcing' no valid evidence had been led in respect thereof, except for a list of names tendered by the petitioners which they failed to substantiate. The petitioners were not compelled to accept the Voluntary Retirement Scheme (VRS) packages offered to them. For the aforesaid reasons this complaint of the petitioners is also not tenable. 930

Necessary Inferences and Material Evidence Disregarded.

The petitioners state that the 2nd respondent has arrived at the conclusion that Support Staff employees will find it more difficult to find jobs than the Clerical or Managerial staff employees and therefore have been offered a better "VRS" package than the other categories of staff on mere conjecture and without any proper

evidence to support the same (para 24 of the report at page 11) The 2nd respondent has given undue and unwarranted weightage to the number of employees in the other categories who have accepted the 'VRS' packages and left, when the same is not in any manner, a material consideration for the determination of issues raised before him, especially as the majority of the Clerical Staff employees (ie 24 out of 40) amounting to 60% of the total sought to be retrenched have not accepted the 'VRS' packages. The petitioners submit that the 2nd respondent has interposed his own personal views whilst determining this matter which is evident from the contents relating to globalization etc. as enumerated by him in the said report which are not matters that are based on any firm evidence. 940

The aforesaid inferences are decisions, views and observations which he 2nd respondent arrived at, which relate to his 'absolute discretion' being incidental matters – and in my view is an expression of his views although he has considered the material evidence completely and drawn inferences accordingly which are correct. 950

Compensation awarded to the Petitioners – wholly inadequate.

The petitioners allege that the compensation awarded to the petitioners by the 1st respondent is totally inadequate, and that severe disparities were apparent in the compensation packages awarded to the several categories of petitioners. The petitioners state that although the Banks boast that the highest compensation packages were awarded in respect of these employees, relevant criteria when calculating the compensation payable to each employee had not been taken into account by the Commissioner of labour. The petitioners contend that the inadequacies and disparities of the compensation awarded by the 1st respondent to the petitioners are evident by the following factual examples pertaining to 3 of the employees/ petitioners in the 3 separate staff categories. 960

Name	Category/Period of service	Compensation awarded	Outstanding Home Loan
Y.G.Rodrigo	Manageria/19 years	Rs. 1.2.Million	Rs. 1.4 Million
B.R.Ranasinghe	Clerical/ 10 years	Rs. 660,000/-	Rs. 560,000/-
K.K.D.Kahaduwa	Support/6 years	Rs. 510,000/-	Rs. 470,000/-

970

Accordingly at the conclusion of 19 years of service Mr. Y. G. Rodrigo of the Managerial Staff catergory would not receive the benefit of the compensation awarded to him since his outstanding Home Loan clearly exceeds the compensation awarded and therefore he will have to repay the bank a sum of Rs. 2 Million. At the conclusion of 10 years of service Mr. B.R. Ranasinghe would receive only a sum of Rs.100,000/- after he settles the outstanding Home loan with the bank. At the conclusion of 6 years of service Mr. K.K.D. Kahaduwa of the support Staff category would receive a sum of Rs. 40,000/- after he settles the outstanding Home loan with the Bank. Under these circumstances the petitioners submit that they are entitled to the substantive reliefs prayed for in the respective petitions. 980

Very significantly the entire case of the petitioners and the Union which represented them, and the evidence before the Commissioner of Labour at the inquiry, was entirely presented on the basis that what the Petitioners wanted was enhanced compensation. It transpires that the Commissioner had reasonably acted on the thrust of the Union case which is for the grant of compensation and he has held that due to the merging of 2 entities, and also due to the enhancing of technology that there has been a diminution of the actual need for cadres, that he should not therefore deny permission to terminate, and that he should order compensation as contemplated by the Act. There are several authorities which hold that the Commissioner need not grant reinstatement and that the he can award compensation under the "TEW" (Special Provisions) Act. The affidavit of Mr. Baratha Gnanawickrema President of the Branch Union of the Ceylon Bank Employees Union in his affidavit filed at page 349 in CA. 2282/02 states as follows. "Without prejudice of what I have stated objecting to the grant of approval by the Commissioner of Labour, I state that the only reasonable relief that should be granted in the circumstances of this case is salary and other benefits which the employees would earn up to the age of retirement. 990 1000

The Only Reasonable Relief

This is substantiated by the fact that Baratha Gnanawickrema states that compensation is the "only reasonable relief that should be granted in the circumstances of the case". Sudheera Wijatilleke and Baratha Gnanawickrema were office bearers of the Union. None of the affected workmen gave evidence nor claimed reinstatement. The

aforesaid 2 Office bearers of the Union obviously coordinated to give evidence in order to make a case out for compensation for all workmen as they in their capacity as Office bearers of the Union would be best equipped to comment upon the financial issues in a post terminal situation. 1010

In this case some positions of the employees retrenched are not longer in existence, and the status quo cannot be resumed. There will be utter disaster and mayhem if the workmen claim a return to work.

Another important issues is what would happen to the large amount of monies that have been taken by the employees on the basis that their services were terminated. The Gratuity Act (section 5) enables the payment of gratuity upon the existence of a terminal situation. The compensation granted is absolutely in excess of that formulated by the State in the published compensation formula and is the highest award made. 1020

I am of the view that the Commissioner has correctly identified the issues, has analysed the relevant facts in relation to the redundant staff, has come to a correct finding with regard to their identification, made orders dated 27.03.2003 having evaluated the evidence based on relevant principles properly, and hence I see no reason to interfere with the orders of the 2nd respondent dated 27.03.2003. For the aforesaid reasons, I refuse the Writ Applications CA. 1070/03, CA. 1080/03 and CA. 2282/02, which are dismissed without costs. 1030

SRISKANDARAJAH, J. – I agree.

Application dismissed.

JAYATISSA
v
APPUHAMY

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 752/95 (F)
DC KALUTARA 5170/P
SEPTEMBER 19, 2007

Partition Law – S35 Amendment – Act 17 of 1977 – Scheme Inquiry – Original defendant permitted to object to final plan – Can the person who is substituted be given another opportunity to consider plan/ report?

Held:

> When the Court had duly and properly allowed the original defendant to object to the final plan, the person who was substituted in the room of the deceased defendant cannot be given another opportunity to consider the plan and the report.

APPEAL from the judgment of the District Court Kalutara.

Daya Guruge with *G.M.R. Wimalaweera* for 1A defendant-appellant.

Hemasiri Withanachchi with *Shantha Karunadasa* for substituted plaintiff-respondent.

November 13, 2007

CHANDRA EKANAYAKE, J.

The 1A defendant-appellant (hereinafter sometimes referred to as the 1A defendant) by this appeal has sought *inter alia,* to set aside the order and decree dated 10.08.1995 pronounced in the District Court Kalutara case No. 5170/P and to direct that a date for consideration of the final plan and report or a date be given to the 1A defendant to file his objections to the scheme of partition plan No. 717 and report. As evidenced by Journal Entry No. 106 of 04.09.1995 the final decree dated 16.08.1995 was tendered and order made to be sent for registration after signing the same. As per 01

Journal Entry No. 109 of 06.10.1995 the final decree had been returned after due registration.

The original plaintiff had instituted the above styled partition action in the District Court of Kalutara seeking to partition Lot No.3 of "Dodangodagewatte" alias "Dodangahawatta" in accordance with the undivided shares shown in paragraph (4) of the plaint. After filing the statement of claim of the original defendant case had proceeded to trial and the learned trial Judge by judgment dated 05.04.1991 had ordered a partition according to the undivided shares embodied there.

After entering the interlocutory decree commission had been issued to the Commissioner in the case namely – E.T. Gunawardena for the final survey. As seen by the Journal Entry No. 67 dated 19.03.1992 said Commissioner had returned the commission with the final plan bearing No. 1162 of 10.02.1992 together with the summary of distribution. Thereafter as per Journal Entry No. 70 of 29.04.1992 the original defendant's Attorney-at-Law having filed a petition supported by an affidavit had moved to reject the said commissioner's plan No. 1162 and moved for an alternative commission. By order of the Court dated 02.06.1992 (J.E.71) application for alternative plan had been allowed and order was made to issue an alternative commission returnable for 12.08.1992. K.D.L. Wijenayake (L.S) while returning the said commission had submitted the alternative plan No. 178 of 13.08.1992 and scheme inquiry had been fixed for 09.10.1992.

At the scheme inquiry on a joint application by both parties commission was issued to both surveyors (Commissioner in the case and K.D.L. Wijenayake – L.S). It appears from the Journal Entry No. 82 of 10.03.1993 that, said commission was returned unexecuted seeking further instructions. Thereafter it was again fixed for scheme inquiry for 09.10.1992, despite both parties having agreed to abide by the plan which would be prepared by both surveyors. However the said commission was not executed and thereafter the matter was again fixed for scheme inquiry on 29.04.1993. It appears that same being resolved by way of written submissions (*vide* Journal Entries 83 to 86) order was fixed for 12.07.1993.

By the order dated 12.07.1993 the learned trial judge had ordered to issue a commission to the Commissioner in the case namely – E.T.Gunawardane to prepare a plan and a report according to the instructions given therein. Last paragraph of the said order is as follows:-

"නමුත් එකී පිඹුර අනුව දැනට ඉඩමේ ප්‍රමාණය රූඩ් 2යි පර්චස් 24.50 ක් නොව රූඩ් 2යි පර්චස් 23.50 ක් වේ. ඒ අනුව එම ප්‍රමාණය පැමිණිලිකරුට හා විත්තිකරුට සම සමව යන සේ විත්තිකරුගේ වගා එහි ඇතුළු වනසේ කොටස් කර අළුත් පිඹුර සාදා වාර්තාවක් සමඟ එවීමට මිනින්දෝරු ඊ.ටී. ගුණවර්ධන මහතාට කොමිෂමක් නිකුත් කරන්න."

That is the plan (No.717) and report submitted in compliance with the above order. Though a joint commission was ordered to bear the expenses jointly by both parties, it is seen from Journal Entry No.95 the plaintiff had undertaken to pay the defendant's share of the commission fees and subsequently commission had to be issued to another Licensed Surveyor as the Commissioner in the case had withdrawn. In the result in compliance with the order of Court Commissioner had been issued to G. Adikaram (Licensed Surveyor) *vide* Journal entry 97 of 19.01.1995 and the respective marginal note of the Registrar of the District Court. The final plan bearing No. 717 dated 25.04.1995 with the report and the other annexures was submitted by G. Adikaram (L.S) as a result of the order of Court dated 12.07.1993, which being the order made after scheme inquiry. For the first time death of the defendant had been brought to the notice of Court on 21.06.1995 (J/E-103) and on 16.08.1995 the 1A defendant was substituted in the room of the deceased-defendant. On that day since there was no objection from 1A defendant, said final plan had been confirmed. Since it was a plan and report submitted in compliance with the joint commission issued in terms of the order dated 12.07.1993 which being an order with regard to the scheme inquiry held (in which the original defendant too participated) no further date need be given to the 1 A defendant to consider same.

In this respect examination of the provisions in section 35 of the Partition Law (as amended by Act No. 17 of 1977) would become relevant. Plain reading of that section would reveal that

after the return to the commission the Court shall call the case in open Court to fix a date for the consideration of the scheme of partition proposed by the surveyor. Of course the time frame within which that has to be done is given in the section. In the case at hand Court had already complied with this provision and furthermore the original defendant being the only defendant in the case was even given an opportunity to tender objections to the final plan and scheme inquiry was fixed. At the inquiry also the original defendant had been duly represented by Counsel and the aforesaid order dated 12.07.1993 was the order which was pronounced after the said inquiry. It is seen that thereafter only the death of the original defendant had occurred and 1 A defendant was substituted. When the Court had duly and properly allowed the original defendant to object to the final plan bearing No. 1162, the person who was substituted in the room of the said deceased-defendant (1 A defendant) cannot be given another opportunity to consider the plan and report (plan No. 717) which being the outcome of the order dated 12.07.1993 – order of the scheme inquiry. For the reasons given as above I see no error in the order dated 16. 08. 1995 of the learned District Judge confirming the final plan bearing No. 717 with the report and the other annexures and in the judgment pronounced also.

For the foregoing reasons this appeal should fail. I would accordingly dismiss the appeal with costs fixed at Rs. 15,000/-

GOONERATNE, J. – I agree.

Appeal dismissed.

NEVILLE FERNANDO
v
CHANDRANI FERNANDO

COURT OF APPEAL
EKANAYAKE, J.
GOONARATNE, J.
CA 902/95
DC KALUTARA 2731/D
JULY 9, 2007

Civil Procedure Code – Divorce – Ground of constructive malicious desertion-Requirements – Burden on whom? Is it a question of fact? Matrimonial relief only to the innocent spouse?

The plaintiff-appellant instituted divorce action seeking a divorce *vinculo matrimonii* dissolving the marriage between him and the defendant-respondent on the ground of constructive malicious desertion of the defendant.

The trial judge dismissed the action holding that, leaving of the matrimonial home by the plaintiff was not due to any fault of the defendant and according to law matrimonial reliefs could be granted only to the innocent spouse.

Held:

1) In the case of constructive malicious desertion the spouse who is out of the matrimonial house must show that the other acted with fixed intention of putting an end to the marriage and the burden of proving just cause in order to assert constructive malicious desertion is on the spouse who alleges constructive malicious desertion.

2) To constitute the offence of constructive malicious desertion by the defendant the necessary conduct should be of grave and convincing character.

3) It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home.
"the function of an appeal Court is to consider the matter without either denying its first Court its special advantages or supposing that it can place itself in the same position by a mere study of the record."

APPEAL from the judgment of the District Court of Kalutara.

Cases referred to:-

1) *Anulawathie* v *Gunapala and another* – 1998 – 1 Sri LR 93.
2) *Edwards* v *Edwards* – 1949 – 21 ALL ER 145.
3) *Alles* v *Alles* – 51 NLR 416.
4) *Chellammah* v *Kanagapathy* – 65 NLR 49 at 52.
5) *Oberholzer* v *Oberholzer* – 1921 – A.D. 272 at 274.
6) *Alwis* v *Piyasena Fernando* – 1993 – Sri LR 119.

Asoka Fernando with *Ms. Manori Manik* and *M. Gamage* for plaintiff-appellant.
Rohana Deshapriya for defendant-respondent

September 21, 2007

CHANDRA EKANAYAKE, J.

The plaintiff-appellant (hereinafter sometimes referred to as the plaintiff has preferred this appeal from the judgment of the learned District judge of Kalutara dated 20.11.1995 pronounced in District Court, Kalutara Case No 2731/D seeking *inter alia* to set aside the said judgment and decree of the District Court and to enter judgment and decree as prayed in the plaint. 01

The plaintiff had instituted the above styled divorce action against the defendant-respondent (hereinafter sometimes referred to as the defendant) seeking *inter alia* a divorce *vinculo matrimonii* dissolving the marriage between the plaintiff and the defendant on the ground of constructive malicious desertion of the defendant. The defendant by her answer dated 20.10.1993 whilst admitting only the marriage and the birth of the 2 children namely – Himal Nilruksha Hikkaduwa, Malshi Nilrukshi Hikkaduwa had prayed for a dismissal of the plaintiff's action. By way of further answer defendant had contended that the plaintiff was living with another lady and even a child was born to her as a result of the said undue intimacy and denying the averment in paragraphs 7 of the plaint stated that in or about February 1987 she was chased out of the matrimonial home by the plaintiff after ill-treating her and harassing her. 10 20

When the trial commenced having admitted the marriage between the plaintiff and the defendant and that the matrimonial home was at No. 35, Siri Nawasa Mawatha, Kalutara-North, case had

proceeded to trial on issues I to 6 and 9-10 raised on behalf of the plaintiff and the defendant respectively. Since the plaintiff had agreed to give custody of the above two children to the defendant (as appearing at page 26 of the brief), the learned trial judge had stated in the judgment no necessity arises to answer the said issues 7 and 8.

Case of the plaintiff had been concluded with evidence and no oral evidence had been adduced for the defendant's case. 30

The learned Trial judge by the impugned judgment had dismissed the plaintiff's action with costs. This is the judgment this appeal has been preferred from.

Perusal of the evidence of the plaintiff reveals that the defendant was in the habit of coupling names of the females and to quarrel with him even prior to the marriage and the defendant continued to do so even after the marriage. His position had been that as he had to leave the matrimonial home he left. Further his evidence in examination-in-chief at page 39 of the brief had been to the following effect:

ප්‍ර : තමා වෙනත් ස්ත්‍රියක් සමඟ ඉන්නවා අඹු සැමියන් වශයෙන්? 40
උ : ඔව්
ප්‍ර : කොයිකාලයේ සිටද ඉන්නේ?
උ : 1992 වර්ෂයේ සිට

The evidence to the above effect was not contradicted and his evidence in cross examination (at page 50 of the brief) had been that one lady by the name Priyangani had a child from him and said child's birth certificate was also produced through him marked as V3. He had further testified that said child was born on 18.04.1993 and particulars to prepare V3 was furnished by him and the above position is supported by the particulars appearing in cage 9 of V3. According to 50 V3 father of child born to said Priyangani is Hikkaduwa Nevil Fernando - the plaintiff.

Having subjected the evidence of the plaintiff with regard to the conduct and behavior of the wife (the defendant) to a severe scrutiny the trial judge had concluded in the judgment that leaving the matrimonial home by the plaintiff was not due to any fault of the defendant and according to our law matrimonial reliefs could be granted only to the innocent spouse.

It is to be observed that the basis of the plaint and issues of the plaintiff had been on the constructive malicious desertion of the defendant-wife In the case of constructive malicious desertion the spouse who is out of the matrimonial home must show that the other had acted with fixed intention of putting an end to the marriage and the burden of proving just cause in order to assert constructive malicious desertion is on the spouse who alleges constructive malicious desertion,– in this case the plaintiff husband. Therefore it becomes essential to examine the actual facts of the case in order to ascertain whether the party was obliged to leave the matrimonial home as a direct consequence of the expulsive acts of the spouse said to have been at fault. It was observed by Weerasuriya, J. in the case of *Anulawathie* v *Gunapala and another*[1] as follows:

> "It is to be observed that when a party seeks a divorce on the ground of constructive malicious desertion what is required to be proved is that, the innocent party was obliged to leave the matrimonial home as a direct consequence of the expulsive acts of the other party."

To constitute the offence of constructive malicious desertion by the defendant (here the wife), the necessary conduct should be of grave and convincing character. In this regard it would be pertinent to consider the decision in *Edwards* v *Edwards*[2]. Their Lordships at 148:

> ".... but the necessary conduct must, from the very nature of the offence of desertion, obviously be of a grave and convincing character. Whether in any given case this requirement is fulfilled is a question of fact on which a jury would require to be carefully directed. It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home."

In the light of the above decision it is clear that in any given circumstances whether requirements to constitute constructive malicious desertion are fulfilled, is a question of fact.

The observations of Lord Radcliffe with regard to finding of fact by a trial judge, In *Alles* v *Alles*[3] would also be of importance. *Per* Lord Radcliffe at 421.

"To reverse this finding on appeal would be a strong step. Only justified if the trail judge had demonstrably misjudged the position."

Similarly Lord Radcliffe in delivering the Privy Council judgment in *Chellammah* v V. *Kanagapathy*[4] at 52 has succinctly stated the circumstances in which a finding of fact of a trial court could be interfered with. Per Load Radcliffe at 52. 100

"The function of an Appeal Court is therefore to consider the matter without either denying its first Court its special advantages or supposing that it can place itself in the same position by a mere study of the record. With these limitations in mind it has to decide whether the judge's findings of fact, since no question of law is in dispute, are so far unmaintainable upon the whole conspectus of the evidence, oral and documentary, that they cannot be supported." 110

The following observation made in *Oberholzer* v *Oberholzer*[5] at 274 would be important in the circumstances of this case.

"These matrimonial cases throw a great responsibility upon a Judge of the first instance, with the exercise of which we should be slow to interfere. He is able not only to estimate and credibility of the parties but to judge of their temperament and character. And we, who have not had the advantage of seen and hearing them, must be careful not to interfere, unless we are certain, on firm grounds, that he is wrong." 120

The above principle was followed by His Lordship the Chief justice G.P.S. de Silva, in the case of *Alwis* v *Piyasena Fernando*[6]. It was held amongst other things that:

"The Court of Appeal should not have disturbed the findings of primary facts made by the District Judge on credibility of witnesses."

In this case the most vital issues of the plaintiff appear to be issues 1 and 2. Those are to the following effect:

"1 පැමිණිල්ලේ 7වෙනි ඡේදයේ සඳහන් පරිදි පැමිණිලිකරු වෛවාහක නිවස අතහැර, කොළඹ 6, හැව්ලොක් පාරේ නිවසකට පදිංචිය සඳහා ගියේද? 130

2 ඉහත සඳහන් පදංචිය එසේ වෙනස් කිරීමට සිදුවූයේ විත්තිකාරිය විසින් පැමිණිලිකරු අනුමිත ද්වේශ සහගත ලෙස අත්හැර යාම නිසාද?"

The learned trial judge had answered issue No. (1) in the affirmative and (2) in the negative. Examination of the plaintiff's evidence demands the answer to issue No. (1) to be in the affirmative. What needs consideration now is whether the learned judge was correct in answering issue No. (2) in the negative. Perusal of the impugned judgment reveals that (as appearing at page 67 of the brief) 140 it had been concluded that under those circumstances it cannot be said that there were strong reasons compelling the plaintiff to leave the matrimonial home. The legal position too had been considered by the learned judge. Judge's finding on facts appear to be that according to the own testimony of the plaintiff he had been living as husband and wife with another lady (from 1992) and thus a matrimonial offence by plaintiff was proved before the Court. Therefore he was not an innocent party. Further the learned judge appears to have considered what really led the plaintiff to leave the matrimonial house in February 1987 (as averred in the plaint). 150 Whether it was due to the fault of the defendant-wife. The finding with regard to the above appearing at page 68 of the brief is as follows:

"... මෙම නඩුවෙන් පවරා ඇති අන්දමට 1986 වර්ෂයේ පැමිණිලිකරුට වෛවාහක නිවසින් ඉවත්වී යාමට වූයේ විත්තිකාරියගේ වරදින්මද යන්නද ඉහතින් සඳහන් හේතූන් මත තීරණය කල නොහැක"

Of course according to paragraph 7 of the plaint the date of leaving the matrimonial home by the plaintiff appears to be 14.2.87. Issue No 01 also refers to the averments in paragraph 07 of the plaint. When concluding as above with regard to constructive malicious 160 desertion it is seen that year 1986 is mentioned there. However paragraph 07 of the plaint gives the date of leaving as 14.02.87. Therefore it is evident that due to some inadvertence, year 1986 appears in the aforesaid finding.

On the evidence available I am unable to infer that plaintiff had left the matrimonial home in February 1987 due to direct consequence of any expulsive acts of the defendant. Further plaintiff's own evidence in cross examination had been that in or about 1987 the

defendant was living in Colombo as she had to follow a course in Borella and he left the matrimonial home in 1986 November or December. Plaintiff's evidence to the above effect would suffice to answer issue No. 02 in the negative since it appears that in February 1987 the defendant had not even lived in the matrimonial home. 170

Having examined the evidence I am inclined to agree with the findings of the learned trial judge and I conclude that issues had been correctly answered.

For the foregoing reasons I see no justification in interfering with the findings. Accordingly this appeal is hereby dismissed. In all circumstances of the case no order is made with regard to costs.

GOONERATNE, J. - I agree.

Appeal dismissed.

PERERA
V
CALDERA AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 1096/96 (F)
DC HOMAGAMA 235/P
AUGUST 27, 2007

Civil Procedure Code – S114 (3) – S154 (3) – S187 – Documents marked become part of the record – Should Court call for documents? Answering of issues – Bare answers – adequate ?

Held:

(1) The absence of answering the points of contest in a judgment – would amount to a clear breach of S187.

(2) The points of determination and the decision thereon needs to be embodied in the judgment which would refer to the reasons for such decision.

(3) There is a duty on Court to take the documents tendered and marked at the trial to the custody and keep them filed of record – documents marked in evidence become part of the record.

Per Anil Gooneratne, J.

"There seems to be a serious lapse in this case where a judgment has been pronounced without documents being considered by the original Court, and it would be no excuse for a trial Court Judge to observe on the judgment that the defendant had not tendered the marked documents to Court. The District Judge should call for those documents".

APPEAL from the judgment of the District Court of Homagama.

Case referred to:-

(1) *Podiralahamy* v *Ran Banda* – 1993 – 2 Sri LR 20.

(2) *Dona Lucihamy* v *Ciciliyanahamy* – 59 NLR 214

(3) *Warnakula* v *Ramani Jayawardane* – 1990 1 Sri LR 207

November 27, 2007

ANIL GOONERATNE, J.

This appeal arises in a partition case from the Judgment of District Judge, Homagama dated 4. 10. 1996. In the Judgment it is stated that parties proceeded to trial on 7 points of contest. Plaintiff had produced plan marked 'x' and two deeds marked P1 & P2. In the Judgment the learned District Judge states that the documents produced in evidence by the defendants had not been tendered to Court. In the petition of Appeal it is also averred *inter alia* that the learned trial Court Judge had not given due consideration to the evidence led by the defendants and the Judgment had been delivered in the absence of the document of the defendants. It is the position of the appellant that the Judge had failed to call for the defendant-appellant's documents.

On a perusal of the Judgment I find that the learned Trial Court Judge had not considered the points of contest. In the absence of answering the points of contest in a judgment would amount to a clear breach of section 187 of the Civil Procedure Code.

In paragraph 7C of the Petition of Appeal it is averred that court made order for *lis pendens* on 21. 7. 1988 and 9. 3. 1989 but there is no compliance with the court order.

There seems to be a serious lapse in this case where a judgment had been pronounced without documents being considered by the Original Court and it would be no excuse for a trial Court Judge to observe in the Judgment that the defendant had not tendered the marked documents to Court. The District Judge should call for those documents. In *Podiralahamy* v *Ran Banda.*[1]. It was held that -

"There is a duty on Court to take the documents tendered and marked at the trial to its custody and keep them filed of record. Documents marked in evidence become part of the record," and 30

At pg. 21 - The provision of section 154 (3) reads as follows:-

"The document or writing or being admitted in evidence the Court, after marking it with a distinguishing mark or letter by which it should when necessary be ever after referred to throughout the trial." . . .

The explanation to the subsection reads as follows:-

" Whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it and if not earlier marked on the account, it must at least be marked when 40 the Court decides upon admitting it".

In the instant case the defendant-appellant's documents D1 to D10 were not only marked but also led in evidence without any objection from the opposing party. Those documents have been admitted; therefore the Court in terms of the provisions of section 114(3) should have kept them in its custody. If was for convenience the Court had allowed the Attorney-at-Law to the defendant-appellant to retain the documents during the trial, there was a duty cast on the learned District Judge to call for the documents.

The learned Counsel or the appellant cited an unreported 50 authority CA/SC No. 63/76(F) D.C. Kurunegala No. 357/LCA minutes of 25.10.1984, where Justice Atukorala observed: "we are of the view that documents once marked in evidence become part of the record and should remain the custody of Court."

The Judgment gives no indication to the points of contest raised at the trial. Even the bare answers to points of contest although not permissible and not suggested or answered by the original court would make this a bare judgment without the required requisites in term of section 187 of the Civil Procedure Code. The Appellate Court should be in a position to glance through the answers given to the points of contest before examining the reasons for same, and should not be called upon to re-write the judgment of the Original Court to fill in the gaps by suggesting that no prejudice would be caused to the parties notwithstanding the bare answers to issues. In the instant case not even the bare answers are incorporated in the judgment of the Original Court. Section 187 of the Code reads thus.... 60

"The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively." 70

The points for determination and the decision thereon needs to be embodied in the Judgment, which should refer to the reasons for such decision. I am inclined to follow the decision on requisites of Judgment reported in *Lucyhamy's Case*[2] and *Warnakula* v *Ramani Jayawardene*[3].

The Court is not inclined to deviate from the usual and normal practice of answering the issues or points of contest.

In the circumstances there is no need to examine the merits of this case in the absence of mandatory requirements which have not be complied with by the Original Court. Therefore I set aside the Judgment of the learned District Judge and send the case the back for trial *de novo*. Subject to this direction this appeal is allowed with cost. 80

EKANAYAKE, J. - I agree.

Appeal allowed.
Trial de novo ordered.