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] 2 SRI L.R. – PARTS 1- 2

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Page

(2007) 2 Sri L.R. Parts 1 - 2

DEBT RECOVERY (SPECIAL PROVISIONS) ACT, NO. 2 OF 1990 amended by Act, No. 9 of 1994 – Constitution - Articles 24(2), 24(3), 149 and 141 – Plaintiffs right to initiate proceedings either in Sinhala or Tamil language – Defendants right to participate in Sinhala or Tamil language. – Civil Procedure Code, Section 49(1) and 754(2) – Alternate remedy – Judgment or order – Revision with exceptional circumstances – Non compliance Rule – Court of Appeal (Appellate Procedure) Rules No. 1990 – Laches.

Rajakumar and Another v Hatton National Bank Ltd 01

EVIDENCE ORDINANCE, Section 35 Evidence (Sp.Pro.) Act 14 of 1995 – – Marine Insurance – Breach of warranty of seaworthiness – Burden of Proof – On whom ? – Admissibility of documents – Documents maintained in the ordinary course of business – Setting up of a different case in appeal – Permitted ?

Janashakthi Insurance Co. Ltd v Umbichy Ltd.................................. 39

FUNDAMENTAL RIGHTS – Article 126(2) of the Constitution – Has the petitioner filed the application within the period prescribed by Article 126(2) of the Constitution ? – Section 13(1) of the Human Rights Commission Act, No. 21 of 1996

Kariyawasam v Southern Provincial Road Development Authority and 8 Others.. 33

MAINTENANCE ORDINANCE, Section 6 – Corroboration – When ? – D.N.A. Test? – Paternity – Cogent evidence – Necessity to corroborate evidence of mother

Weerasinghe v Jayasinghe 50

(To be continued in parts 3 & 4)

WRIT OF CERTIORARI - Quash decision to sign Cease Fire Agreement (CFA) – Agreement illegal? – Null and void ? – Constitution Articles 4(b) and 29 with Articles 30(1) and 43(1) 6th Amendment Article 140 – Executive power – Collective responsibility of Cabinet – Policy decision – Legality of entering into an agreement with the LTTE ? – Prevention of Terrorism Act, No. 48 of 1979 – Judicial Review – Policy decisions – Could the Court consider the illegality or *mala fide* of a policy decision?

Tilwin Silva v Ranil Wickremasinghe and Others.............................. 15

RAJAKUMAR AND ANOTHER
v
HATTON NATIONAL BANK LTD.

COURT OF APPEAL
EKANAYAKE, J.
SISIRA DE ABREW, J.
CA 2012/2003
DC MT. LAVINIA 123/2001/DCM
DECEMBER 12, 2006

Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 – Constitution Articles 24(2), 24(3) – Articles 149, 141 – Plaintiffs right to initiate proceedings either in Sinhala or Tamil language – Defendants right to participate in Sinhala or Tamil language. Civil Procedure Code 49(1), Section 754(2) Alternate remedy – Judgment or order – Revision - exceptional circumstances – Non compliance with Rule – Court of Appeal (Appellate Procedure) Rule - 1990 – Laches.

The plaintiff-respondent instituted action in the District Court of Mt. Lavinia under and in terms of the Debt Recovery (Special Provisions) Act No.2 of 1990 as amended in order to recover a certain amount. The District Court granted leave to appear and show cause upon deposit of a sum of Rs. 2.5 million, the terms sought by the defendant-appellant were refused by Court – Judgment was thereafter entered and *decree nisi* was made absolute. The defendant moved in Revision.

It was contended by the appellant a Tamil National that the plaintiff bank failed to provide copies of the plaint and the affidavit in the Tamil language or at least in English language – contravening Article 24(2), Article 24(3). The respondent contended that, the Revision application is misconceived in law, there is delay and that, Rule 3(1) of the Court of Appeal Rules 1990 – has not been complied with.

Held:

(1) A plain reading of Article 24(2) suggests that the plaintiff bank has the right to initiate proceedings either in the Sinhala or Tamil language, and the defendant has the right to participate in the proceedings in Court either in Sinhala or Tamil language.

In this case the petitioners have chosen to participate in the proceedings in the Sinhala language, the motion is also in the Sinhala language – Article 24(2) has been complied with.

(2) There must be evidence before the District Court that the 1st defendant-petitioner is not conversant with the language used in the District Court. In the papers filed by the defendant-petitioners they have not stated that, the 1st defendant-petitioner is not conversant in the Sinhala language. – The position contended under Article 24(3) cannot therefore be accepted.

(3) As regards the position that, the plaintiff bank has not complied with Section 49 (1) of the Civil Procedure Code – there was no evidence before the District Court to suggest that the language of the 1st defendant-petitioner was not the language of the District Court of Mt. Lavinia.

Held further :

(4) The impugned order is not a final order and as such the defendant-petitioner could invoke the jurisdiction of the Court of Appeal under section 754(2); The defendant had an alternate remedy.

(5) The petitioners are not entitled to invoke the revisionary jurisdiction of the Court of Appeal, in that – the petitioners have not established exceptional circumstances warranting the intervention of the Court of Appeal.

(6) The petitioners have not produced a copy of the impugned order – they have not complied with Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules 1990 – without examining the order, Court is unable to make a determination as to the correctness of same – this is a necessary document.

Held further :

(7) The present application has been filed eight months after the pronouncement of the 1st order and four months after the 2nd order – there is delay.

Per Sisira de Abrew, J.

"Revision being a discretionary remedy is not available to those who sleep over their rights, I further hold that it is not the function of the Court of Appeal, in the exercise of its revisionary jurisdiction to relieve parties of the consequences of their own folly, negligence and laches".

APPLICATION in revision from an order of the District Court of Mt. Lavinia.

Cases referred to:

(1) *In Re the insolvency of Hayman Thornhill* 2 NLR 105.

(2) *Ameen* v *Rasheek* 6 CLW 8.

(3) *Rustom* v *Hapangama* 1978-79-80 1 Sri LR 352 (SC)

(4) *Rasheed Ali* v *Mohamed Ali* 1981 2 Sri LR 29 (CA)

(5) *Rasheed Ali* v *Mohamed Ali* 1981 1 Sri LR 262 (SC)

(6) *Thilagaratnam* v *E.A.P. Edirisinghe* 1982 1Sri LR 56.

(7) *Hotel Galaxy Ltd.* v *Mercantile Hotel Management Ltd.* 1987 1Sri LR 5.

(8) *Caderaman Pulle* v *Ceylon Paper Sacks Ltd.* 2001 3 Sri LR 112.

(9) *Dharmaratne* v *Palm Paradise Cabanas Ltd.* 2003 3 Sri LR 24.

(10) *Lokutthuttripitiyage Nandawathie* v *Madapathage D. Gunawathie* CA 769/2000 DC Mt. Lavinia 33/92/P CAM 27.9.2001.

(11) *Mary Nona* v *Francina* 1988 2 Sri LR 250.

(12) *Navaratnasingham* v *Arumugam* 1980 2 Sri LR 01.

(13) *Samarasekera* v *Mudiyanse* 1990 1 Sri LR 137.

(14) *Shanmugadevi* v *Kulathilake* 20031 Sri LR 215.

(15) *Don Lewis* v *Dissanayake* 70 NLR 8.

(16) *H.A.M. Cassim* v *G.A. Batticaloa* 69 NLR 403.

(17) *Colombo Apothecaries Ltd.* v *Commissioner of Labour* 1998 3 Sri LR 320.

(18) *Wijesinghe* v *Tharmaratnam* 4 Sri Kantha 47.

Lakshman Jaya Kumar for defendant-petitioner-petitioner.

Palitha Kumarasinghe PC with *I. Idroos* for plaintiff-respondent-respondent.

Cur.adv.vult.

March 16, 2007

SISIRA DE ABREW, J.

Plaintiff-respondent-respondent (hereinafter referred to as the plaintiff bank) instituted action in the District Court of Mt. Lavinia under and in terms of Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 against the defendant-petitioners-petitioners (hereinafter referred to as the defendant-petitioners) in order to recover Rs. 7.5 million. The District Court issued a *decree nisi* against the defendant-petitioners. The defendant-petitioners made an application for leave to appear and show cause against the said *decree nisi.* The learned District Judge, by his order dated 20.3.2003, granted leave upon deposit of a sum of Rs. 2.5 million before 16.7.2003. The defendant petitioners, by motion dated 15.7.2003, sought permission of the District Court, *inter alia*, (a) to deposit three deeds pertaining to three lands belonging to the 2nd defendant-petitioner; (b) thereafter

to sell the lands; (c) and to deposit the proceeds of the sale of the three lands as security instead of the security ordered by the District Court. The learned District Judge, by his order dated 16.7.2003, refused the application in the motion. The learned District Judge made further order and entered judgment for the plaintiff bank as prayed for as the defendant-petitioners have failed to comply with the order dated 20.3.2003. The *decree nisi* was also made absolute on this date. The defendant-petitioners, by this revision application, seeks to revise the orders dated 20.3.2003 and 16.7.2003.

Learned Counsel for the defendant-petitioners contended before us that the plaintiff bank failed to provide copies of the plaint and the affidavit in the Tamil language or at least in English language to the 1st defendant-petitioner who is a Tamil national and as such the plaintiff bank had not complied with Articles 24(2) and 24(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka (the Constitution). Article 24(2) of the Constitution reads as follows:

> *"Any party or applicant or any person legally entitled to represent such party or applicant may initiate proceedings, and submit to Court pleadings and other documents, and participate in the proceedings in Court, in either Sinhala or Tamil."*

A plain reading of the Article 24(2) of the Constitution suggests that the plaintiff bank has the right to initiate proceedings either in Sinhala or Tamil language and the defendant has the right to participate in the proceedings in Court either in Sinhala or Tamil language. In this case the petitioners have chosen to participate in the proceedings in the District Court of Mount Lavinia in the Sinhala language. This is evinced by the language used in the motion dated 15.07.2003 filed on behalf of the defendant-petitioners. The language used in the said motion is the Sinhala language. Thus the above contention of the learned Counsel for the defendant petitioners cannot be accepted. On being questioned on the propriety of his contention, Learned Counsel for the defendant-petitioners, in the course of the hearing of this application, moved to withdraw this contention.

Learned Counsel for the defendant-petitioners next based his contention on Article 24(3) of the Constitution. He made the same submission of not handing over a copy in Tamil language or English language and further submitted that since the 1st defendant-petitioner

is not conversant with the language used in the District Court of Mount Lavinia the plaintiff bank should have given a copy of the plaint and the affidavit in the Tamil language or the English language. I now turn to this question. Article 24(3) of the Constitution reads as follows:

> *"Any judge, juror, party or applicant or any person legally entitled to represent such party or applicant, who is not conversant with the language used in a Court, shall be entitled to interpretation and to translation into Sinhala or Tamil, provided by the State, to enable him to understand and participate in the proceedings before such Court, and shall also be entitled to obtain in such language, any such part of the record or a translation thereof, as the case may be, as he may be entitled to obtain according to law."*

If the contention of learned Counsel for the defendant-petitioners is correct, then there must be evidence before the District Court that the 1st defendant-petitioner is not conversant with the language used in the District Court of Mount Lavinia which, according to the proceedings, is the Sinhala language. In the petition and affidavit filed by the defendant-petitioners, they have not stated that the 1st defendant-petitioner is not conversant with the Sinhala language. Therefore the above contention of learned Counsel should fail.

Learned Counsel for the defendant-petitioners next contended that the plaintiff bank had not complied with section 49(1) of the Civil Procedure Code (CPC) and raised the same question that the 1st defendant-petitioner was not provided with the copy of the plaint and affidavit in the Tamil language or English language. Section 49(1) of the CPC reads as follows:

> *"The plaintiff shall endorse on the plaint, or annex thereto, a memorandum of the documents, if any, which he has produced along with it; and if the plaint is admitted, shall present as many copies on unstamped paper of the plaint as there are defendants, translated into the language of each defendant whose language is not the language of the Court; unless the court, by reason of the length of the plaint or the number of the defendants or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief or remedy required in the action, in which case he shall present such statements."*

The words "translated into the language of each defendant **whose language is not the language of Court"** must be emphasized. Was there evidence before the learned District Judge to suggest that the language of the 1st defendant-petitioner was not the language of the District Court of Mount Lavinia? The above question has to be answered in the negative because the defendant-petitioners have failed to aver this position viz; that his language is not the language of the District Court, in the petition and affidavit filed both in the District Court and this Court. For these reasons the above contention of learned Counsel for the defendant-petitioners should fail.

Learned President's Counsel for the plaintiff's bank on the other hand, contended that the defendant-petitioners cannot now seek to revise the order dated 20.3.2003 as they have, in the motion dated 15.7.2003 filed in the District Court of Mount Lavinia, sought to deposit proceeds of sale of lands belonging to the 2nd defendant-petitioner in compliance with the order dated 20.3.2003 wherein the learned District Judge granted leave to appear upon deposit of Rs. 2.5 million. I now advert to this contention. The defendant-petitioners, by the said motion dated 15.7.2003, among other things, sought permission of the Court, instead of the security ordered by the Court, to deposit deeds of certain lands belonging to the 2nd defendant-petitioner and to deposit proceeds of sale of these lands in the event of the Court granting permission to sell the lands. They have stated in the said motion that they were seeking to do so in compliance with the order dated 20.3.2003. On a consideration of the totality of the contents of the said motion, it seems to me that the defendant-petitioners have accepted the correctness of the order dated 20.3.2003. For these reasons, I hold the view that the petitioners are not entitled to challenge the correctness of the order dated 20.3.2003 by way of revision and that learned President's Counsel is entitled to succeed in his argument.

Learned President's Counsel next contended that the defendant-petitioners could not invoke the revisionary jurisdiction of this Court against the order dated 20.3.2003 as the defendant-petitioners could have appealed against the said order with leave of this Court first had and obtained. He drew our attention to

section 754(2) of the CPC which reads as follows:

"Any person who shall be dissatisfied with any order made by any original Court in the course of any civil action, proceeding, or matter to which he is or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained."

It is common ground that the order made on 20.3.2003 is not a final order and as such the defendant-petitioners, in my view, could invoke the jurisdiction of this Court under section 754(2) of the CPC. I, therefore, conclude that defendant-petitioners had an alternative remedy against the said order dated 20.3.2003.

Learned President's Counsel next brought to our notice that the order dated 16.7.2003 is a final order and as such the defendant-petitioner could have preferred an appeal against the said order in terms of section 754(1) of the CPC which reads as follows:

"Any person who shall be dissatisfied with any judgment pronounced, by any original Court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law."

'Judgment' has been interpreted in section 754(5) of the CPC as follows: "Judgment" means any judgment or order having the effect of a final judgment made by any civil court.

The learned District Judge, by his order dated 16.7.2003, made the *decree nisi* absolute. Thus, it is crystal clear that this order is a final order.

Upon a consideration of section 754(1) of the CPC and the order dated 16.7.2003, I hold that the defendant-petitioners had a right of appeal against the said order. For the above reasons, I conclude that the defendant-petitioners had alternative remedies against the orders dated 20.3.2003 and 16.7.2003. Now the question that remains for consideration is whether the defendant-petitioners could invoke the revisionary jurisdiction of this Court when there is an alternative remedy. In this connection, I would like to consider certain judicial decisions .

In the case of *In Re the insolvency of Hayman Thornhill* [1], discussing the scope and object of the exercise of revisionary

powers by the Supreme Court Bonser C.J. stated as follows:

"The Supreme Court has the power of revising the proceedings of all inferior courts. This power .... The object at which the Supreme Court aims in exercising its powers of revision is the due administration of justice; and whether any particular person has complained against an order; proposed to be revised, or is prejudiced by it, is not to be taken into account in the exercise of such power."

In *Ameen* v *Rasheed*[2] Abrahams, CJ. observed: "It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have discretion to act in revision. It has been said in this Court often enough that revision of an appealable order is an exceptional proceeding, and in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal. I can see no reason why the petitioner should expect us to exercise our revisional powers in his favour when he might have appealed, and I would allow the preliminary objection and dismiss the application with costs."

The above judgment of Abrahams, CJ. was cited with approval by His Lordship Justice Ismail in *Rustom* v *Hapangama*[3] and stated thus: "The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise these powers in revision.If the existence of special circumstances does not exist then this Court will not exercise its powers in revision."

In *Rasheed Ali* v *Mohamed Ali*[4] Soza, J. remarked thus: "The powers of revision conferred on the Court of Appeal are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However, this discretionary remedy can be invoked only where there are 'exceptional circumstances' warranting the intervention of the Court." On appeal to the Supreme Court, His Lordship Justice Wanasundara affirming the view expressed by Soza, J. held as follows: "The powers of revision vested in the Court of Appeal are

very wide and the Court can in a fit case exercise that power whether or not an appeal lies. Where the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action except when non-interference will cause a denial of justice or irremediable harm." Vide *Rasheed Ali* v *Mohamed Ali.*[5]

In *Thilagaratnam* v *E.A.P. Edirisinghe*[6] L.H. de Alwis, J. remarked thus: "Though the Appellate Courts' powers to act in revision were wide and would be exercised whether an appeal has been taken against the order of the original court or not such powers would be exercised only in exceptional circumstances." In *Hotel Galaxy Ltd.* v *Mercantile Hotel Management Ltd.*[7] Sharvananda, CJ. commenting on the requirement of exceptional circumstances in the exercise of revisionary powers held: "It is settled law that the exercise of the revisionary powers of the appellate court is confined to cases in which exceptional circumstances exist warranting its intervention."

Dr. Ranaraja, J. commenting on the requirement of exceptional circumstances in a revision application held as follows: "The power of revision vested in the court is discretionary. The power will be exercised when there is no other remedy available to a party. It is only in very rare instances where exceptional circumstances are present that courts would exercise powers of revision in cases where an alternative remedy has not been availed of by the applicant. Thus the general principal is that revision will not lie where an appeal or other statutory remedy is available. It is only if the aggrieved party can show exceptional circumstances, for seeking relief by way of revision, rather than by way of appeal, when such appeal is available to him as of right, that the court will exercise its revisionary jurisdiction in the interests of due administration of justice."

Nanayakkara, J. stressed the need for exceptional circumstances in the exercise of revisionary powers by the Court of Appeal in *Caderamanpulle* v *Ceylon Paper Sacks Ltd.*[8] and stated thus:

"The existence of exceptional circumstances is a pre-condition for the exercise of powers of revision." The scope and object of the exercise of revisionary powers by the Court of Appeal is succinctly stated by His Lordship Justice Amaratunga in *Dharmaratne* v *Palm Paradise Cabanas Ltd.*(9) "Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted, if such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal."

In *Lokutthuttripitiyage Nandawathi* v *Madapathage D. Gunawathi*(10) His Lordship Justice Udalagama observed thus: "In an application for revision it is necessary to urge exceptional circumstances warranting the interference of this court by way of revision. Filing an application by way of revision to set aside an order made by a District Court 3 1/2 years before the institution of the revision application is considered as inordinate delay and the application is dismissed on the ground of laches."

Upon a consideration of the above judicial decisions, I hold that the revisionary powers of this Court cannot be exercised when an alternative remedy is available unless there are exceptional circumstances warranting the intervention of this Court.

The question that remains for consideration is whether the defendant-petitioners, in the present case, have established exceptional circumstances warranting the intervention of this Court. I have carefully gone through the petition of the defendant-petitioners and I have to conclude that they have not established exceptional circumstances warranting the intervention of this Court. I have earlier held that the petitioners had alternative remedies against the orders dated 20.3.2003 and 16.7.2003. For these reasons, I hold that the defendant-petitioners are not entitled to invoke the revisionary jurisdiction of this Court and the petition of the defendant petitioners should fail on this ground alone.

Learned President's Counsel next contended that the defendant-petitioners had not produced a copy of the order dated 16.7.2003 and as such they had not complied with rule 3(1) of the Court of Appeal (Appellate Procedure) rules 1990. I now turn to this

question. It is true that the defendant-petitioners have not produced a copy of the order dated 16.7.2003. In my view, without examining this order, this Court is unable to make a determination as to the correctness of this order. Therefore this is a necessary document in deciding whether the application to revise order dated 16.7.2003 should be allowed or not. In order to appreciate the contention of the learned President's Counsel it is necessary to consider rule 3(1)(a) and (b) of the above rules. I set out below Rule 3(1)(a) and (b).

Rule 3(1)(a):

"Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application(or duly certified copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule, the Court may ex mero motu or at the instance of any party dismiss such application."

Rule 3(1)(b)

"Every application by way of revision or restitutio in integrum under Article 138 of the Constitution shall be made in like manner together with copies of the relevant proceedings (including pleadings and documents produced), in the Court of First Instance, tribunal or other institution to which the application relates."

In *Mary Nona* v *Francina*[11] Ramanathan, J. held: "Compliance with Rule 46 of the Supreme Court Rules 1978 in an application for revision is mandatory. A copy of the proceedings containing so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context must be filed. Merely filing copies of three journal entries with no bearing on the matters raised in the petition is not a compliance with Rule 46."

Rule 46 of the Court of Appeal Rules published prior to the publication of the present Rules is almost identical with Rule 3(1) of

the present Court of Appeal (Appellate Procedure) Rules.

In *Navarathnasingham* v *Arumugam*(12) Soza, J. observed thus: "As the petitioner in the instant case had come into Court only with a certified copy of the proceedings of 10th February, 1980, and the order delivered on 19th February, 1980, and the orders canvassed by him could not be reviewed in the absence of the earlier proceedings, the evidence and original complaint which were procured subsequently, the petition should have been rejected for non-compliance with Rule 46."

The above judgment of Soza, J. was cited with approval by Gunawardane, J. in *Samarasekare* v *Mudiyanse*(13) and he stated: "The rules of procedure have been devised to eliminate delay and facilitate due administration of justice. The instant case is a good example which illustrates that the revisionary powers of this Court cannot be exercised without the petitioner furnishing to this Court the relevant proceedings on which the order sought to be revised is based on. Rule 46 had been formulated to avert such situations. The observance of Rule 46 is mandatory."

Again in *Shanmugadevi* v *Kulathilake*(14) Bandaranayake, J. discussing the facts of that case where,

"The appellant ("the plaintiff") instituted action against the respondent ("the defendant") and another person for a declaration that the plaintiff is the tenant of the premises in suit and for an injunction against the 1st defendant from demolishing the said premises. The 1st defendant pleaded that the plaintiff was in illegal occupation of the premises as the same were burnt during the 1983 riots and were currently vested in the REPIA. The District Judge gave judgment for the 1st defendant. The plaintiff filed a revision application in the Court of Appeal on 12.12.2000; supported it on 15.12.2000 and obtained a stay order and notice on the 1st defendant for 15.01.2001. The plaintiff filed with his application 4 documents including the judgment of the District Judge but failed to file all the material documents or to explain the reason for the failure and seek leave of court to furnish the necessary documents later, as required by Rule 3(1)(b) read with Rule 3(1)(2) of the Court of Appeal (Appellate Procedure) Rules, 1990. Instead the plaintiff amended her petition without notice to the 1st defendant and without leave of court. She filed one additional document with the amended petition and the

balance documents with her counter objections."

Bandaranayake, J. remarked: "The requirements of Rules 3(1)(2) and 3 (1)(b) are imperative. In the circumstances of the case the Court of Appeal had no discretion to excuse the failure of the plaintiff to comply with the Rules."

I have earlier held that the order dated 16.7.2003 is a necessary document in order to examine the correctness of the same. Applying the principles of the above judicial decisions, I hold that the observance of Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules is mandatory in applications for revision. Thus, the petition of the defendant-petitioners to revise the order dated 16.7.2003 should fail on this ground alone.

Learned President's Counsel next contended that the defendant-petitioners are guilty of delay and laches for the reason that the present application has been filed eight months after the pronouncement of the 1st order (dated 16.7.2003) and four months after 2nd order (dated 20.3.2003). I now advert to this contention. The present application has been filed on 21.11.2003. Therefore the delay complained of by learned President's Counsel is correct. The defendant-petitioners have not explained the delay in coming to this Court. This a case where the defendant-petitioners were granted leave to appear upon the condition that they should deposit Rs. 2.5 million before 16.7.2003 and the learned District Judge made the decree *nisi* absolute on 16.7.2003. Thus, the defendant-petitioners should be vigilant over these developments. The defendant- petitioners, in my view, have slept over their rights and as such they are guilty of delay and laches.

In *Don Lewis* v *Dissanayake*(15) His Lordship Justice Tennakoon, with whom Manicavasagar, J. agreed, discussing the delay in moving Court in a revision application, held: "that it was not the function of the Supreme Court, in the exercise of the jurisdiction now invoked, to relieve parties of the consequences of their own folly, negligence and laches. The *maxim vigilantibus, non dormientibus, jura subvention* provided a sufficient answer to the petitioner's application."

In *H.A.M. Cassim* v *G.A. Batticaloa*(16) Sansoni, CJ. held: "An application in revision must be made promptly if it is to be entertained by the Supreme Court."

In CA application No. 1184/88 (decided on 16.10.89), an application to revise an order of the District Judge was refused on the ground of delay. His Lordship Justice S.N. Silva (as he then was) observed as follows: "We have to note that order in respect of which the application is made was delivered by the learned District Judge on 7.10.1987. The petitioner filed this application on 13.3.1989, one year and five months after the impugned order. The petitioner has not explained the delay in filing this application. A person invoking the revisionary jurisdiction of this court has to show due diligence and institute proceedings without delay. The petitioner sought the intervention in the District Court and as such, was aware of the order that was made by the learned Additional District Judge. In the circumstances we are of the view that the petitioner has unduly delayed in filing this application and as such is precluded from securing relief by way of revision."

"Filing an application by way of revision to set aside an order made by a District Court 31/2 years before the institution of the revision application was considered as inordinate delay and the application was dismissed on the ground of laches". Vide Justice Udalagama in *Lokutthuttripitiyage Nandawathi* v *Madapathage D. Gunawathi (supra).*

The power of revision vested in the Court of Appeal is discretionary. Vide *Colombo Apothecaries Ltd.* v *Commissioner of Labour*[17], *Rasheed Ali* v *Mohamad Ali (supra)*, and *Wijesinghe* v *Tharmarathnam*[18]. On a consideration of the above judicial decisions, I hold that revision being a discretionary remedy is not available to those who sleep over their rights. I further hold that it is not the function of the Court of Appeal, in the exercise of its revisionary jurisdiction, to relieve parties of the consequences of their own folly, negligence and laches.

I have earlier held that the defendant-petitioners are guilty of delay and laches, I therefore hold that the defendant-petitioners are not entitled to invoke the revisionary jurisdiction of this Court and the petition of the defendant-petitioners should be dismissed on this ground alone.

For the reasons set out in my judgment, I dismiss the petition of the defendant-petitioners with costs fixed at Rs. 40,000/-.

EKANAYAKE, J. – I agree.

Application dismissed.

TILWIN SILVA
v
RANIL WICKREMASINGHE AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 461/2002
JUNE 2, 2006
SEPTEMBER 22, 2006
NOVEMBER 23, 2006
JANUARY 18, 2007

Writ of Certiorari – Quash decision to sign Cease Fire Agreement (CFA) – Agreement illegal? – Null and void? – Constitution Article 4 (b) Article 29 read with Article 30 (1), Article 43(1) 6th Amendment Article 140 – Executive power – Collective responsibility of Cabinet – Policy decision – Legality of entering into an agreement with the LTTE? – Prevention of Terrorism Act No. 48 of 1979 – Judicial Review – Policy decisions – Could the Court consider the illegality or mala fide of a policy decision?

The petitioner sought a *writ of certiorari* to quash the decision of the 1st respondent Prime Minister to sign the CFA, and further sought a declaration that the said agreement is illegal, null and void – and a writ of prohibition not to sign any similar agreements.

Held:

(1) The petitioner's prayer for a declaration to declare that the agreement is illegal, null and void cannot be granted, as Article 140 does not empower this Court to grant and issue orders in the nature of declarations. The petitioner's prayer for a writ of prohibition not to sign any similar agreement is vague wide and doubtful and such relief cannot be granted.

Held further:

(2) The Cabinet which consists of the President – Head of the Cabinet, the Prime Minister and the Cabinet of Ministers is in charge of the direction and control of the Government and they are collectively responsible to Parliament (Article 43 (1)). When these provisions are considered, in the light of the concept of collective responsibility of the Cabinet the President and the Cabinet are part of one unit that is collectively responsible.

The deliberation within the Cabinet amongst its members including the President, is a matter for the concern of the Cabinet and not of this Court.

Once the act is considered to have been carried out by the Cabinet or consequent to a Cabinet decision then it necessarily follows the President– member and Head of the Cabinet is part of it and in the collective nature of the Cabinet decision. Hence the decision of the Cabinet to enter into a CFA with the LTTE cannot be said to have been taken without the concurrence of the President.

Per Sriskandarajah, J.:

"As a matter of fact this agreement was not terminated by the Governments of Sri Lanka even though this was in operation during two Executive Presidents of the Republic and two Governments of different political parties – this shows the desire of the President and the consecutive governments to have the said agreements in force to achieve the objects enumerated in the preamble of the CFA".

(3) Cabinet which is headed by the President and which is in charge of the direction and the control of the Government could take a policy decision to enter into an agreement with the LTTE and the 1st respondent who was the Prime Minister and a member of the Cabinet could enter into an agreement for and on behalf of the Government of Sri Lanka.

Once a policy decision is taken by the Cabinet to enter into a CFA with the LTTE, it could be implemented by the Executive.

(4) The petitioner's contention that the CFA binds the government not to prosecute the violators of the Prevention of Terrorism Act (PTA) is untenable. The gazetted regulations show that, the violations of the PTA are proceeded while the CFA is in full force.

(5) The challenge of the petitioner that the CFA is in violation of the concept of State and Sovereignty cannot be maintained. Judicial Review could be based upon the legal rules which regulate the use of governmental power. The challenges are based on the elementary concept of illegality, irrationality, proportionality and procedural impropriety. The petitioner cannot complain to this Court in judicial review proceedings that the CFA alienated the Sovereignty of the people or violates the concept of State.

(6) The preamble to CFA sets out the intention of parties. The short and simple definition that can be given to the CFA is that it is a value decision attached to efforts to resolve a conflict. From the preamble it is clear that this document is a policy document on a political issue. It is axiomatic that the contents of a policy document cannot be read and integrated as statutory provisions. Too much of legalism cannot be imported in understanding the scope and meaning of the clauses contained in policy formulations.

For a policy decision to have legal consequences or legal impact that policy decision should have been taken either by invoking a statutory provision or statutory power should have been conferred on the said decision, it is pertinent to note that neither statutory provision had been invoked nor statutory power had been conferred on the CFA.

(7) CFA is a mere decision of policy to build confidence between parties to find a negotiated solution to the ongoing ethnic conflict in Sri Lanka. As there is no statutory power conferred on the CFA or involved on the termination of the CFA it has no legal consequences or legal impact, it cannot be tested in Court for its legality and the CFA is not amenable to judicial review.

APPLICATION for a writ of *certiorari* / prohibition.

Cases referred to:

(1) *Parameswary Jayathevan* v *Attorney-General and others* 1992 2 Sri LR 337 at 360.

(2) In *Re the 13th Amendment to the Constitution and the Provincial Council Act* 1982 2 Sri LR 312 at 322.

(3) In *Re the 19th Amendment to the Constitution* 2002 3 Sri LR 85.

(4) *Wimal Weerawansa and 13 others* v *Attorney-General and 3 others* (P Toms Case).

(5) *Ram Jawa* v *State of Punjab* 1955 2 Sri LR at 235 and 236.

(6) *Blackburn* v *Attorney -General* 1971 1 WLR 1037.

(7) *Premachandra v Major Montague Jayawickrama* 1994 Sri L.R. 90 at 107.

(8) *Baker v Carr* (1962) 369 US 186.

(9) *Bhut Nath v State of West Bengal* AIR 1974 SC 806, 811

(10) *BALCO Employees Union (Legal)* v *Union of India and others* AIR 2002 SC 350.

(11) *Narmada Bachao Andolan* v *Union of India and others* 2000 10 SSC 664 at 763.

Manohara de Silva PC with *Udaya Gammanpila, Pasan Gunasena, Bandara Thalagune* and *Anusha Perusinghe* for the petitioner.

Harsha Fernando SSC for the 1st, 26th and 28th to 60th respondents.

Shibly Aziz PC with *A.P. Niles* and *Rohana Deshapriya* for the 3rd to 25th respondents.

2nd respondent absent and unrepresented.

Cur.adv.vult.

March 6, 2007

SRISKANDARAJAH, J.

The Petitioner is the General-Secretary of the Janatha Vimukthi Peramuna (JVP) which is a recognized political party in Sri Lanka. The 1st respondent was the Prime Minister of Sri Lanka during the relevant time and the 2nd respondent, is the Leader of the Liberation Tigers of Tamil Eelam, (LTTE), 3rd to the 25th respondents were members of the Cabinet of Ministers of Sri Lanka during the relevant time. Consequent to the Parliamentary General Election which was held on 2nd of April 2004 a new Cabinet of Ministers have been appointed and the new Cabinet of Ministers are added as the 27th to the 59th respondents.

The petitioner in this application has sought a writ of *Certiorari* to quash whole or a part of the 'Agreement on a ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam' marked as P5 and also a writ of Prohibition restricting and or prohibiting the respondents from giving effect to and or acting in any manner to give effect to the decision and or undertaking in the said agreement in whole or in part. The said agreement is hereinafter referred to as CFA.

The CFA in its preamble states:

"The overall objective of the Government of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the GOSL) and the Liberation Tigers of Tamil Eelam (hereinafter referred to as the LTTE) is to find a negotiated solution to the ongoing ethnic conflict in Sri Lanka.

The GOSL and the LTTE (hereinafter referred to as the Parties) recognize the importance of bringing an end to the hostilities and improving the living conditions for all inhabitants affected by the conflict. Bringing an end to the hostilities is also seen by the parties as a means of establishing a positive atmosphere in which further steps towards negotiations on a lasting solution can be taken.

The parties further recognize that groups that are not directly party to the conflict are also suffering the consequences of it. This is particularly the case as regards the Muslim population.

Therefore the provisions of this Agreement regarding the security of civilians and their property apply to all inhabitants.

With reference to the above, the Parties have agreed to enter into a ceasefire, refrain from conduct that would undermine the good intentions or violate the spirit of this agreement and implement confidence-building measures as indicated in the articles below."

Article 1 of the CFA titled "Modalities of Ceasefire" and states that the parties have decided to enter into a ceasefire. Articles 1.2 and 1.3 are titled "Military Operations" and deals with the cessation of military action. Articles 1.4 to 1.8 are titled "Separation of forces" and deals with the separation of the forces of the Government and the LTTE. Articles 1.9 to 1.13 are titled "Freedom of movement" and deal with the movement of the forces of each side through the territories controlled by the other side. Article 2 is titled "Measures to restore normalcy" and deals with various "Confidence – building measures". Article 3 is titled "The Monitoring Mission" and deals with the setting up of an international monitoring mission. Article 4 is a miscellaneous provision, and is titled "Entry into force, amendments and termination of the Agreement". It is an admitted fact that the CFA came into force on 23.2.2002 and is still in force.

The petitioner submitted that by the CFA, the aforementioned 1st respondent has agreed to bind the government of Sri Lanka as enumerated in his petition in paragraph 9(a) to (k). He contended that the 1st respondent when he signed the CFA was only the Prime Minister of Sri Lanka and he was not clothed with any power, authority or jurisdiction to bind the Government of the Democratic Socialist Republic of Sri Lanka in the said CFA.

The petitioner further contended that the 1st respondent in his capacity as the Prime Minister is not a member or an agent of the Executive of the Republic. The executive power of the People shall be exercised by the President of the Republic under Article 4(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as Constitution). According to Article 43(1) of the Constitution, there shall be a Cabinet of Ministers charged with the direction and control of the Government of Sri Lanka. It was held in *Parameswary Jayathevan* v *Attorney-General and*

others[1] at 360 that the Cabinet can exercise certain executive powers. In *Re the 13th Amendment to the Constitution and the Provincial Council Bill*[2] at 322, it was held that Provincial Governors can exercise the executive power of the President. However the petitioner contended that the Prime Minister as a member of the Cabinet or otherwise cannot exercise the executive power of the President. The Prime Minister is merely the member of Parliament who in the President's opinion is mostly likely to command the confidence of Parliament (Article 43(3) of the Constitution). Accordingly, the Prime Minister's post is in the Legislature and not in the Executive. The Supreme Court held in *Re* the *19th Amendment to the Constitution*[3] that the Executive cannot alienate its powers or functions to the Legislature. Hence the 1st respondent has no capacity to enter into an agreement on behalf of the Government of Sri Lanka.

The petitioner contended that whereas the President of the Democratic Socialist Republic of Sri Lanka is the Head of the State, the Head of the Executive and of the Government and the Commander in Chief of the Armed Forces, vide Article 30(1)of the Constitution and vested with the executive power of the Republic of Sri Lanka including the defence of Sri Lanka vide Article 4(b) of the Constitution, the President was neither a party nor had given concurrence to the CFA. The petitioner relied on a news item which appeared in the 'Island' newspaper of 23.2.2002 marked P6 which news item stated "the Presidential Secretariat stated that the President was only informed of the said purported agreement only after the 2nd respondent had placed his signature and just few hours prior the 1st respondent was scheduled to place his signature thereon. The President had expressed her surprise and concern with regard to the manner in which this purported agreement had been prepared."

The petitioner admitted (in paragraph 13 of his affidavit) that the said agreement had been briefed by the 1st respondent the Prime Minister to the Cabinet consisting of the 3rd to the 25th respondents and a decision was taken to enter into the CFA.

Before considering the capacity of the 1st respondent (The Prime Minister) to enter into the CFA it is important to consider the

exercise of the Executive power under the Constitution.

The President of the Republic of Sri Lanka is the Head of the State the Head of the Executive and the Head of the Government (Article 30(1) of the Constitution). The Cabinet which consists of the President (as the member and the head of the Cabinet of Ministers), the Prime Minister (who is a member of the Cabinet) and the Cabinet of Ministers, is in charge of the direction and the control of the Government of the Republic and they are collectively responsible to Parliament (Article 43(1) of the Constitution). When these provisions are considered in the light of the concept of "collective responsibility" of the Cabinet, the President and the Cabinet are part of one unit that is collectively responsible.

When commenting on the confidentiality and collective responsibility of the Cabinet a former Judge of the Constitutional Court Joseph A.L. Cooray in the Book titled"Constitutional and Administrative Law of Sri Lanka" – 1995 at page 191 stated:

> "The proceedings of the Cabinet of Ministers are secret and confidential. The secrecy of Cabinet decisions is necessary for arriving at a compromise and agreement through frank discussions among the Ministers under the direction of the President, as Head of the Executive and the Cabinet. This practice gives effect to the principles of public unanimity and collective responsibility and also tends to promote strong and stable government."

The deliberation within the Cabinet amongst it members including the Head of the Cabinet (the President of Sri Lanka) is a matter for the concern of the Cabinet and not of this court. The Supreme Court in *Wimal Weerawansa and 13 others* v *Attorney General and 3 others*[4] when dealing with the Communications between the President and the Cabinet held thus;

> "in this instance the MOUs has been tabled in Parliament and there is no evidence before this court that the Cabinet of Ministers has not been apprised of the MOU at the time of its execution. In any event if there is a fault in these respects on the part of the President, they are matters for the immediate concern of the Cabinet of Ministers and Parliament and not of this Court..."

Therefore, once an act is considered to have been carried out by the Cabinet or consequent to a decision of the Cabinet, then it necessarily follows that the President who is a member of the Cabinet of Ministers and Head of the Cabinet of Ministers (Article 43(2) of the Constitution) is part of it and and is clothed in the collective nature of the cabinet decision. Hence the decision of the Cabinet to enter into a CFA with the 2nd respondent cannot be said to have been taken without the concurrence of the President.

In any event Article 4.4 of the CFA provides for the unilateral termination of the CFA. It provides:

"This agreement shall remain in force until notice of termination is given by either party to the Royal Norwegian Government. Such notice shall be given fourteen (14) days in advance of the effective date of the termination."

As contended by the petitioner if the President of the Republic at the time of the execution of this agreement or at any time thereafter expressed his dissatisfaction of the said agreement, as the Head of the Government of Sri Lanka the President would have unilaterally terminated the said agreement. As a matter of fact this agreement was not terminated by the Government of Sri Lanka even though this was in operation during two Executive Presidents of the Republic and two governments of different political parties. This shows the desire of the President and the consecutive governments' to have the said agreement in force to achieve the objects enumerated in the preamble of the said agreement.

Once a policy decision is taken by the Cabinet to enter into a CFA with the 2nd respondent it could be implemented by the Executive.

Even though the Constitution has not specifically provided for the separation of powers the legislative scheme of the Constitution has provided for a functional separation of powers. This could be seen in Article 4 of the Constitution and elaborated under separate Chapters of the Constitution. The provisions relating to Executive Powers is contained in Chapters VII, VIII and IX, the Legislative Powers in Chapters X to XII and the Judicial Power in Chapters XV and XVI.

By virtue of Article 4(b) of the Constitution the executive power shall be exercised by the President. Even though the executive power cannot be comprehensively defined, the Indian Supreme Court in *Ram Jawa* v *The State of Punjab*[5] observed:

> "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, subject of course, to the provisions of the Constitution or any law.
>
> The executive function comprises both the determination of policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on and supervision of the general administration of the State."

The Executive provided in the Constitution includes The President (Chapter VII), The Cabinet of Ministers (Chapter VIII) and The Public Service (Chapter IX). As executive power encompasses a wide area, the President, while personally performing some of the executive functions, operates the rest of the executive functions of government through the Cabinet of Ministers and Public Officers.

The President appoints the Prime Minister (Article 43(2) of the Constitution) a Member of Parliament who in his opinion is most likely to command the confidence of Parliament. The President, Prime Minister and the Ministers are members of Cabinet (Article 43(2) of the Constitution) and the Cabinet is responsible to the Parliament (Article 43(1) of the Constitution). In relation to the appointment of Cabinet of Ministers it is laid down that the President shall make such appointment in consultation with the Prime Minister. However there is no obligation on the part of the President to follow the advice of the Prime Minister. In these contexts the Prime Minister has a pivotal role to play, as being the Member of the Cabinet and Member of Parliament who commands the confidence of Parliament, especially when the President and the majority of the members of Parliament are represented by two different political parties which has different political premise. In this instant the Prime Minister was the head of the governing party

and the President belongs to the party which was in the opposition. Hence the submission of the petitioner that the post of the Prime Minister is in the legislature and not in the executive has no merit.

In *Wimal Weerawansa and 13 others* v *Attorney-General and 3 others (supra)* the Supreme Court observed that there is no illegality, in the President of the Republic entering into a Memorandum of Understanding for the establishment of a Tsunami Operation Management Structure (P-TOMS), and in this instant the MOU has been agreed and accepted on 24.6.2005 by the Secretary, Minister of Relief, Rehabilitation and Reconstruction (the 3rd respondent in the said case) for and on behalf of the Government of the Democratic Socialist Republic of Sri Lanka (GOSL) and the 4th respondent (in the said case) for and on behalf of the Liberation Tigers of Tamil Eelam (LTTE). In the above circumstances a Public officer has agreed and accepted for and on behalf of the Government of Sri Lanka. As I have discussed above the President, while personally performing some of the executive functions, operates the rest of the executive functions of Government through the Cabinet of Ministers and Public Officers. Hence the submission of the petitioner that the Prime Minister cannot sign an agreement for and on behalf of the Government of Sri Lanka has no merit.

From the above analysis it is clear that the Cabinet which is headed by the President and which is in charge of the direction and the control of the Government could take a policy decision to enter into an agreement with the 2nd respondent and the 1st respondent who was the Prime Minister and the member of the Cabinet could enter into an agreement for an on behalf of the Government of Sri Lanka. In view of the above the submissions of the petitioner that the 1st respondent is not clothed with any power or authority or jurisdiction to sign the CFA, in as much as the President of the Democratic Socialist Republic is the Head of the State and the 1st respondent has usurped the powers of the President by entering into the aforesaid agreement and it is in violation of Article 30 of the Constitution, have no basis.

The petitioner has also challenged the said agreement on the basis that no one has authority to sign any agreement with the 2nd respondent and /or the LTTE. The said agreement namely;

'Agreement on a ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam' (P5) was signed by the 1st respondent with the 2nd respondent the leader of the LTTE. The petitioner contended as the LTTE was proscribed by the Government of Sri Lanka under the Prevention of Terrorism Act, any agreement signed by any body including the 1st respondent with the LTTE is illegal and bad in law.

This question was dealt with by the Supreme Court in *Wimal Weerawansa and 13 others* v *Attorney-General and 3 others (supra).* Where the Chief Justice Sarath N. Silva when deciding the alleged infringement of fundamental rights relate to the Memorandum of Understanding (MOU) for the establishment of a Tsunami Operation Management Structure (P-TOMS), which has been agreed and accepted on 24.6.2005 by the 3rd respondent (in the said case), the Secretary, Ministry of Relief Rehabilitation and Reconstruction for and on behalf of the Government of the Democratic Socialist Republic of Sri Lanka (GOSL) and the 4th respondent (in the said case) for an on behalf of the Liberation Tigers of Tamil Eelam (LTTE) held;

> "Mr. S.L. Gunasekera, contended that it is illegal to enter into the MOU with the LTTE which he described as a terrorist organisation that caused tremendous loss of life and property in this country. The contention is that even assuming that the President could enter into a MOU for the object and reasons stated in the preamble, the other party to the MOU is not an entity recognised in law and should not be so recognised due to antecedent illegal activities of the organisation.
>
> In this regard I have to note that the matter so strenuously urged by Counsel cannot by itself denude the status of the 4th respondent to enter into the MOU. The circumstances urged by Counsel cannot and should not have the effect of placing the 4th respondent and the Organisation that he seeks to represent beyond the rule of law. We have to also bear in mind that already a Cease-Fire Agreement has been entered into on 23.2.2002 between the Government of Sri Lanka and the LTTE, which according to section 2(b) of the MOU "shall continue in full force and effect".

In these circumstances there is no illegality in entering into the MOU with the 4th respondent..."

In this judgment the Supreme Court has unequivocally held that the Government entering into an MOU with the LTTE is not illegal. Therefore the petitioner's claim that any agreement signed by anybody including the 1st respondent with the LTTE is illegal and bad in law is untenable.

The petitioner also challenged the said agreement on the basis that certain clauses mentioned in the agreement binds the government and thereby alienated the sovereignty of the people which includes the power of government. The petitioner submitted that the 1st respondent agreed to bind the Government in the following manner which violates certain Articles of the Constitution.

a) by agreeing to stop all the offensive military operations against the LTTE which is a proscribed organisation under the provisions of the Prevention of Terrorism Act *inter-alia* in violation of Articles 1, 2, 3, 4, 27, 28, 30, 157A of the Constitution,

b) by restricting the right of movement of Sri Lanka Armed Forces *inter-alia* in violation of Articles 1, 2, 3, 4,14, 27, 28, 30, 157A of the Constitution,

c) by providing confidential information with regard to defence localities to an organisation called the Sri Lanka Monitoring Mission consisting of non-citizens *inter-alia* in violation of Articles 1, 2, 3, 4, 27, 28, 30, and 157A of the Constitution,

d) by restricting the use and possession of ammunition and other military equipment by the armed forces *inter-alia* in violation of Articles 1,2,3,4,27, 28, 30, 157A of the Constitution,

e) by restricting the Armed services personnel from entering into areas specified in article 1.4 and 1.5, *inter-alia* in violation of Articles 1, 2, 3, 4, 27, 28, 30 and 157A of the Constitution,

f) by demarcating areas in the territory of Sri Lanka to which the armed forces or any agency of the government would not have access and thereby handing over and/or granting full control of certain areas to an armed terrorist organisation

inter-alia in violation of Articles 1, 2, 3, 4, 27, 28, 30, 157A of the Constitution,

g) by permitting members of an armed terrorist organisation namely the LTTE to man check points *inter-alia* in violation of Articles 1, 2, 3, 4, 27, 28, 30, 157A of the Constitution,

h) by declaring that the Prevention of Terrorism Act entered into by Parliament and presently part of the law of the land be made ineffective and agreeing not to prosecute violators of the said Act under the provisions of the said Act *inter-alia* in violation of Articles 3, 4(a), 27, 28, 75 and 76 of the Constitution and by usurping the legislative and judicial power of the people,

i) by abdicating the power of the government by restricting the right of the armed forces to protect the territorial integrity of the State.

j) whilst permitting LTTE to carry and possess arms and denying other Tamil Groups (Opposed to the LTTE) and other political parties to carry weapons thereby denying equality before law in violation of the Article 12(1) and 12(2) of the Constitution.

k) compelling the Sri Lankan Government to absorb illegal armed cadres to the Sri Lankan armed forces in violation of the criteria of recruitment under the Army Act, Navy Act and Air Force Act and the breach of Article 12(1) and 12(2) of the Constitution.

The learned Counsel for the petitioner strenuously argued that by the CFA the Prevention of Terrorism Act entered into by Parliament and presently part of the law of the land be made ineffective by agreeing not to prosecute violators of the said Act and it is a violation of Article 75 and 76 of the Constitution.

This Court could take judicial notice of the fact that the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 (sic) of 2006 published in the Gazette Extraordinary No. 1474/5 of 6th December 2006 provides for the prosecution of the violators of the Prevention of Terrorism Act. Regulation 6 of the said regulation prohibits any person, group,

groups of persons or an organisation engaging in "specified terrorist activity". Regulation 20 defines "specified terrorist Activity" i.e. "Specified terrorist activity" means an offence specified in the Prevention of Terrorism Act, No. 48 of 1979, ... and Regulation 10 provides that "Any person who acts in contravention of Regulation 6 of these regulations shall be guilty of an offence, and shall on conviction by the High Court be sentenced to a term of imprisonment of not less than ten years and not exceeding twenty years". This shows that the violators of the Prevention of Terrorism Act are prosecuted while the CFA is in full force. Therefore the petitioner's contention that the CFA is in violation of Article 75 and 76 is untenable.

The petitioner also contended that certain provisions of the CFA mentioned above violate Articles 27 and 28 of the Constitution; namely the Directive Principles of State Policy and Fundamental Duties. Article 29 of the Constitution specifically provides that no question of inconsistency with the provisions in Chapter VI of the Constitution i.e. Article 27 and Article 28 shall be raised in any Court or Tribunal. Therefore the inconsistency of the CFA if any to Article 27 and Article 28 of the Constitution is not justiciable.

The petitioner's grievance that the CFA violates Article 30 of the Constitution; namely the powers of the President of the Republic, has already been analysed by me in this Order in detail and I have concluded that the submission that CFA violate Article 30 of the Constitution has no basis.

The petitioner contended that certain clauses in the CFA is in violation of Article 12(1), 12(2) and 14 of the Constitution. These Articles are in relation to Fundamental Rights. The jurisdiction of this court is ousted by Article 126 of the Constitution in deciding questions affecting fundamental rights. Hence the petitioner cannot challenge the CFA on the basis that it violates Article 12(1), 12(2) and 14 of the Constitution in judicial review proceedings in the Court of Appeal under Article 140 of the Constitution.

The petitioner also contended by the provisions of the CFA mentioned above the sovereignty of the People was alienated and it violates Articles 1, 2, 3, 4, and 157A of the Constitution. These Articles provides for the '**State**' and '**Sovereignty**'.

In *Blackburn* v *Attorney-General*(6) Lord Denning M.R. quoted with approval an article by Professor H.W.R. Wade ("The Basis of Legal Sovereignty") in the Cambridge Law Journal, 1955, at p. 196 in which he said that "sovereignty is a political fact for which no purely legal authority can be constituted....".

In Administrative Law Ninth Edition at page 9 the learned authors H.W.R. Wade & C.F. Forsyth stated:

> "The most obvious opportunities for theory lie on the plane of constitutional law. Does the law provide a coherent conception of the state? Is it, or should it be, based on liberalism, corporatism, pluralism, or other such principles? What are its implications as to the nature of law and justice? More pragmatically, should there be a separation of powers, and if so how far? Is a sovereign parliament a good institution? Is it right for parliament to be dominated by the government? Ought there to be a second chamber? The leading works on constitutional law, however, pay virtually no attention to such question, nor can it be said that their authors' understanding of the law is noticeably impaired. The gulf between the legal rules and principles which they expound, on one hand, and political ideology on the other hand, is clear and fundamental, and the existence of that gulf is taken for granted."

Judicial review could be based upon the legal rules which regulate the use of governmental power.The challenges are based on the elementary concept of illegality, irrationality, proportionality and procedural impropriety. The petitioner cannot complain to this Court in judicial review proceedings that the CFA alienated the Sovereignty of the People or violates the concept of State as the concept of State and Sovereignty are political ideology and no purely legal authority can be constituted. Therefore the challenge of the petitioner that the CFA is in violation of Article 1,2,3,4 and 157A cannot be maintained in this proceeding.

The Court when considering the issue of notice on the respondents has to consider whether the petitioner has at least an arguable case to seek writ of *Certiorari* or writ of Prohibition in relation to CFA or parts of CFA. In this regard I have considered the merits of the petitioner's application. Now I proceed to consider a

more fundamental question that is whether the CFA itself is amenable to judicial review.

The 1st, 26th and 28 to 60th respondents submitted that the very nature of the said agreement although the word 'agreement' is used the nature and its forms differs drastically to that of an agreement or contract as understood in a sense as enforceable by a Court. The subject matter itself is that of policy on a political issue, the nature and the context of which is outside the judicial space. The preamble of this agreement sets out the intention of the parties. The short and simple definition that can be given to the CFA is that it is a value decision attached to efforts to resolve a conflict. This demonstrates that there are certain qualitative considerations that would be taken into account in arriving at this value judgment. A *prima facie* reading of the preamble and the contents of the CFA clearly points out that the ingredients that may have gone into the decision to enter into the CFA are beyond the realm of judicial review. The 3rd to 25th respondents also submitted that the present application involves a political question which is not amenable to judicial review and they relied on the following cases in support of their contention; *Premachandra* v *Major Montague Jayawickrema,*[7] *Baker* v *Carr*[8] and *But Nath* v *State of West Bengal.*[9]

From the preamble of the CFA it is clear that this document is a policy document on a political issue. It is axiomatic that the contents of a policy document cannot be read and interpreted as statutory provisions. Too much of legalism cannot be imported in understanding the scope and meaning of the clauses contained in policy formulations.

The Supreme Court of India in *BALCO Employees Union (Regd.)* v *Union of India and others*[10] quoted with approval the following observations made in the majority decision in *Narmada Bachao Andolan* v *Union of India and others.*[11]

"While protecting the rights of the people from being violated in any manner utmost care has to be taken that the court does not (SIC) its jurisdiction. There is, in our constitutional framework a fairly clear demarcation of powers. The Court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction.

At the same time, in exercise of its enormous power the Court should not be called upon to or undertake governmental duties or functions. The Courts cannot run the Government nor can the administration indulge in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the Constitution casts on it a great obligation as the sentinel to defend the values of the Constitution and the rights of Indians. The Courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words, the court itself is not above the law.

In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not *mala fide*, it will not be in public interest to require the Court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such policy decision".

and held: "In a democracy it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic

policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or *mala fide*, a decision bringing about change cannot *per se* be interfered with by the Court."

The government is free to formulate its own policy and it is in public interest the Courts will not go into and investigate these policy decisions unless it is illegal, contrary to law or *mala fide*. But on the other hand the Court will not consider the illegality or *mala fide* of a policy decision unless the said decision provides legal consequences or legal impact. The Court has nothing to do with mere decision of policy. For a policy decision to have legal consequences or legal impact that policy decision should have been taken either by invoking a statutory provision or statutory power should have been conferred on the said decision. It is pertinent to note that neither statutory provision had been invoked nor statutory power had been conferred on the CFA.

H.W.R. Wade & C.F. Forsty in Administrative Law Ninth Edition at page 345 the authors stated:

"A necessary corollary is that, as usual throughout administrative law, **we are concerned with acts of legal power, i.e. acts which, if valid; themselves produce legal consequences** (emphasis added). Courts of law have nothing directly to do with mere decisions of policy, such as decisions by the government that Britain shall join the European Communities (even though a treaty is concluded) or that grammar schools shall be replaced by comprehensive schools. **Such decisions have no legal impact until statutory powers are conferred or invoked. But as soon as Parliament confers some legal power it becomes the business of the courts to see that the power is not exceeded or abused**" (emphasis added).

In *Blackburn* v *AG (supra)* Mr. Blackburn challenged an agreement in judicial review proceedings for a declaration that the said agreement is *ultra viras* and null and void on the basis that the said agreement entered into by the Government affects the sovereignty of the British Nation. Lord Denning delivering the Judgment held: *"that the said application is premature as the said agreement has no legal consequence and the Court consider the legality of the agreement only after the Parliament confers legal power on the said agreement."*

CFA is a mere decision of policy to build confidence between parties to find a negotiated solution to the ongoing ethnic conflict in Sri Lanka ; as there is no statutory power conferred on the CFA or invoked on the formulation of the CFA it has no legal consequences or legal impact. Therefore it cannot be tested in Court for its legality and hence the CFA is not amenable to judicial review. Even a party to this agreement or a person who has sufficient interest in this agreement cannot seek a Public law remedy for the enforcement of the provisions of the CFA or to quash or prohibit a decision taken to violate any of the provisions of the CFA. Similarly the petitioner also cannot make an application for a writ of *Certiorari* or Prohibition to quash, or prohibit the operation of the said Cease Fire Agreement.

In the first part of my Order I have analysed the merits of this application and I have held that this application has no legal basis. In the second part of my Order I have analysed whether the CFA is justiciable and I have held that the CFA is not justiciable. As there is no legal basis for this application and as it is misconceived in law this Court refuses to issue notice on the respondents.

Notice refused.

KARIYAWASAM
V
SOUTHERN PROVINCIAL ROAD DEVELOPMENT AUTHORITY AND 8 OTHERS

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.
DISSANAYAKE, J. AND
AMARATUNGA, J.
S.C. APPLICATION NO. 157/2006

Fundamental rights – Article 126(2) of the Constitution – Has the petitioner filed the application within the period prescribed by Article 126(2) of the Constitution ? – Section 13(1) of the Human Rights Commission Act, No. 21 of 1996 – Affidavit – Jurat.

At the hearing the respondents raised three preliminary objections, namely;

(1) Application of the petitioner is not filed within time;

(2) The affidavit filed by the petitioner in support of his application is defective;

(3) The petitioner has not disclosed that he had made an application to the Human Rights Commission on the same matter.

Held:

(1) An application for alleged infringement of a fundamental right which has been filed in the Human Rights Commission within one month from the alleged infringement of a fundamental right is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court in terms of Article 126(2) of the Constitution.

(2) The jurat (of the affidavit) contains all necessary particulars including the date of affirmation and attestation. There is no requirement that the Justice of the Peace must put the date below his signature in addition to the date given in the jurat. Failure to put the date below the J.P.'s signature cannot affect the validity of the affidavit when the date of attestation is embodied in the jurat.

Per Gamini Amaratunga J. -

"......However, where the J.P. has written below his signature a date different to the date given in the jurat, such writing creates a doubt not only with regard to the exact date of affirmation and attestation, but also with regard to the other particulars given in the jurat. If this doubt is not cleared by a reasonable explanation consistent with petitioner's contention the affidavit is liable to be rejected as defective ....",

(3) The failure to disclose by the petitioner in his petition that he had made an application to the Human Rights Commission on the same matter is not a ground to reject this application as he has not gained any undue advantage by his failure to refer to it.

APPLICATION under Article 126(1)
On a preliminary objection being taken.

Saliya Pieris with *Sapumal Bandara* for the petitioner.

D.S. Wijesinghe, P.C. with *Kaushalya Molligoda* for the 1st, 2nd, 3rd and 8th respondents.

Cur.adv.vult

July 5, 2007

GAMINI AMARATUNGA, J.

The petitioner, a Technical Training Coordinator of the Southern Provincial Road Development Authority has filed this fundamental rights application, dated 28.4.2006 and filed on 2.5.2006, challenging his transfer from the Head Office at Galle to the Regional Engineer's Office at Elpitiya. The transfer has been made by letter dated 14.3.2006. The reliefs sought by the petitioner are a declaration that the respondents have violated his fundamental right guaranteed by Article 12(1) and an order quashing the impugned transfer.

At the hearing before us the learned President's Counsel for the 1st to 8th respondents raised three preliminary objections, namely;

(1) That the application of the petitioner is out of time.

(2) That the affidavit filed by the petitioner in support of his application is defective for the reason that the date written below the signature of the Justice of the Peace who attested the petitioner's affidavit is different from the date given in the jurat.

(3) That the petitioner has failed to disclose that he had made an application to the Human Rights Commission on the same matter.

After oral submissions, both parties have filed their written submissions on the preliminary objection.

The petitioner's application for relief against the impugned transfer dated 14.3.2006 has been filed on 2.5.2006. On the face of it, it is clearly out of time for not being within the period of one month prescribed by Article 126(2) of the Constitution.

The learned Counsel for the petitioner submitted that the petitioner has made an application to the Human Rights Commission seeking relief against the impugned transfer. The petitioner has not averred this fact in his application. However along with his written submissions the learned Counsel has filed a copy of the petitioner's application made to the Matara branch of the Human Rights Commission. It is dated 27.3.2006 and the date

stamp on it indicates that it has been received by the Matara branch on the same date. The Copy of a letter dated 14.6.2006 written by the Regional Co-ordinating Officer of the Matara branch of the Human Rights Commission to the 3rd respondent shows that the Commission has sent two letters dated 28.3.2006 and 24.4.2006 to the 3rd respondent calling for a report on the petitioner's complaint and that the 3rd respondent had failed to respond to those letters even by 14.6.2006.

According to section 13(1) of the Human Rights Commission Act No. 21 of 1996, **"where an inquiry into a complaint made by an aggrieved party to the Human Rights Commission within one month of the alleged infringement of a fundamental right is pending before the Commission, the period within which such inquiry is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court in terms of Article 126(2) of the Constitution."**

The petitioner's application to the Human Rights Commission was within one month of the impugned transfer. The Human Rights Commission, by calling for a report from the respondent Authority has set in motion the process of holding an inquiry into the petitioner's application, but the Authority has failed to submit its report to the Commission. In those circumstances, the petitioner is entitled to claim the benefit conferred by section 13(1) of the Human Rights Commission Act. I accordingly hold that the petitioner's application to this Court is not time barred.

The second objection is that the date given in the jurat of the petitioner's affidavit is different from the date written by the Justice of the Peace (the J.P.) below his signature and therefore the affidavit is defective. The date given in the jurat is "27th day of April 2006" and the date written below the J.P.'s signature is 2006.4.12. The learned Counsel for the petitioner submitted that the petitioner has signed the affidavit on 27th April 2006 before the JP but the latter in writing the date below his signature had made a mistake by writing the date as 2006.4.12. On the other hand the contention of the learned President's Counsel for the 1st to 8th respondents was that the date given by the J.P. coincides with the one month requirement as the period of one month from the impugned transfer

letter expired on 14.4.2006. The learned President's Counsel submitted that the 13th and 14 April being public holidays on account of the New Year, the probabilities are that the J.P. signed the affidavit on 12th before the onset of the holidays.

A jurat "is a certificate of officer or person before whom writing was sworn to. In common use the term is employed to designate the certificate of the competent administering officer that writing was sworn to by the person who signed it. "Black's Law Dictionary – 5th Ed.p.765. In other words, the jurat is the J.P.'s attestation clause which is essential to the validity of an affidavit.

The jurat in the petitioner's affidavit states that it was read over and explained to the affirmant; that he understood its nature and contents and that he affirmed and signed it on 27th day of April 2006 at Colombo. On the right hand side of the jurat the J.P. has signed below the printed words "before me." Thus the jurat contains all necessary particulars including the date of affirmation and attestation. There is no requirement that the J.P. must put the date below his signature in addition to the date given in the jurat. The failure to give the date below the J.P.'s signature cannot affect the validity of the affidavit when the date of attestation is embodied in the jurat.

However where the J.P. has written below his signature a date different to the date given in the jurat, such writing creates a doubt not only with regard to the exact date of affirmation and attestation, but also with regard to the other particulars given in the jurat. If this doubt is not cleared by a reasonable explanation consistent with the petitioner's contention that the date 2006.4.12 written below the J.P.'s signature was a mistake made by the J.P., the affidavit is liable to be rejected as defective.

The learned Counsel for the petitioner submitted that the petitioner has signed the affidavit on 27.4.2006. The petition filed in this Court is dated 28.4.2006, which was a Friday. The next two days i.e. 29th and 30th April, 2006 were Saturday and Sunday. The 1st of May was a public holiday. The petitioner's application has been filed on 2.5.2006, which was the first working day after 28.4.2006. This sequence of events supports the petitioner's contention that the petitioner signed the affidavit on 27.4.2006.

In the body of the affidavit, in paragraph 14, (paragraph 13 in the petition) there is a reference to a letter dated 19.4.2006, sent by the 3rd respondent to the petitioner. A copy of that letter is attached to the petition marked P10. It is the 3rd respondent's reply to the petitioner's appeal dated 16.3.2006 sent to the 3rd respondent to get the transfer cancelled (P8). The 3rd respondent in his affidavit has admitted that the petitioner's appeal against the transfer was rejected by P10. If the affidavit had been prepared and signed by the J.P. by 12.4.2006, the petitioner could not have referred to P10 dated 13.4.2006 in his affidavit. This intrinsic evidence contained in the affidavit clearly shows that the affidavit had been prepared on a date subsequent to 19.4.2006.

In considering the submission of the learned Counsel for the petitioner that the date 2006.4.12, written below the J.P.'s signature was a mistake, this Court can taken into account ordinary human conduct as well. The date "27th day of April 2006" is printed in the jurat. The J.P. had placed his signature parallel to the printed jurat, towards the right hand edge of the same paper. In the absence of reasons so compelling, this Court is unable to hold that the J.P. had consciously and deliberately put the date as 2006.4.12 when the jurat, parallel to his signature, has the date '27th day of April' in the printed form.

The learned Counsel for the petitioner also submitted that the date written by the J.P. appears to be 2006.4.17 and not 2006.4.12. In fact in the way the date is written it is not clear whether the date is 12 or 17. The learned Counsel for the petitioner submitted that the J.P. in writing the date 27th had written figure 1 instead of figure 2. If the second figure in the date written by the J.P. is taken as 7, it is consistent with the second figure of the date given in the jurat. As pointed out earlier, in considering the ordinary human conduct it is not possible to rule out the possibility of human error.

The petitioner's reference in his affidavit to P10 dated 19.4.2006 is a clear indication that the affidavit could not have been prepared and signed on a date prior to 19.4.2006. The date given in the Jurat (27.4.2006) is consistent with the position that the affidavit had been signed on 27.4.2006 (which is a date subsequent to P10 dated 19.4.2006). On the other hand the date 2006.04.12 (or 17) written by the J.P. cannot be a correct date in view of the reference

in the body of the affidavit to P10 dated 19.4.2006. Thus the only reasonable conclusion this Court can come to is that the date written by the J.P. below his signature was an inadvertent error and as such it cannot affect the validity of the jurat. Accordingly I hold that the affidavit of the petitioner is not defective and the second preliminary objection is also overruled.

The third preliminary objection is that in his petition the petitioner has failed to disclose that he had made an application to the Human Rights Commission on the same matter. It is true that in his application the petitioner has not referred to his communication to the Human Rights Commission. However by his failure to refer to it, the petitioner has not gained any undue advantage and as such the 3rd preliminary objection is not a ground to reject the petitioner's application. Accordingly I direct to list the petitioner's application for hearing on its merits.

SHIRANEE TILAKAWARDANE, J. - I agree.
DISSANAYAKE, J. - I agree.

Preliminary objections overruled.
Matter set down for argument.

JANASHAKTHI INSURANCE CO. LTD.
v
UMBICHY LTD.

SUPREME COURT
S.N. SILVA, C.J.
JAYASINGHE, J.
SHIRANEE TILAKAWARDANE, J.
SC 26/99
HC CIVIL 187/96 (1)
DC COLOMBO 13405/MR
JUNE 19, 2006
OCTOBER 25, 2006
DECEMBER 15, 2006
JANUARY 26, 2007

Evidence Ordinance, Section 35, Evidence (Sp. Pro.) Act 14 of 1995 — Marine Insurance – Breach of warranty of seaworthiness - Burden of Proof – on whom? - Admissibility of documents – Documents maintained in the ordinary course of business – Setting up of a different case in appeal – Permitted?

The defendant-appellant successor to the original insurer appealed against the judgment of the Commercial High Court which awarded to the insured, the plaintiff-respondent on two causes of action for breach of contract to pay the sums insured on contracts of Marine Insurance, pertaining to the carriage of consignment of cargo.

In appeal it was contended by the appellant that the High Court erred in its application of the presumption, since there was no proof that the vessel had set sail for Colombo and there was no proof of unauthorized deviation from the normal route which discharged the insurer of liability and the plaintiff has failed to prove that it complied with the Institution classification clause and as such the claim is not maintainable and certain documents – telexes – have not been proved and as such were inadmissible.

Held:

(1) The evidence on record reveals that the vessel left the Port of Mersin and called at the port in Limersol due to engine trouble and from there sailed to Thessaloki and the documents or record indicate clearly that the shipment is to Colombo from Mersin via the Steam M.V. Elliot – which established that the voyage contemplated was in fact the voyage insured.

(2) Under the general law of insurance the burden of proving that a warranty has been broken lies upon the insurers. The burden of proof of breaches of conditions was on the insurer in accordance with the ordinary rule that the onus of proving a breach of a condition of an insurance policy which would relieve the insurer from liability in respect of a particular loss was, unless his policy otherwise provided, on the insurer.

Per Shiranee Tilakawardane, J.

"I do not believe there to be any doubt regarding the fundamental position of Insurance Law that burden of proof related to an alleged breach of warranty lies on the insurer alleging it – I cannot accept the contention of the defendant-appellant that the burden of proving compliance with the "Institute Classification clause" lies with the plaintiff-respondent".

(3) The law of evidence provides that the documents maintained by the party in the ordinary course of business can be produced by such party as evidence. Section 35 (a) of the Evidence Ordinance permits a witness who by reference to documents and studying the relevant documents learns to speak on the facts disclosed by those documents. The Director of plaintiff-respondent company has certified in Court that the documents were maintained in the ordinary course of business. There is no impediment to the admissibility of this evidence in the light of the provisions contained in the Evidence Ordinance.

Per Shiranee Tilakawardane, J.

> "The defendant-appellant is prohibited from setting up a different case from that set up at the trial, he cannot take up a case in appeal which differs from that of the trial."

APPEAL from a judgment of the Commercial High Court.

Cases referred to:

(1) *Royster Guano Co.* v *Globe & Rutgers* 19230 AMC 11 (St. NY)
(2) *The Al Jubail iv* 1982 Lloyds Rep. 637 (Singapore)
(3) *Stebbing* v *Liverpool & London & Globe* 1917 2 KB 42323
(4) *Marshall* v *Emperor Life* (1865) LR 1QB 235
(5) *Parker* v *Potts* - 1815 23 Dow 223
(6) *Franco* v *Natush* (18236) Tyr & Gv. 401
(7) *Pickup* v *Thames and Mersey Marine Insurance* (1878) 23 QBD 594 CA
(8) *Bond Air Services Ire* v *Hill* 1955 2 QB 417
(9) *Barett* v *London General Insurance Co. Ltd.* (1935) 1KB 238.

Faiz Musthapha PC with *Dinal Phillips* for defendant-appellants.
K. Kanag-Iswaran PC with *K.M. Basheer Ahamed* for plaintiff-respondent.

Cur.adv.vult

May 23, 2007

SHIRANEE TILAKAWARDANE, J.

This is an appeal by the successor to the original insurer, the defendant-appellant, against the judgment of the Commercial High Court dated 22nd April 1999, awarding the insured, the plaintiff-respondent, damages on two causes of action for breach of contract to pay the sums insured on two contracts of marine insurance, pertaining to the carriage of consignments of cargo from Turkey to Sri Lanka.

The High Court awarded the insured an amount aggregating to Rs. 27,323,372.00 with legal interest thereon from 1st September 1987 to the date of decree and thereafter on the aggregate amount of the decree till payment in full and taxed costs.

The plaintiff-respondent instituted action against the defendant-appellant on 24th May 1993 for the loss of cargo consisting of 2000 metric tons of red split lentils valued at Rs. 25,668,380/- and 200 metric tons of chickpeas valued at Rs. 1,654,992/- consigned to the

plaintiff-respondent on M.V. 'Elitor' which sailed from the port of Mersin in Turkey on or about 24th May 1987.

The cargo comprising 2000 metric tons of red split lentils valued at Rs. 25,668,380/- had been insured on 2nd April 1987 by the policy marked as P1, against total loss of the entire consignment by total loss of the carrying vessels and the 200 metric tons of chickpeas valued at Rs, 1,654,992/- was insured on 12th May 1987 by the policy marked as P2 against loss by any risk, except those excepted under the said policy by Institute Cargo Clause A.

The said policies of insurance were issued by National Insurance Corporation. The defendant-appellant is the successor to the business of the said Corporation and all its assets and liabilities.

The plaintiff-respondent's version is that after sailing from the Port of Mersin on 24th May 1987, the vessel M.V. 'Elitor' developed engine trouble and called at its home port in Limersol, and sailed therefrom on or about 20th June 1987 and sank with all its cargo on or about 8th July 1987. The entire consignment of the plaintiff-respondent was lost.

The plaintiff-respondent notified the defendant-appellant of its claims on the said policies in August 1987. However these claims were not met by either the defendant-appellant or its predecessor. The plaintiff-respondent states however, that others who had consigned cargo on board the same vessel were paid by the National Insurance Corporation admitting its liability. A cause of action having arisen to sue the defendant-appellant for monies due under the above policies, the plaintiff-respondent has instituted this action.

At the trial the defendant repudiated liability on several grounds, including that the vessel never left the port on its voyage to Colombo, the ship was not seaworthy for the voyage to Colombo, the ship secretly discharged the cargo of red split lentils and chickpeas in Lebanon, the plaintiff failed to inform the defendant immediately of the sinking of the ship, and the plaintiff has not suffered any loss or damage since the equivalent of the consignment said to have been lost was supplied to the plaintiff by Betas Beton.

S. Ashokan, a director with the plaintiff company gave evidence that the vessel, 'Elitor' did not arrive at the port of Colombo and that ordinarily the ship would have arrived within two to three weeks. Due

to the non-arrival of the ship, the plaintiff made inquiries through Lloyds and from local agents and the owners. Telexes received from Lloyds of London, marked as P3 and P4 were produced by the witness. Referring to the originals of these documents the witness stated that these documents were taken over by the CID as part of an ongoing investigation. The witness certified that documents P3 and P4 are copies of the originals and were taken and maintained in the ordinary course of business.

The plaintiff-respondent made its claims to the defendant-appellant through its letters P8 dated 24th August 1987, and P11 dated 18th August 1987. The plaintiff-respondent also produced documents P9(a) and P10(a) which are Clean Shipped on Board Bills of Lading stating that the consignments described therein have been shipped at the Port of Loading in Mersin, Turkey. Documents P10(b) and P10(c) are certificates issued by the shipping agent in Turkey certifying that the shipment has been effected in the vessel 'Elitor' and that the vessel 'Elitor' is an ocean going seaworthy vessel.

The documents submitted along with claims P8 and P11 establish that the consignment of red split lentils and chickpeas were shipped on board the vessel 'Elitor' from the Port of Mersin, Turkey. These documents have not been contested by the defendant-appellant. As remarked upon by the learned Judge, although the Defendant has taken several positions against the plaintiff's claim, the defendant has neither called any witnesses not elicited even under cross-examination the veracity of the position taken by them.

The learned High Court Judge having examined and analysed the evidence in view of relevant legal positions, concluded that *"the plaintiff has established its claim on the basis that the ship M.V. Elitor on board of which the plaintiff-respondent's consignment of goods covered by P1 and P2 were legally presumed to be lost and resulted in the actual total loss of goods to the plaintiff which is covered by P1 and P2 with the liability of the defendant, having to pay the value the two contracts have covered."*

Aggrieved by this decision of the High Court, the defendant-appellant has raised this appeal on the following grounds;

Firstly, that the High Court has erred in its application of the presumption, since there was no proof that the vessel has set sail for

Colombo and there was proof of unauthorized deviation from the normal route which discharged the insurer of liability.

Secondly, that the plaintiff-respondent has failed to prove that it complied with the institute Classification Clause, and as such the claim is not maintainable.

Thirdly, that the documents P3 and P4 which are copies of telexes said to have been received from Lloyds have not been proved and as such, were inadmissible.

Considering the first ground of appeal, it is the defendant-appellant's contention that the presumption has been incorrectly applied in the instant case as for the presumption to operate it is necessary to establish that the vessel sailed on the voyage insured. The defendant-appellant submits that in the instant case, there is no evidence that the vessel set sail for Colombo.

The evidence on record reveals that the vessel left the Port of Mersin, and called at the port in Limersol due to engine trouble, and from there sailed to Thessaloki on or about the 20th of June 1987. The documents submitted together with the claims P8 and P11 confirm that the consignment of 2000 metric tons of red split lentils and 200 metric tons of chickpeas were shipped on board the vessel M.V. Elitor as covered by the policy. Document P4 from Lloyds established that the ship has reached the port in Limersol and left the port on the 29th of June and hence no information is available.

There is no doubt that the vessel has in fact left the port of Mersin, and the documents on record indicate clearly that the shipment is to Colombo from Mersin via the steamer M.V. Elitor (Vide documents P6, P9(a), which established that the voyage contemplated was in fact the voyage insured – from Mersin, Turkey to Colombo, Sri Lanka). I find that the Learned Judge correctly held that vessel did sail from the Port of Mersin on or about 24th May 1987 for the port of Colombo.

As part of the same ground, the defendant-appellant has also contended the issue that there has been a deviation from the authorised voyage and that this discharges the insurer from all liability on the policy of insurance. It is unnecessary to examine the merits of this argument as this is a new issue which the defendant-appellant failed to raise at the trial stage. The defendant-appellant is prohibited

from setting up a different case from that set up at the trial. I agree with the plaintiff-respondent's submission that deviation is a question of fact and the impact of such a deviation upon the insurer's liability must be considered in light of attendant circumstances.

The defendant-appellant has also alleged that it is not liable under the insurance policy since the plaintiff-respondent is in breach of a condition of the policy, namely the Institute Classification Clause. The written submissions of the defendant-appellant clearly mentions that the same issue is contained in paragraph 8 of the answer at page 45 and issue 5 of the defendant at page 164.

However a bare reading of both documents does not reveal any reference to the Institute Classification Clause or a breach thereof. In paragraph 8 of the answer reference is made to the un-seaworthiness of the vessel and also to the breach of the unseaworthiness and unfitness exclusion clause. No clear mention is made of the breach in the manner taken up in appeal; that the plaintiff-respondent is in breach of the conditions of the policy pertaining to the Institute Classification Clause. There is no doubt that the defendant-appellant cannot take up a case in appeal, which differs from that of the trial. Therefore, where the defendant-appellant has failed to raise the matter clearly at the trial stage, it is prohibited from doing so in appeal.

However, even if this court considers the alleged breach of the Institute Classification Clause as raised by the defendant-appellant, the contention fails since the defendant-appellant has failed to discharge the burden of proving a breach of warranty by the plaintiff-respondent.

It is the defendant-appellant's position that being a warranty, the burden was on the plaintiff-respondent to establish compliance. The defendant-appellant claims that as the plaintiff-respondent has failed to discharge its burden and prove compliance with the conditions in this clause, the defendant-appellant is discharged from any liability under the policy.

The Institute Classification Clause stipulates that:

> *"The marine transit rates agreed for this insurance apply only to cargoes and/or interests carried by Mechanically self-propelled vessels of steel construction Classed as below by one of the following classification societies".*

"Provided such vessels are:

(i) Not over 15 years of age or

(ii) Over 15 years of age but not over 25 years of age and have established and maintained a regular pattern of trading on an advertised scheduled to load and unload at specific ports."

The clause clearly requires that the vessel be classed with a Classification Society agreed by the underwriters, remains in the same class and also that the Classification Society's recommendations, requirements and restrictions regarding seaworthiness and of her maintenance thereof be complied with by the date(s) set by the Society. (Vide, Hodges on Law of marine Insurance at page 113).

The main objective of the clause is to improve safety standards and ensure the seaworthiness of the vessel through the intervention of a reputed Classification Society agreed by the underwriters. Though not specifically mentioned as such, the clause be considered as a warranty if there is an intention to warrant. It follows that a breach of this clause would relieve the insurer from all liability under the policy as from the date of the breach.

It is not uncommon that a policy will contain a warranty that the vessel will not be operated without a certificate of seaworthiness or that the vessel will be surveyed and inspected by an approved surveyor and a certificate issued by the surveyor attesting to the seaworthiness of the vessel. (Vide, Parks on the Law and Practice of Marine Insurance and Average at page 247; *Royster Guano Co.* v *Globe & Rutgers*[(1)]. In *The Al Jubail IV*,[(2)] it was held that the compliance with the warranty was a condition precedent to coverage, and the assured failed to recover.

There is little doubt therefore that the Institute Classification Clause in the policy is a warranty which requires compliance by the plaintiff-respondent. However, the question of where the onus of proof lies in such a case is for the court to consider when coming to a determination.

Under the general law of insurance the burden of proving that a warranty has been broken lies upon the insurers. (Vide. Colinvaux on The Law of Insurance at page 115) In *Stebbing* v *Liverpool and*

London and Globe[3] where a claim by the applicant was challenged by the respondent insurers on the basis that the applicant had suppressed material facts and had made untrue answers in the proposal form, the court held that the burden of proving the untruth of the answers in the proposal, lay on the respondents; if they cannot establish it, then they fail in the defence. Laying down a test for determining the onus of proof in a given case, Lord Reading stated that, "the burden of proof lies at first on the party against whom judgment would be given if no evidence at all was adduced."

Similarly in *Marshall* v *Emperor Life,*[4] where the right of the assured to recover on a policy is disputed on the ground that he had stated in the proposal that he had not had certain diseases, whereas he in fact had one of them at the time, it was held that the insurer is obliged to give particulars of the symptoms of the disease alleged.

In the case of marine insurance it is well established that the burden of proving a breach of the implied warranty of seaworthiness lies on the insurer where he alleges it. (Vide, Ivamy on Marine Insurance at page 298). Ivamy refers to the decisions in *Parker* v *Potts*[5] and *Franco* v *Natusch*[6]. In *Pickup* v *Thames and Mersey Marine Insurance Co.*,[7] the court upheld the principle that even where a ship springs a leak soon after commencing her voyage, the burden of proof remains on the insurer and there is no shift in the principle that the party alleging un-seaworthiness must prove it.

Parks in *The Law and Practice of Marine Insurance and Average* at page 249, states conclusively that, *"the burden of proving a breach of warranty is on the underwriter, and that is so even where compliance is expressed as a condition precedent to recovery under the policy."* The same view is expressed in Arnold on The Law of Marine Insurance and Average at page 684.

In *Bond Air Services Inc* v *Hill,*[8] the court clearly held that *"the burden of proof of breaches of conditions was on the respondents in accordance with the ordinary rule that the onus of proving a breach of a condition of an insurance policy which would relieve the insurer from liability in respect of a particular loss was, unless the policy otherwise provided, on the insurer."* Also in *Barett* v *London General Insurance Co. Ltd.*[9] at 238 it was pronounced that the burden of proof lies on the insurers.

I do not believe there to be any doubt regarding the fundamental position of insurance law that the burden of proof related to an alleged breach of warranty lies on the insurer alleging it. I cannot accept the contention of the defendant-appellant that the burden of proving compliance with the warranty contained in the Institute Classification Clause lies on the plaintiff-respondent. In this case the burden of proving non-compliance with the warranty lies squarely on the defendant-appellant. It is clear that the defendant-appellant has failed to prove the charge against the plaintiff-respondent.

The final ground of appeal put forward by the defendant-appellant related to the admissibility of documents P3 and P4, which were admitted by the learned Judge under section 35(1) of the Evidence Ordinance. The witness, S. Ashokan stated in evidence that due to the non-arrival of the ship, the plaintiff-respondent Company made inquiries as to the whereabouts of the ship, through Lloyds by telex and also the local agents and owners of the ship.

The documents P3 and P4 produced by the witness are communications from Lloyds to the plaintiff-respondent Company in response to inquiries made in the ordinary course of business of the plaintiff-respondent company. With regard to the originals of these documents, the witness stated that these documents were taken over by the CID as part of an investigation on matters concerning the vessel M.V. Elitor. The witness gained access to these documents when he became a Director of the plaintiff-respondent company following the death of both his father and uncle .The witness has certified that these were copies taken from the originals which were handed over to the CID and they were copies taken in the ordinary course of business related to the company.

Section 35(a) of the Evidence Ordinance makes admissible a statement of fact contained in a record compiled,

(a) *by a person in the course of any trade or business in which he is engaged or employed or for the purposes of any paid or unpaid office held by such person, and*

(b) *from information supplied to such person by any other person who had or may have had personal knowledge of the matter dealt with in that information.*

The law of evidence provides that the documents maintained by a party in the ordinary course of business can be produced by such party as evidence. Section 34(a) of the Evidence Ordinance permits a witness who by reference to documents and studying the relevant documents learns to speak on the facts disclosed by those documents.

It is contended by the defendant-appellant that the said documents have not been maintained in the ordinary course of business. The record shows that the documents were admitted subject to proof and that objections were raised by the defendant against their reception in evidence as they had not been proved. However the defendant did not raise a challenge at the trial to the statement of the witness that the documents were maintained in the ordinary course of business. No questions were put to the witness on whether the documents had been maintained in the ordinary course of business of the company. The documents are admissible under 35(a) of the Evidence Ordinance. The Director of the plaintiff-respondent Company has certified in Court that the documents were maintained in the ordinary course of business.

I find no reason to disbelieve the statements of the witness. I find that the documents P3 and P4 produced before court were maintained in the ordinary course of business of the company and find no impediment to the admissibility of this evidence in light of the provisions contained in the Evidence Ordinance.

The defendant-appellant has also sought to rely on the Evidence (Special Provisions) Act No. 14 of 1995. It was contended that while this Act provides for the admissibility of contemporaneous recordings by electronic means, such evidence would only be admissible if notice is given to the other party and an opportunity to inspect the evidence and the machine used to produce the evidence. I find it unnecessary to comment on the merits of this submission, as this too is a fresh submission made at the appeal stage which finds no place in the trial proceedings.

It is clear having considered all three grounds of appeal submitted by the respondent that the vessel M.V. Elitor certainly left the port in Mersin for Colombo as evidenced by the several shipping documents and communications produced in Court. It is also clear that the burden

of proving the breach of warranty lay on the defendant-appellant and that no evidence has been produced to establish its claim against the plaintiff-respondent. On the admissibility of documents, I find that the documents are admissible under section 35(a) of the Evidence Ordinance as they had been maintained in the ordinary course of business of the plaintiff-respondent Company.

For these reasons, I find that the judgment of the High Court is correct in fact and law and this appeal is refused and dismissed. I order that the defendant-appellant pay costs in the sum of Rs.10,000/- to the plaintiff-respondent.

S.N. SILVA, C.J. – I agree.

JAYASINGHE, J. – I agree.

Appeal dismissed.

WEERASINGHE
v
JAYASINGHE

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
AMARATUNGA, J.
SOMAWANSA, J.
SC 21/2006
SC Spl LA 286/2004
HC RATNAPURA 8/2001
MC BALANGODA 39587/M
OCTOBER 25, 2006
JANUARY 10, 2007

Maintenance Ordinance, Section 6 – Corroboration – When? – D.N.A. Test? Paternity – Cogent evidence – Necessity to corroborate evidence of mother.

The Magistrate's Court found that the appellant is the father of the child and was directed to pay maintenance to the child. The High Court affirmed the said order. It was contended in appeal that, there is a DNA report indicating that he is not the father of the child.

On a suggestion made by the Supreme Court the DNA report was sent to the GENETECH for a medical opinion – which confirmed the DNA report.

It was contended by the appellant that in the Magistrate's Court the respondent's evidence had not been corroborated by other evidence in terms of section 6 of the Maintenance Ordinance.

Held:

Per Dr. Shirani A. Bandaranayake, J.

"In the instant case, it is apparent that the respondent's evidence had convinced the Magistrate. In such circumstances, in terms of section 6 it was necessary for the respondent's evidence to have been corroborated by other independent evidence, where the question of paternity looms large, the mother's evidence would have to be corroborated by independent evidence".

Held further:

(1) In cases where parentage (paternity) is in issue the most cogent evidence is likely to be obtained by blood tests in general and DNA tests in particular. Such tests may be used either to rebut the presumption or allegation of paternity or to establish marriage".

(2) DNA profiling can establish parentage with a virtual certainty; DNA tests are also known as genetic finger printing could by matching the alleged father's DNA bands with that of the child's bands after excluding such bands that match the mother's would make positive finding of paternity with virtual certainty.

(3) The DNA test could be used by the appellant to rebut the allegation of paternity.

APPEAL from the judgment of the High Court of Ratnapura.

Cases referred to:

(1) *Angohamy* v *Babasinno* 1910 4 Weerakantha's reports 60.

(2) *Karuppiah Kangany* v *Ramaswamy Kangany* 52 NLR 262.

(3) *Wimalaratne* v *Milina* 77 NLR 332.

(4) *Turin* v *Liyanora* 53 NLR 310.

(5) *Le Roux* v *Neethling* – Juta (1891-1892) 247.

(6) *Stocker* v *Stocker* 1966 1 WLR 190.

W. Dayaratne with *P. Jayawardane* for respondent-appellant-appellant.

Ananda Panagoda with *Kumari Thirimanne* for appellant-respondent-respondent.

May 24, 2007

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of Ratnapura dated 14.09.2004. By that judgment the learned Judge of the High Court affirmed the order of the learned Additional Magistrate of Balangoda dated 26.04.2001 by which the defendant-appellant-appellant (hereinafter referred to as the appellant) was found to be the father of the child and the appellant was directed to pay a sum of Rs. 4000/- per month as maintenance of the child.

The appellant appealed to the Court on which Special Leave to Appeal was granted on the following questions :

(4) Is the entire approach of the learned Magistrate in regard to the question of paternity of the child wrong and has the learned High Court Judge failed to consider it in his order?

(5) Has the learned Magistrate failed to consider that in terms of section 6 of the Maintenance Ordinance, which speaks of corroboration of the evidence of the mother, it must be taken to include any kind of corroboration which is recognized by law and has the learned Magistrate as well as learned High Court Judge failed to consider the said question of law?

(6) Has the learned Magistrate erroneously considered the mere contradictions of the respondent/petitioner's evidence as corroborations of the applicant/respondent's case?

When this matter was taken up for hearing, learned Counsel for the appellant brought to the notice of this Court that there is a report of the DNA test, setting out the results that the appellant

is not the father of the child of the applicant-respondent-respondent (hereinafter referred to as the respondent). This Court had thereafter directed the appellant to obtain a special medical opinion on the DNA report, which was obtained from the GENETECH Institution.

Accordingly, both learned Counsel agreed that the only question that has to be considered was as follows:

> *"In view of the DNA test report, whether the respondent's evidence has been corroborated, in terms of section 6 of the Maintenance Ordinance*?

The facts of this appeal, as set out by the appellant, *albeit* brief, are as follows:

The respondent instituted action in the Magistrate's Court, Balangoda against the appellant seeking for orders that the appellant be declared as the father of the child, namely, Rasandanie Sachinika (hereinafter referred to as the child) and for the appellant to pay a sum of Rupees Five Thousand (Rs. 5000/-) per month as maintenance. The appellant denied paternity and therefore was enlarged on a personal bail in a sum of Rupees Five Thousand (Rs. 5000/-) and the case was fixed for inquiry.

When the said inquiry commenced in April 1998, the respondent, her mother, namely, Kasturi Arachchige Leelawathie, her grandmother, namely, Matarabha Parana Withanalage Alisnona and a midwife of the Base Hospital Balangoda, namely Widane Pathirannahelage Nandawathie gave evidence and filed the documents, which contained the birth certificate of the child (පැ1), complaint made by the respondent to the Balangoda Police (පැ2) and the Medico Legal Report of the respondent dated 21.01.1998 (පැ 3).

The appellant denied allegations including paternity against him and stated that the respondent is his divorced wife's eldest sister and he came to know about the birth of the child only at the inquiry held at Balangoda Police Station into a complaint made against him by the respondent. He has produced two documents, namely his statement made to Balangoda Police

Station on 14.10.1997 (X) and the plaint of the Divorce Case No. 248/97 of District Court, Balangoda (XI).

Learned Magistrate of Balangoda held that the appellant was the father of the child and ordered a sum of Rupees Four Thousand/(Rs. 4000/-) per month as maintenance to the child, which order was affirmed by the learned Judge of the High Court.

Having stated the facts of this appeal, let me now turn to consider the question of corroboration by other evidence vis-a-vis the applicability of the DNA test report.

Section 6 of the Maintenance Ordinance deals with the rule requiring corroboration of the mother's evidence in proceedings for maintenance and is in the following terms:

"No order shall be made on any such application as aforesaid on the evidence of the mother of such child unless corroborated in some material particular by other evidence to the satisfaction of the Magistrate."

The said provision is quite clear and what it stipulates is the necessity for the mother's evidence to be corroborated by other evidence. Such corroboration of the mother's evidence has been vital in establishing paternity and this was the approach of our Courts that considered matters even under section 7 of the Maintenance Ordinance, No. 19 of 1889, which section was an identical provision to that of section 6 of the Maintenance Ordinance. For instance, in the early decision of *Angohamy* v *Babasinno*[1], it was held by Wood Renton, J. that corroboration should consist of some evidence, oral or real, entirely independent of that of the applicant which renders it probable that her story as to the paternity of the children in respect of whom she is applying for maintenance is true.

In fact our Courts have been specific of the need for corroborating the mother's evidence in establishing paternity as even on instances where the mother's evidence had appeared to be quite impressive. This position was clearly laid down in *Karuppiah Kangany* v *Ramaswamy Kangany*[2] where it

was stated that upon the uncorroborated testimony of the mother, a Magistrate cannot make an order against the putative father.

It is thus apparent that in a matter, where the question of paternity is looming large, the mother's evidence would have to be corroborated by independent evidence. Such type of corroboration was defined in *Wimalaratne* v *Milina*(3), where it was stated that, in an application for maintenance of an illegitimate child, evidence of any number of witnesses, who had heard from the applicant's mouth that the defendant was the father of the child would not constitute independent corroboration of the story of the applicant as to paternity.

The necessity for corroborated evidence was considered at length in *Turin* v *Liyanora*(4), in terms of section 6 of the Maintenance Ordinance, where it was stated that,

> "*What the statute provides is that no order for maintenance of an illegitimate child should be made unless a mother who has given convincing evidence is corroborated in some material particular. If the mother's evidence does not convince the Judge the question of corroboration does not arise*".

In *Turin's case* reference was also made to the observations of De Villers, CJ, in *Le Roux* v *Neethling*(5) regarding corroboration, where it was stated that,

> "*I think it may be laid down as a general rule that the plaintiff who seeks to fix the paternity of an illegitimate child on a man must clearly prove it, and must be corroborated by some independent testimony, and in case of doubt, judgment must be given in favour of the defendant.*"

In the instant matter, it is apparent that the respondent's evidence had convinced the learned Magistrate. In such circumstances, in terms of section 6 of the Maintenance Ordinance, it was necessary for the respondent's evidence to have been corroborated by other independent evidence.

The only independent witness was the midwife, namely Widane Pathirannahelage Nandawathie. She had been a Family Health Officer attached to the Base Hospital, Balangoda. Admittedly her duty had been to enter the necessary details for the issuance of the child's Birth Certificate. Except for the details relevant for that purpose, the witness had not given any evidence to corroborate the respondent's evidence. Infact, it is interesting to note that the proceedings of the Magistrate's Court Balangoda of 06.05.1999, disclose that, the Magistrate herself had been of the view that the witness Nandawathie's evidence had been detrimental to the respondent. In such circumstances, it is apparent that the respondent's evidence had not been corroborated by other evidence in terms of section 6 of the Maintenance Ordinance.

In the light of the aforementioned, it would be of paramount importance to consider the applicability of the evidence based on the DNA Report in deciding the paternity of the child.

As stated earlier, both parties, on a suggestion made by this Court had agreed to subject themselves to a DNA test.The said DNA test was carried out by the Molecular Medicine Unit of the University of Kelaniya and had stated that the appellant, namely Upul Kumara Weerasinghe is not the father of the child, namely, Rasandanie Sachinika.

Thereafter, both parties had also obtained a further report from Molecular Diagnostics and School of Gene Technology (GENETECH), which had clearly stated in its conclusion that the respondent is not the biological father of the child in question and that this could be stated with 100% certainty. Although there are no statutory guidelines as to when blood and/or DNA tests should be ordered by Court, in different instances the Court has directed the use of such tests. In *Stocker* v *Stocker*[6], Karminski, J. referred to the importance of using serological evidence as it could successfully exclude a proportion of men, wrongly supposed to be father of a given child.