THE

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CEYLON ELECTRICITY BOARD AND OTHERS
v
RANJITH FONSEKA

SUPREME COURT.
DR. SHIRANI BANDARANAYAKE, J.
MARSOOF, J. AND
EKANAYAKE, J.
S.C. (SPL.) L.A. NO. 113/2008
C.A. WRIT APPLICATION NO. 51/2007
DECEMBER 01, 2008

Supreme Court Rules 1990 – Rule 2 – Rules 8(2) – Constitution – Article 136 – Special Leave to Appeal should be by way of petition together with affidavit and other supporting documents – Non-compliance of Supreme Court Rules – Substantial Compliance?

The Respondents-Petitioners (Petitioners) had preferred an application for Special Leave to Appeal to the Supreme Court against an order of the Court of Appeal, which stayed the decision of the petitioner to withhold the respondents pension until the next date of the case.

The Counsel for the petitioner-respondent, took up the following preliminary objections:

(1) The petition and affidavit for Special Leave to Appeal is titled:
   (a) *"in the Court of Appeal of the Democratic Socialists Republic of Sri Lanka".*
   (b) *the caption of the petition is titled:*
   "In the matter of an application under and in terms of Article 154(3)(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka."
(2) The written submissions of the petitioners have not been annexed, whereas in paragraph 4 of the petition and in paragraph 5 of the affidavit it is stated that written submissions have been annexed marked as 'P4'.
(3) The petitioners are described as 1st to 10th respondents-appellants whereas,
   (a) The 10th respondent-appellant so described is the Hon. Attorney-General.
   (b) Proxy has only been filed for the 1st respondent-appellant.

Held:

(1) A petition with an incorrect title would not be acceptable for the purpose of making an application for Special Leave to Appeal in terms of Rule 2 of the Supreme Court Rules 1990. A defective petition would amount to non-compliance with the said rule.

(2) Where there had been objections based on non-compliance with the Supreme Court rules, whilst due consideration should be given to remove any technical objections in order to meet out justice, it is also necessary to ensure that the approach of Court in interpreting the applicability of Supreme Court Rules, should not lead to serious erosion of well established Court procedures, applied and maintained throughout several decades.

(3) If there is no proper petition filed for the purpose of a Special Leave to Appeal application, then such application would amount to non-compliance with Rule 2 of the Supreme Court Rules 1990.

(4) It is apparent that the default in question, including the non-compliance with Rule 2 of the Supreme Court Rules 1990, had not been satisfactorily explained by the petitioners nor have they cured it to the satisfaction of the Supreme Court, thus giving no opportunity to use the judicial discretion.

per Dr. Shirani Bandaranayake, J.

"An application such as the present application which is teeming with irregularities and mistakes cannot, not cnly be tolerated, but also would be difficult to maintain as each irregularity stated above is fatal to the acceptability and maintainability of the application".

Cases referred to:

(1) *Velupillai* v *Chairman, Urban District Council* (1926) 29 NLR 464.
(2) *Kiriwanthe and Another* v *Navaratne and Another* (1990) 2 SLR 393.
(3) *Priyani E. Soyza* v *Rienzie Arsecularatne* (1999) 2 SLR 179.
(4) *S.C. (Spl.) L.A. No. 49/2007.*
(5) *Samantha Niroshana and Another* v *Gunasekera* (S.C. (Spl.) L.A.145/2006 S.C. Minutes of 2.8.2007.
(6) *Jones* v *Chennell* (8 ch. D. 506).
(7) *Read* v *Samsudin* (1895) 1 NLR 292.
(8) *Annamalai Chettiar Muthappan Chettiar* v *Karunanayake and Another* (S.C. Appeal 69/2003 S.C. Minutes of 06.06.2005.
(9) *Reaindran* v *K. Velusomasunderam* (S.C. (Spl.) L.A. 298/99 S.C. Minutes of 07.02.2000.
(10) *N.A. Premadasa* v *the Peoples Bank* S.C. (Spl.)L.A. 212/99 S.C. Minutes of 24.02.2000.
(11) *Hamed* v *Majbdeen and Others* S.C. (Spl.) L.A. 38/2001 S.C. Minutes of 23.07.2001.

(12) *K.M. Samarasinghe* v *R.M.D. Ratnayake and Others* SC (Spl.) L.A. 51/2001 S.C.Minutes of 27.07.2001.

(13) *Soong Che Foo* v *Harosha K. de Silva and Others* S.C. (Spl.) 184/2003 S.C. Minutes of 25.11.2003.

(14) *C.A. Haroon* v *S.K. Muzoor and Others* S.C. (Spl.) L.A. 158/2006 S.C. Minutes of 24.11.2006.

APPLICATION for Special Leave to Appeal from the judgment of the Court of Appeal.

Mohan Peiris, P.C. with *Nuwanthi Dias* for respondents-petitioners.

Romesh de Silva, P.C. with *Sugath Caldera, S, Cooray and G.G. Arulpragasam* for petitioner-respondent.

Cur.adv. vult.

December 16, 2008

DR. SHIRANI BANDARANAYAKE, J.

This is an application for Special Leave to Appeal filed by the respondents-petitioners (hereinafter referred to as the petitioners) from the judgment of the Court of Appeal dated 28.04.2008. By that judgment the Court of Appeal had confined itself to consider the sole issue of the grant of interim relief prayed for by the petitioner-respondent (hereinafter referred to as the respondent) directing the payment of his pension, which was withheld by the petitioners and the Court of Appeal had made order staying the decision of the petitioners to withhold the respondent's pension, until the next date of that case.

The petitioners had preferred an application for Special Leave to appeal to this Court against the said order of the Court of Appeal and when it came up for support, learned President's Counsel for the respondent took up the following as preliminary objections:

(1) The petition and affidavit for Special Leave to Appeal filed before this Court is titled *in the Court of Appeal of the Democratic Socialist Republic of Sri Lanka*;

The caption is titled as follows:

"In the matter in the application under and in terms of Article 154P(3)(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka".

(2) The written submissions of the petitioners have not been annexed whereas in paragraph 4 of the petition as well as in paragraph 5 of the affidavit it is stated that the written submissions have been annexed marked as P4.

(3) The petitioners are described as 1st to the 10th respondents-appellants whereas;

(a) The 10th respondent-appellant so described is the Hon. The Attorney-General; and

(b) proxy has only been filed for the 1st respondent-appellant.

Learned President's Counsel for the respondent, accordingly submitted that the preliminary objections so raised are fatal to the acceptability and maintainability of this application and the objections be upheld and the application for Special Leave to Appeal be dismissed *in limine*.

Learned President's Counsel for the petitioners contended that on the day this application was first taken up for support, the President's Counsel for the petitioner had sought for permission to amend the caption, if necessary, and had apparently filed amended caption. Learned President's Counsel for the petitioners referred to the oft quoted words of Abrahams C.J. in *Velupillai* v *Chairman, Urban District Council*[1], where it was stated that,

"this is a Court of justice, it is not an academy of law."

Learned President's Counsel further submitted that he is relying on the decisions of *Kiriwanthe and another* v *Navaratne and another*[2] and *Priyani E. Soysa* v *Rienzie Arsecularatne*[3].

Having stated the contention of both learned President's Counsel for the petitioners and respondent, let me now turn to refer to the relevant facts of this matter and to examine whether the objections taken by the learned President's Counsel for the respondent would amount to a dismissal *in limine* of the Special Leave to Appeal application filed by the learned President's Counsel for the petitioners.

The judgment of the Court of Appeal, as stated earlier, was delivered on 28.04.2008 and the Special Leave to Appeal application had been filed in the Supreme Court on 15.05.2008. In that

application the petition and the affidavit were titled as correctly submitted by the learned President's Counsel for the respondent, referring to the Court of Appeal and not to the Supreme Court. Further, as submitted by the learned President's Counsel for the respondent, the caption referred to Article 154P(3)(b) of the Constitution. There is no dispute regarding the contention of the learned President's Counsel for the respondent on the 2nd and 3rd preliminary objections that the written submissions were not filed along with the petition and affidavit and that the proxy filed was only of the 1st petitioner. However, the contention of the learned President's Counsel for the Petitioners was that notwithstanding the above, there was substantial compliance with the Supreme Court Rules of 1990.

In such circumstances, let me examine the said preliminary objections raised by the learned President's Counsel for the respondent to ascertain whether there had been compliance with the Supreme Court Rules of 1990.

Referring to the 1st preliminary objection raised by the learned President's Counsel for the respondent, learned President's Counsel for the petitioners contended that although the captions in the petition and affidavit had been defective, such defects are not fatal to the maintainability of this application. The contention was that in terms of Rule 2 of the Supreme Court Rules of 1990 an affidavit is merely used as a supplementary source of evidence and therefore a defective caption in the affidavit will not reduce the evidentiary value of the relevant application.

It is common ground that the application for Special Leave to Appeal preferred by the petitioners contained incorrect titles. Rule 2 of the Supreme Court Rules, 1990, which is contained in Part I and deals with applications for Special Leave to Appeal, clearly stipulates that,

> *"Every application for Special Leave to Appeal to the Supreme Court shall be made by a petition in that behalf* lodged at the Registry, together with affidavits and documents in support thereof as prescribed by Rule 6 ....." (emphasis added).

Rule 2 of the Supreme Court Rules, 1990 thus states quite clearly that an application for Special Leave to Appeal should be made by way of a petition. A petition for the said purpose therefore is a mandatory requirement and to fulfill such requirement, it is necessary

for the petition to be a valid petition. A petition with an incorrect title therefore would not be acceptable for the purpose of making an application for Special Leave to Appeal in terms of Rule 2 of the Supreme Court Rules 1990, and thereby it is apparent that there had been non-compliance with the said Rule.

The question, which arises at this point is that in a situation, where there has been non-compliance with Rule 2 of Supreme Court Rules 1990, whether it is possible for the petitioners to cure that defect by an amendment to the petition.

Learned President's Counsel for the petitioners, after filing the application for Special Leave to Appeal on 15.05.2008, had filed a motion on the same date, moving this Court to permit the learned Counsel to support the application for interim relief. Accordingly, this matter was fixed for support on 28.05.2008 and on that date, it was re-fixed for support, since the respondents had not received the necessary documents. In fact it is recorded that the learned Counsel for the petitioners had undertaken to handover a 'fresh set of papers' to the learned Counsel for the respondent. A careful perusal of the record does not however reveal any other application made by the learned President's Counsel for the petitioners as the Journal Entry reads thus:

> *"Court is informed that Mr. Romesh de Silva, PC, appears for the respondent. Mr. Arulpragasam submits that the Counsel for the respondent has not received papers filed in this application. Counsel for the petitioners undertakes to handover a fresh set of papers.*
>
> *Support on 04.06.2008."*

On 04.06.2008, the matter had been re-fixed for support as the petitioners were exploring the possibility of a settlement. Only at that time, learned President's Counsel for the petitioners had moved for time to file papers to amend the caption, if it becomes necessary, and it had been recorded that,

> *"Learned President's Counsel for the petitioners informs Court that this matter be re-fixed for support since the petitioners are exploring the possibility of a settlement.*

Learned President's Counsel for the petitioners' also moves for time to amend the caption, if necessary.

Of consent, support on 19.06.08" (emphasis added).

On 11.06.2008, petitioners had filed the amended caption, along with the written submissions, which was the annexure marked X4 in the Court of Appeal and had moved this Court to accept same. When this matter was taken up for support on 19.06.2008, learned President's Counsel for the respondent took up the preliminary objections, stated earlier. It is therefore quite apparent that the motion for the amendment had not been supported at the time the preliminary objections were taken and in the event, if the said motion was fixed for support, the learned President's Counsel for the respondent, as has been stated in his oral as well as in his written submissions, would have objected to such an amendment.

Therefore it is apparent that at the time the objections were taken, although motions were filed to amend the petition, the said motions were not supported; permission of Court was not sought to amend and therefore admittedly no amendment was permitted by this Court, Accordingly, in those circumstances, it cannot be disputed that the defect in question was not cured by the petitioners within a reasonable time.

Learned President's Counsel for the respondent, in support of his contention that this application must be dismissed *in limine* due to the defects in the petition, referred to the decision in S.C. (Spl.) L.A. No. 49.2007[4], where the petition, which was filed in the Supreme Court titled *'In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka',* had to be withdrawn on the basis of the objections taken by the respondent.

As stated earlier, learned President's Counsel for the petitioners, relied on the decision in *Kiriwanthe and Another* v *Navaratne and Another (supra)* and *Priyani Soysa* v *Rienzie Arsecularatne (supra)* stating that in those decisions the Court had held that the non-compliance with the Supreme Court Rules is not fatal and does not necessitate a dismissal of the case.

The rationale of the decision in *Kiriwanthe and Another* v *Navaratne and Another (supra)* as clearly stated in *Samantha*

Niroshana and Another v *Gunasekera*[5] was that in certain instances, taking into consideration the surrounding circumstances, the Court could exercise its discretion either to excuse the non-compliance or to impose a sanction. The majority decision in *Priyani Soysa* v *Rienzie Arsecularatne (supra)* had followed that *dictum* and had used its discretion in coming to its conclusion.

A careful examination of the decision in *Kiriwanthe (supra)*, clearly indicates that it does not suggest that there ought to be an automatic exercise of Courts discretion to excuse the non-compliance with regard to Supreme Court Rules. It is not disputed that in *Kiriwanthe (supra)* Mark Fernando, J. had stated that although the requirements of Rule 46, (as was the case in that application) must be complied with, strict or absolute compliance is not essential. In Mark Fernando, J.'s words,

> *".... I am content to hold that the requirements of Rule 46 must be complied with, but that strict or absolute compliance is not essential; it is sufficient if there is compliance which is 'substantial' – this being judged in the light of the object and purpose of the Rule."*

However, *Kiriwanthe (supra)* cannot be considered as a decision, which had expressed the view that the Court would always exercise its discretion to excuse non-compliance with the Rules. A close scrutiny of the said decision in *Kiriwanthe and another* v *Navaratne and Another (supra)* clearly emphasizes the fact that, what the Court had stated was that it would be necessary for the Court to first determine whether such non-compliance could be excused or impose a sanction on the basis of the circumstances of each instance. As has been stated by Mark Fernando, J., in the said decision,

> *"It is not to be mechanically applied, as in the case now before us; the Court should first have determined whether the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction ..."*

The Rules of the Supreme Court, it is to be noted, is for the sole purpose of regulating generally the practice and procedure of the Court. Article 136, which deals with the Rules of the Supreme Court states that the Rules made to so regulate the practice and procedure would include,

"a) *rules as to the procedure for hearing appeals and other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of such appeals for non-compliance with such rules;*

b) *rules as to the proceedings in the Supreme Court and Court of Appeal in the exercise of the several jurisdictions conferred on such Courts by the Constitution or by any law, including the time within which such matters may be instituted or brought before such Courts and the dismissal of such matters for non-compliance with such rules;*

...."

The said Articles of the Constitution therefore clearly specifies the fact that subject to the terms stipulated in the specific Rules, there are instances, where an application could be dismissed for non-compliance with relevant Rules.

I am certainly mindful of the observations of Sir George Jessel, Master of the Rolls, made in the case of *Jones* v *Chennell*(6) cited with approval by Bonser, C.J. over a century ago in *Read* v *Samsudin*(7) and has been referred to in *Annamalai Chettiar Muthappan Chettiar* v *Karunanayake and another*(8), where it was stated that,

> *"It is not the duty of a Judge to throw technical difficulties in the way of the administration of justice, but where he sees that he is prevented from receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way, upon proper terms as to costs and otherwise."*

This position was carefully considered in *Annamalai Chettiar Muthappan Chettiar (supra)*, where it was held that objections raised on the basis of non-compliance with a mandatory Rule cannot be taken as a mere technical objection and where there has been non-compliance with such mandatory Rules at the time the matter was taken for hearing, serious consideration should be given to the effects of such non-compliance.

It is therefore quite apparent that, this Court had given careful consideration to matters, where there had been objections based on non-compliance with Supreme Court Rules. Whilst due consideration should be given to remove any technical objections in order to meet out justice, it is also necessary to ensure that the approach of Court in interpreting the applicability of Supreme Court Rules, should not lead to serious erosion of well established Court procedures, applied and maintained throughout several decades.

In *Samantha Niroshana* v *Gunasekera (supra)* this Court had noted that a long line of cases had decided that non-compliance with Rule 8(3) of the Supreme Court Rules of 1990 would result in the dismissal of the application (*Reaindran* v *K. Velusomasunderam*[9], *N.A. Premadasa* v *The People's Bank*[10], *Hamed* v *Majbdeen and Others*[11], *K.M. Samarasinghe* v *R.M.D. Ratnayake and Others*[12], *Soong Che Foo* v *Harosha K. De Silva and Others*[13], *C.A. Haroon* v *S.K. Muzoor and Others*[14].

The preliminary objection taken in this matter does not deal with Rule 8(3) of the Rules, but relates to Rule 2 of the Supreme Court Rules 2 and 8 are contained in Part I of the Supreme Court Rules 1990 and deal with Special Leave to Appeal applications. Rule 2 clearly states that it is a mandatory requirement that any application for Special Leave to Appeal to the Supreme Court be made by a petition in that behalf. Accordingly, if there is no proper petition filed for the purpose of a Special Leave to Appeal application, then such would amount to non-compliance with Rule 2 of the Supreme Court Rules 1990.

In such circumstances, the question, which arises at this point is to see whether the said non-compliance with Rule 2 of the Supreme Court Rules of 1990 would result in the dismissal of this application

or whether the discretion of this Court could be used to over rule the preliminary objection.

It is pertinent to note at this juncture that the aforesaid non-compliance with Rule 2 was not the only objection raised by the learned President's Counsel for the respondent.

Along with the objection of not having a proper petition in terms of the Supreme Court Rules 1990 before this Court, learned President's Counsel for the respondent had contended that the affidavit is not in order as the affidavit is titled 'in the Court of Appeal of the Democratic Socialist Republic of Sri Lanka' and that the written submissions filed in the Court of Appeal although had been referred to in the paragraph 4 of the petition that it has been attached to the petition as P4, has not been annexed. Learned President's Counsel for the respondent, also referred to the fact that although this is an application filed apparently for the purpose of obtaining Special Leave to Appeal from the judgment of the Court of Appeal, in the application, the petitioners are referred to as appellants. It is an obvious fact that aggrieved persons would become appellants before this Court, only if and when Special Leave to Appeal is granted for the application made by the petitioners, by this Court.

The caption of the application was also erroneous as it was titled as follows:

> *"In the matter in the application under and in terms of Article 154P(3)b of the Constitution of the Democratic Socialist Republic of Sri Lanka."*

As correctly submitted by learned President's Counsel for the respondent that the said Article 154P(3)(b) does not in any way refer to an application for Special Leave to Appeal to the Supreme Court, and clearly refers to an application to High Court. It is also to be borne in mind that even in the amended petition the petitioners had referred to Article 154P(3)(b) in its title. Considering the aforementioned circumstances, along with the defective title to the petition and affidavit; the petitioners being referred to as appellants, which include the Hon. the Attorney-General; the proxy being filed only for the 1st petitioner, it is quite evident that the petition filed before this Court is teeming with mistakes and irregularities.

As correctly submitted by the learned President's Counsel for the respondent the application for Special Leave to Appeal filed by the petitioners before the apex Court of the Republic, should have been drafted with 'care and due diligence' in order to maintain the stature and dignity of this Court. An application such as the present application, which is teeming with irregularities and mistakes cannot, not only be tolerated, but also would be difficult to maintain as each irregularity stated above is fatal to the acceptability and maintainability of the application. Even if the objection may be technical in nature, such irregularities clearly demonstrate the fact that the application made by the petitioners has not complied with the Supreme Court Rules of 1990.

As has been stated earlier, if I am to apply the test stated by Mark Fernando, J., in *Kiriwanthe's case (supra)*, it is apparent that the default in question, including the non-compliance with Rule 2 of the Supreme Court Rules 1990, had not been satisfactorily explained by the petitioners nor have they cured it to the satisfaction of this Court, without undue delay, thus giving no opportunity to use the judicial discretion.

In the circumstances, on a consideration of all the material placed before this Court and for the reasons aforementioned, I hold that the preliminary objections raised by the learned President's Counsel for the respondent must be sustained. The petitioners' application for Special Leave to Appeal is accordingly dismissed.

I make no order as to costs.

MARSOOF, J. - I agree.
EKANAYAKE, J. - I agree.

Application dismissed.

DHEERASENA
v
POST MASTER AND OTHERS

COURT OF APPEAL
EKANAYAKE, J. (P/CA)
GOONERATNE, J.
CA 552/2007 (WRIT)
MAY 5, 2008

Writ of Mandamus – Prior services to be considered and added to entitle him for his full pension? – Public Law remedy – If there is only a privilege does mandamus lie? – No absolute right to a pension? – Delay?

The petitioner sought a *writ of mandamus* compelling the respondent to consider his prior services and to add same to entitle him for his full pension.

Held:

(1) The *writ of mandamus* retains its original character as a public law remedy, and it should be a duty of a public nature where power is conferred by law to exercise it in a given factual situation may be either a duty or enable only a privilege conferred by law on the repository of such power.

(2) If this is only a privilege either to exercise it or not *mandamus* does not lie to compel its exercise, in the case of a privilege to exercise or not to exercise the power in question, *mandamus* still does not lie even if the repository of the power decided to exercise it.

The petitioner in terms of the Minutes on Pension does not have an absolute right for a pension therefore there is no duty cast to grant a pension.

Per Anil Gooneratne, J.

"Though the petitioner has a grievance he cannot maintain this application since the facts contended have been determined by the Court of Appeal, one cannot keep on reagitating the same issue over and over again by introducing the case of another person to get over the difficulty".

(3) Section 20(a) of the Minutes of Pensions is relevant only to a public servant who at the time of retirement was entitled to a pension, but due to an interruption of service he becomes not entitled to the payment of the complete pension, where the minimum pension has not been covered, his prior service could be added, even though he was daily paid or held a

temporary monthly paid or was a permanent non-pensionable monthly paid employee.

(4) Inordinate delay would disentitle the petitioner to relief by way of a prerogative writ.

APPLICATION for a *Writ of Mandamus.*

Cases referred to:

(1) *J.B. Textiles Industries Ltd.* v *Minister of Finance and Planning* 1981 2 Sri LR 238, 280-285.

(2) *Perera* v *Chairman, Urban Council Dehiwela Mt. Lavinia* 62 NLR 383.

(3) *Attorney-General* v *Abeysinghe* 78 NLR 381.

(4) *Gunawardane* v *Attorney-General* 49 NLR 359.

(5) *Nixon* v *Attorney-General* 1930 1 Chan 587.

(6) *Nixon* v *Attorney-General* 1931 AL 184 (HC).

(7) *Athula Ratnayake* v *Jayasinghe* 78 NLR 35.

(8) *Rasammah* v *A.P.B. Manamperi (Government Agent, Anuradhapura)* 77 NLR 313.

(9) *Dissanayake* v *Fernando* 71 NLR 356.

S. Amarasekera for petitioner.

A. Gnanathasan, DSG with *G. Wakishta Arachchi* SC for respondent.

June 19, 2008

ANIL GOONERATNE, J.

The petitioner a retired Grade II Post Master has filed this application seeking a *Writ of mandamus* praying for relief as in prayer (ii) of his petition. By this application petitioner pleads that his prior services should be considered and added to entitle him for his full pension and as referred to in document P3, P4, P10, P11 and P12.

Preliminary objections were raised by the learned Deputy Solicitor-General who appeared for the respondents, to the application of the petitioner and their objections are pleaded in paragraphs 3 of the statement of objections of the respondents as follows:

(i) The petitioner is estopped from invoking the Writ Jurisdiction of Your Lordships' Court since the facts contested in this application have already been determined by the Court of

Appeal in CA 785/2001. The order of the said application has been annexed to the petition marked as P6.

(ii) The petitioner has suppressed and/or misrepresented vital material facts to Your Lordships' Court.

(iii) There is inordinate delay on the part of the petitioner even when the petitioner invoked the jurisdiction of Your Lordships' Court in the year 2001 since the petitioner retired in the year 1988.

(iv) The 2nd respondent cannot determine the eligibility of the payment of pension to the petitioner in contravention of the letter of appointment (P1) and the Cabinet decisions (1R3A,1R3-B, 1R4-A, 1R5-A, 1R5-B) they have already been made, refusing the payment of pension to the petitioner;

(v) Necessary parties i.e. the Cabinet of Ministers are not before Your Lordships' Court.

The case of the petitioner is that he was appointed a Sub-Post Master of Pahala Moragahawewa Sub-Post Office on 01.02.1958 and continued to serve until 01.03.1988. On or about 01.10.1980 the said Sub-Post Office had been upgraded and the petitioner who was the incumbent Sub-Post Master was appointed to the post of Grade II Post Paster and Signaler by the appointed letter marked P1, dated 23.01.1981. Petitioner completed 8 years service in the said post which he states is pensionable, until he reached the age of 60 years on 01.03.1988. By letter marked P2 petitioner was released from service.

On the appointment as Sub-Post Master by P1, petitioner had served 8 years and 4 months when he reached the age of retirement which period was insufficient for pension entitlement. As such in order to complete 10 years of service to make him eligible for a pension he applied for an extension of service. He claimed it was granted (no document annexed to support this point). However petitioner states that the letter of extension of service to conclude 10 years service was concluded after 27 days and he could not serve the required period of 10 years. (no document annexed to support this point). Petitioner also pleads (paragraph 8 of the

petition) that he appealed to the authorities against the cancellation of service extension which he claims to have been granted and cancelled as stated above and for such appeal there was no response, until he received letter P3 of 17.8.1999 from the 3rd respondent to take steps to award the petitioner a pension.

The petitioner seeks to support his case by referring to letters marked P3, P4 addressed by 3rd respondent to 1respondent (Post Master General) which request the Post Master General to grant the petitioner pension rights. To this application documents P10-P12 are also annexed to support the petitioner's case. Documents P3, P4 and P10-P12 are all letters written by Government officials requesting that a pension be granted to the petitioner (including Director Pensions).

The counter objections of the petitioner *inter alia* focus on the following, where the petitioner thought it fit to formulate certain arguments to counter the position of the respondents.

(a) Denies that he misrepresented or suppressed facts.

(b) That he is not estopped by the previous case he filed and determined by this court since a cause of action accrued to him after a grant of pension to another person called Anagihamy who was entitled to a pension.

(c) Cabinet of Ministers are not necessary parties since the Cabinet did not decide the granting of pension to the above named Anagihamy.

(d) Although the petitioners service before the pensionable post, has been waived as non-pensionable service, subscription has been deducted from the salary to the Public Servants' Provident Fund from 25.09.1978.

(e) Although the petitioner did not get the privilege of drawing a pension as he was not in service on 12.11.1994 as per ඇමෙ/95/2547/114/067 dated 15.11.1995 of the Secretary to the Cabinet of Ministers. Cabinet White Paper No. 62/1995 enable every substitutes and assistants of Sub Post Masters to claim public service in view of that there is no difficulty in recognising Sub Post Master as Public Servants. Vide paragraphs 6 of P7.

The *Writ of Mandamus* retains it's original character as a public law remedy and it should be a duty of a public nature where power is conferred by law, to exercise it in a given factual situation may be either a duty, or enable only a privilege, conferred by law on the repository of such power. It is only if there is a duty to exercise it in a given situation that *mandamus* lies to compel it's exercise in that situation.

If there is only a privilege either to exercise it or not, *mandamus* does not lie to compel it's exercise. *J.B. Textiles Industries Ltd.* v *Minister of Finance and Planning.*(1) In the case of a privilege to exercise or not to exercise the power in question, *mandamus* still does not lie even if the repository of the power already decided to exercise it. *Perera* v *Chairman, Urban Council Dehiwela-Mount Lavinia.*(2) The petitioner in terms of the Minutes on Pension does not have an absolute right for a pension. Therefore there is no duty cast to grant a pension in the manner pleaded in the petition.

The application before this court seeks to compel the 2nd and 3rd respondent in view of documents P3, P4, P10-P12 to pay the petitioner a full pension. Before I could answer the preliminary objection raised by the learned Counsel for the State, it would be necessary to consider whether in view of the very nature of this prerogative writ whether the petitioner could get the benefit of a *Writ of Mandamus* to compel the state to pay him a pension. Does the Petitioner have a legal right in this context to demand for a pension?

I would refer to a decided case on 'pension' from which the question of a legal right to a pension was considered. In *Attorney-General* v *Abeysinghe*(3).

Held:

(1) The Minutes on Pensions do not create legal rights enforceable in the Courts.

(2) A Court has no jurisdiction to grant a declaration in respect of a pension.

(3) The expression "no absolute right" in the first section of the Minutes on Pensions means "no legal right". In Sri Lanka there is no constitutional provision or any other provision of

written law which has the effect of altering the meaning of Section 1 of the Minutes on Pensions.

At 364/365

The expression "no absolute right" to my mind means "no legal right". It is a signal hoisted by the draftsman to indicate both to the beneficiaries under the Minutes on Pensions and to the Courts that the Minutes are not to be taken as creating rights enforceable in the Courts. The "no legal right" concept contained in Section 1 of the Minutes is then reinforced by the text of rules 2 and 15 which contain the expressions "may be awarded" and "may in his discretion grant".

It was held as long ago as 1948, in the case of *Gunawardene* v *The Attorney-General*(4) that the Minutes on Pensions merely regulates the administration of pensions by those in whose hands that duty is placed and does not confer upon retired government servants any legal rights in respect thereof. I find myself, with respect, in agreement with this decision. In *Gunawardene's* case Gratiaen, J. was following the decisions of the English Court of Appeal and of the House of Lords in the case of *Nixon* v The *Attorney-General*(5) in which those two judicial bodies were called upon to examine Section 30 of the Superannuation Act (4 and 5 William IV, Chapter 24) of England.

Section 1 of the Minutes of Pensions follows very closely the language of Section 30 of the Superannuation Act. I think it would be useful to reproduce a few passages from the judgments in the Court of Appeal (*Supra*(5)) and of the *House of Lords*(6). The Court of Appeal said:

> "The Act appears to me to be an Act to regulate the administration of the pension and superannuation allowances by those in whose hands that duty is placed, and in no part is there any conferment upon the recipients of a title to claim or receive them. To put the question beyond doubt Section 30 is in these terms: 'Provided always, and be if further enacted, that nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services .... ." Words could not be more explicit. An attempt was made to suggest that the use of the

word "absolute" left it possible that a conditional right remained to the civil servants, but I cannot accept that view. In my judgement the word is used so that a right in any form may be negativated. The Section destroys the possibility of a claim of legal right".

In view of the above the petitioner has no absolute right for a pension or a legal right; and as such it may not be necessary to go into the preliminary objection. Nevertheless we are of the view that the petitioner though he has a grievance cannot maintain this application since the facts contested in this application have already been determined by the Court of Appeal in C.A. 785/2001. One cannot keep on reagitating the same issue over and over again by introducing the case of another person namely 'Angihamy' in the manner disclosed by the petitioner in his application to get over the difficulty.

In C.A. 758/2001 .... It was held,

In terms of Section 2(1) cf the Minute of Pensions a minimum period has been prescribed, and a person would not be entitled or eligible for the payment of pensions unless he has served 120 months or ten years. Clearly on the facts referred to above the petitioner is not entitled to a pension in terms of this provision contained in the Minute on Pensions.

It has been argued by Counsel appearing for the petitioner that the payment of this pension was recommended by the Director of Pensions who has made this recommendation of payment in terms of and under Section 20(a) of the said Minute of Pensions. This Section is relevant only to a public servant who at the time of retirement was entitled to a pension, but due to an interruption of service he becomes not entitled to the payment of the complete pension. Where the minimum period has not been covered for the payment of pensions, his prior service could be added, even though he was daily paid or held a temporary monthly paid or was a permanent non-pensionable monthly paid employee. This situation has not covered the present application of the petitioner.

The above extract from the judgment is a very comprehensive answer to the entire issue even if one were to argue that the petitioner has a legal right. I need not consider every limb of the

preliminary objection and would also accept the position of the respondents of an inordinate delay in the present application which would disentitled the petitioner for relief under writ jurisdiction since over the years a very long lapse of time is apparent from the date of retirement of the petitioner. (1988) Inordinate delay would disentitle the petitioner of relief by way of a prerogative Writ. 78 NLR 35, 77 NLR 313, 71 NLR 356.

In all the above circumstances we reject and dismiss the petitioner's application for relief for a *Writ of Mandamus*. However we are not inclined to make an order for costs

EKANAYAKE, J. (P/CA) – I agree.

Application dismissed.

METAL PACKING LTD. AND ANOTHER
v
SAMPATH BANK LTD.

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 325/2006
DC COLOMBO 1143/DR
MARCH 19, 2007

Debt Recovery (Special Provisions) Act – No. 2 of 1990 – Sections 6 2(a), 6 2(b) and 22 – Amended by Act No.9 of 1994 – Should the plaintiff affirm in the affidavit that the sum is "lawfully due"? Justly due? Failure to reply business letters?

The District Court after inquiry ordered the respondents to deposit 1/3 of the principal amount. The objection that in the affidavit there is no averment that the amount is "lawfully due", was rejected as the Court held that on the face of the plaint and the affidavit the amounts claimed were "lawfully due".

On leave being sought,
It was contended that the law amended – Act No. 9 of 1994 making it obligatory to annex to the plaint an affidavit affirming that the money is "lawfully due" and that the affidavit filed does not contain the word "lawfully due".

Held:

(1) The defendant did not disclose a defence against the claim in the plaint. The defence is mainly confined to technical objections to the regularity of the procedure. The defendants have merely denied the plaintiff's case. Mere denial is not sufficient when they have failed to respond to the letter of demand sent by the plaintiff demanding the said sum. In business matters in certain circumstances, the failure to reply to a letter amounts to an admission of a claim made therein.

Per Eric Basnayake, J.

"The term justly due was interpreted in *Ramanayake* v *Sampath Bank*, where the Court held that the failure to aver in the affidavit that the amount is 'justly due' is not a fatal defect, if the affidavit shows that the amount is rightly due and properly due and hence that is only a technical objection which should not be allowed to prevail."

(2) The Courts have to be satisfied that the contents of the affidavit disclose a defence against the claim made by the plaintiff which is *prima facie* sustainable.

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Cases referred to:

(1) *Ramanayake* v *Sampath Bank* 1993 1 Sri LR 149.

(2) *Seneviratne and Others* v *Lanka Orix Leasing Company Ltd.* 2006 1 Sri LR 230.

(3) *People's Bank* v *Lanka Queen International Pvt. Ltd.* 1 Sri LR 233.

(4) *Car Mart and another* v *Pan Asia Bank Ltd.* 2004 3 Sri LR 56.

(5) *National Development Bank* v *Chrys Tea (Pvt) Ltd. and Another* 2002 2 Sri LR 2006.

(6) *Saravanamuttu* v *De Mel* 49 NLR 429.

M.A. Sumanthiran with *Nigel Bartholomeusz* for defendant-petitioner-petitioner.

P. Wickremasekera for plaintiff-respondent-respondent.

June 2, 2008

ERIC BASNAYAKE, J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) filed this action in the District Court of Colombo against the defendant-petitioner-petitioner (hereinafter referred to as the 1st and the 2nd defendant as the case may be) under the Debt

Recovery (Special Provisions) Act as amended to recover *inter alia* a sum of Rs. 12,851,301.30 together with interest amounting to Rs. 10,911,751.93.

The 1st defendant opened an account with the plaintiff's bank to obtain a loan and subsequently obtained one. The 2nd defendant stood as surety. The 1st defendant settled part of the loan and defaulted. The plaintiff informed the 1st defendant of the amount outstanding with a breakdown (P12 and 13). Thereafter this amount was demanded. However, the defendants did not respond (P10, 11,12 and 14A). *Order nisi* was issued at the first instance to which the defendants filed papers and sought leave to defend unconditionally.

The defendants in the objections filed admitted to the fact of the 1st defendant obtaining a loan from the plaintiff. The defendants stated that a sum of Rs. 14,088,248.08 was paid to the plaintiff. The defendants do not mention the amount taken as a loan.

The court after inquiry required the defendants to deposit 1/3rd of the principal amount, namely, Rs. 4,283,767.01. The defendants are now seeking to have the order of the learned Additional District Judge set aside.

Objection

The only objection taken before this court is that the plaintiff had failed to affirm in the affidavit that the sum claimed is 'lawfully due'. The law requires an affidavit to be annexed to the plaint to the effect that the sum claimed is 'lawfully due' to the institution. The learned Counsel appearing for the defendants submitted that this failure is fatal and thus the action should be dismissed.

Section 4(1) of the Debt Recovery (Special Provisions) Act as amended by Act No. 9 of 1994 is as follows:

> 4(1) The institution suing shall on presenting the plaint **file with the plaint an affidavit to the effect that the sum claimed is lawfully due** to the institution from the defendant (emphasis added).

The learned Counsel appearing for the plaintiff had drawn the attention of court to the several paragraphs of the plaint and the

corresponding affidavit showing that the 1st defendant had obtained a loan from the plaintiff bank accepting its terms and conditions (p7) and also presenting a promissory note (P9). The statements of account reflected the amount recovered and the amount outstanding (P12 and 13). The amount outstanding was demanded (P15A and 15B) and was never disputed to have been so by the defendants. The learned Counsel submitted that the above mentioned facts would be sufficient to indicate that the sum claimed was 'lawfully due'.

Prior to the amendment (by Act No. 9 of 1994) the law stated that "the sum claimed is justly due". The term 'justly due' was interpreted in the case of *Ramanayake* v *Sampath Bank*(1) where the Court held that the failure to aver in the affidavit that the amount is 'justly due' is not a fatal defect if the affidavit shows that the amount is 'rightly due' and 'properly due' and hence that is only a technical objection which should not be allowed to prevail. The learned Additional District Judge held that on the face of the plaint and the affidavit the amounts claimed were 'lawfully due'. Hence the learned Judge rejected this submission.

Submission of the Counsel for the defendants

The learned Counsel for the defendants submitted that the law was amended after the judgment in *Ramanayake* v *Sampath Bank (supra)* thus making it obligatory to annex to the plaint an affidavit affirming that the money claimed is "lawfully due". The affidavit filed by the plaintiff does not contain the word "lawfully due" or anything to that effect.

In *Seneviratne and Another* v *Lanka Orix Leasing Company Ltd.*(2) the plaintiff instituted action upon an on demand promissory note under the Debt Recovery (Special Provisions) Act as amended by Act No. 9 of 1994 to recover a certain sum of money. The District Court directed the defendant to deposit half the amount claimed. In a leave to appeal application one of the objections taken was that the plaint and the affidavit did not contain averments to the effect that the sum claimed by the plaintiff was 'justly due'. Wimalachandra J. held that "the defendants have not dealt with the plaintiff's claim on its merits and they have solely depended on the regularity of the procedure and technical objections to the plaintiff's

action. The defendants have not disclosed a triable issue (at 237).

Like in the present case in *Seneviratne's case (supra)* too the defendants filed application against the impugned order of the learned Judge on the basis that they were entitled to unconditional leave to appear and defend. Wimalachandra, J. having followed the case of *People's Bank* v *Lanka Queen Int'l Private Ltd.*(3) held that the effect of the amended section 6(2) does not permit unconditional leave to defend the claim without furnishing security. Wimalachandra, J. quoted De Silva J's observation in the *People's Bank* case *(supra)* as follows:

> "The new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show cause. On an examination of the amendment introduced in sub-section 6(2) it is abundantly clear that the word "application" which appears in the original section has been qualified with the following words: "Upon the filing of an application for leave to appear and show cause supported by affidavit". This shows that -
>
> (a) It is mandatory for the defendant to file an application for leave to appear and show cause.
>
> (b) Such application must be supported by an affidavit which deals specifically with the plaintiff's claim and states clearly and concisely what the defence to the claim is and what facts are relied upon to support it.
>
> This section does not permit unconditional leave to defend the case as the defendant respondent has requested from the District Court. The minimum requirement according to sub-section(c) is for the furnishing of security.
>
> If the defendant satisfies (a) and (b) above then the defendant should be given an opportunity of being heard. The court will have to decide on one of the three matters specified in the above section.

They are:

(a) The court may order the defendant to pay in to court the sum mentioned in the *decree nisi*. Thus even where the requirements as stated above are complied with, the court has the power and the authority to order the defendant to pay the full sum mentioned in the *decree nisi* before permitting the defendant to appear and defend.

(b) Alternative to (a) above, the court may order the defendant to furnish security which, in the opinion of the court is reasonable and sufficient to satisfy the *decree nisi* in the event of it being made absolute. The difference between this provision and (a) above is that instead of paying the full sum mentioned in the *decree nisi*, it will be sufficient for the defendant to furnish security, such as banker's draft, and then defend the action.

(c) The third alternative is where the court is satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to security and framing of issues or otherwise permit the defendant to defend the action. Thus it is imperative that before court acts on section 6(2)(c) it has to be satisfied;

(i) with the contents of the affidavit filed by the defendant;

(ii) that the contents disclose a defence which is *prima facie* sustainable; and

(iii) determine the amount of security to be furnished by the defendant, and permit framing and recording of issues or otherwise as the court thinks fit."

In *Car Mart and Another* v *Pan Asia Bank Ltd.*(4) in a similar action where the defendant was ordered to pay 1/3rd of the amount claimed, the learned Counsel for the defendant submitted that the *decree nisi* was bad in law. He submitted that the action was not properly constituted according to the provisions of the Debt Recovery Act. He

submitted that the plaint was prepared in contravention of the provisions of section 22 of the Act. He further submitted that after the court has entered *decree nisi* for the total amount claimed by the Bank, at the end of the action the court has to either make the *decree nisi* absolute or discharge it whereby the court has no power to vary the amount.

The Court held that the proviso to section 6(3) empowers the court to vary the *decree nisi* at the end of the action. If the defendant at the end of the case satisfies court that a sum of money is not legally due from him or a sum not legally recoverable from him the court has power to make adjustments to the *decree nisi* before making it absolute. The court held that the District Court has granted leave for the defendants to appear and defend after depositing the sum ordered. Amaratunga, J. held (at 59) that "after depositing this sum it is open to the defendants to show that penal interest is included in the sum claimed."

Under section 6(2)(a) or 6(2)(b) the court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the *decree nisi.* Section 6(2)(c) is the only section which permits the court discretion to order security which would be a lesser sum than the sum mentioned in the *decree nisi* (*National Development Bank* v *Chrys Tea (Pvt) Ltd. and Another.*[5] followed in *Seneviratne and Another* v *Lanka Orix Leasing Company Ltd. (supra)*). Even under Section 6(2)(c) the court has to order security, but the court can use its discretion to determine the amount of security if the defendant discloses a defence. The courts have to be satisfied that the contents of the affidavit filed by the defendants disclose a defence against the claim made by the plaintiff which is *prima facie* sustainable (Wimalachandra J. in *Seneviratne's* case *(supra)* at 240).

The defendants did not disclose a defence against the claim made in the plaint. Like in *Seneviratne's* case in the instant case too the defendants defence is mainly confined to technical objections to the regularity of the procedure. The defendants have merely denied the plaintiff's case. "Mere denial is not sufficient when they have failed to respond to the letter of demand sent by the plaintiff demanding the said sum. In business matters, in certain circumstances, the failure to reply to a letter amounts to an admission

of a claim made therein." (*Saravanamuttu* v *De Mel*[6] followed in *Seneviratne's* case *(supra)*).

Therefore this case is without any merit. Hence this application is dismissed with costs.

WIMALACHANDRA, J. - I agree.

Application dismissed.

TEA TANG LTD.
v
KOLONNAWA URBAN COUNCIL

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 949/2005
MARCH 17, 2008
MAY 8, 2008.

Writ of Certiorari – Urban Councils Ordinance – Sections 160 and 166 – Levying of rates – Municipal Councils Ordinance Section 236, 237 and 238 – Increase of rates – Is the Ministers approval necessary to access the annual value afresh – Judicial review – Only on illegality? – Not on the basis that decision is right or wrong? – Alternate remedy?

The petitioner sought a *writ of certiorari* to quash the decision to increase the annual value of the petitioners premises in respect of the years 2003-2004-2005 and prohibiting the Urban Council from revising the annual value without the sanction of the Minister.

The petitioner contended that they submitted objections to the 2003 assessment, but before a decision was arrived at a notice of assessment for 2004 was received and the annual value and rates contained therein were same as the annual value and rates for the year 2003. The petitioner objected to the valuation, and was informed that the Valuation Department had decided not to change the 2003 valuation. It was the contention of the petitioner that the annual assessment rates for the years 2003, 2004 and 2005 are *ultra vires* sections 237 and 238 of the Municipal Councils Ordinance.

Held:

(1) The power to impose and levy rates by the 1st respondent is under section 160 of the Urban Councils Ordinance. Under Section 160(3) when the Council imposing any rate for any year resolves to levy without alteration the same rates as was in force during the preceding year the approval of the Minister is not required.

(2) Section 236 of the Municipal Councils Ordinance provides for a person aggrieved by the decision under section 235 to institute action in the District Court and the decision of the Court is subject to an appeal to the Court of Appeal (section 236 (3)). Though the petitioner has lodged an objection and the decision was conveyed to him, the petitioner has not taken any action to challenge the decision in the District Court (section 236).

(3) The Minister's approval is necessary to impose and levy a rate on the annual value of any immovable property for the 1st time (section 160 (1) Urban Councils Ordinance) but if the respondent levies without alteration the same rate as was in force during the preceding year the Minister's approval is not necessary (section 160(3)).

(4) The petitioner cannot challenge the assessment of the annual value of the petitioner's property in this application. These proceedings are judicial review proceedings and the challenge can only be on the basis of legality or illegality and not on the basis that the decision is right or wrong.

The petitioner has an effective alternate remedy provided by statute to challenge the correctness of the assessment of the annual value.

APPLICATION for a *writ of certiorari.*

Cases referred to:

1. *Best Footwear (Pvt.) Ltd. and two others* v *Aboosally, Former Minister of Labour and Vocational Training and Others* 1997 2 Sri LR 137.
2. *Jayawardena* v *Silva* 73 NLR 284.
3. *Ishak* v *Lakshman Perera, Director-General Customs and Others* 2003 3 NLR 18.
4. *Tennakoon* v *Director-General Customs and Another* 2004 1 Sri LR 53.

Manohara de Silva, PC with *A. Wijesundara* for petitioner.
Gamini Kirandage for respondent.

Cur.adv.vult.

June 16, 2008

SRISKANDARAJAH, J.

The petitioner is a company incorporated under the Companies Ordinance and has its factory and stores at the premises bearing No. 235/4 and 235/2A, Old Avissawella Road, Orugodawatte

respectively. The said premises are coming under the Municipal limits of the Kolonnawa Urban Council.

The petitioner in this application is seeking a *writ of certiorari* to quash the decision to increase the annual value of the petitioner's premises bearing the assessment Nos. 235/4, 235/4/1/1 and 235/2A Old Avissawella Road, Orugodawatte contained in the assessment notice issued in respect of year 2003, 2004 and 2005 marked as P3, P6 and P9 and a prohibition prohibiting the Urban Council from revising the annual values of the aforesaid premises without the sanction of the Minister.

The petitioner submitted that in terms of section 160 of the Urban Councils Ordinance the Urban Council is empowered to impose and levy rates and taxes on the annual value of the immovable property situated within the town and the assessment of the said rates taxes and the annual value of the property is assessed in terms of section 166 of the Urban Council Ordinance as amended. For the purposes of levying rates and taxes the Urban Council has allocated three assessment numbers for the aforesaid premises namely: No. 235/2A for Stores, No. 235/4 for the Factory and No. 235/4,1/1 for the Manager's quarters.

The petitioner submitted that the petitioner received the assessment notice sent for the year 2003 in respect of these premises on 24th March 2003. In the said notice the 1st respondent has increased the annual value of the said premises which resulted in an increase in the total rates and taxes payable on the aforesaid three premises. The petitioner submitted its objection to the said assessment on 8.04.2003. An inquiry was held on the said objection on 20th August 2003 and the petitioner tendered written submission at the conclusion of the inquiry. But before the petitioner knowing the outcome of the said inquiry, a notice of assessment for the year 2004 was received by the petitioner and the annual value and the rates contained therein were same as the annual value and the rates contained in the notice of assessment received for the year 2003. The petitioner lodged an objection to the said notice of assessment.

The petitioner was informed by the 1st respondent that the Valuation Department after considering the objection of the petitioner for the annual assessment for the year 2003 has decided not to make

any change in the assessment. The petitioner submitted that the assessment notice issued for the year 2004 and 2005 contained the same annual value.

The petitioners contended that the annual assessment made for the years 2003, 2004 and 2005 are *ultra vires* sections 237 and 238 of the Municipal Councils Ordinance.

The power to impose and levy rates by the 1st respondent Urban Council is under section 160 of the Urban Council Ordinance.

Section 160 provides as follows:

160(1) The Urban Council of a town may, subject to such limitations, qualifications, and conditions as may be prescribed by the Council, and subject to the approval of the Minister, impose and levy a rate on the annual value of any immovable property or any species of immovable property situated with the town.

(1A) in pursuance of the powers under sub-section (1), the Council may impose a higher rate on premises used for business or commercial purposes.

1AA

(2) .....

2A ....

2B ....

(3) Where the Council in imposing any rates for any year, resolves to levy without alteration the same rate as was in force during the preceding year, the approval of the Minister shall not be required for the imposition and levy of such rate.

(5) .....

The above section authorises the 1st respondent to impose and levy a rate on the annual value. Under Section 160(3) when the Council imposing any rate for any year, resolves to levy without alteration the same rate as was in force during the preceding year, the approval of the Minister is not required.

The assessment of annual value is provided in Section 166 of the Urban Council Ordinance. It provides:

166. The assessment of any immovable property for the purpose of any rate under – this Ordinance shall, with the necessary

modifications, be made in manner prescribed by section 235 of the Municipal Councils Ordinance, with respect to immovable property within Municipal limits, and all the provisions of the said section, together with those of sections 233, 242, 243 and 241, shall, with the necessary modifications, apply with respect to every such assessment made for the purposes of this Ordinance.

Provided that, pending the making of any such assessment, any valuation of any immovable property made for the purposes of the assessment tax under the Police Ordinance, or any enactment passed in amendment thereof shall be deemed to be the valuation of such property for the purpose of any rate on the annual value thereof under the Ordinance.

Section 235 of the Municipal Councils Ordinance provides:

(1) The Council shall cause to be kept a book, to be called the "Assessment Book", in which the annual value of each house, building, land, or tenement within the Municipality shall be entered every year, and shall cause to be given public notice thereof and the place where the assessment book may be inspected. [Shall not have effect in such areas as may be specified in an Order under section 2 of the Rating and Valuation Ordinance – See section 76 thereof]

(2) ....

(3) ....

(4) Such notice shall further intimate that written objections to the assessment will be received at the Municipal Office within one month from the date of service of the notice.

(5) ....

(6) ....

(7) When any objection to an assessment is disposed of the Council shall cause the decision thereon to be notified to the objector, and such decision shall be noted in the book of objections, and any necessary amendment shall be made in the assessment book.

Section 236 of the Municipal Council Ordinance provides for a person aggrieved by the decision under section 235 to institute an action in the District Court and the decision of this court is subject to

an appeal to the Court of Appeal (236(3)). The petitioner admitted that he lodged an objection for the assessment of the annual value as provided by section 235 of the Municipal Council Ordinance and the decision was communicated to him but the petitioner had not taken any action to challenge the said decision in the District Court as provided by Section 236 of the Municipal Council Ordinance.

The petitioner's main contention is that the said decision to increase the annual assessment for the year 2003, 2004 and 2005 is *ultra vires* section 237 and 238 of the Municipal Council Ordinance. Section 237 has no relevance to the 1st respondent.

The Minister's approval is necessary to impose and levy a rate on the annual value of any immovable property for the first time (Section 160(1) but if the 1st respondent levy without alteration the same rate as was in force during the preceding year the Minister's approval is not necessary (Section 160(3)). It has to be noted that the 1st respondent has not increased or varied the rate imposed on the annual value of the property. But the annual values of the said properties of the petitioner were increased after a fresh valuation of the said properties by the Valuation Department according to section 235 of the relevant Ordinance. The Minister's approval is not necessary to assess the annual value of a property a fresh (section 238 of the Municipal Council Ordinance is not applicable to the 1st respondent). The petitioner has not filed an action in the District Court challenging the decision for a fresh assessment and the determination of the annual value as provided in section 236 of the Municipal Council Ordinance hence the said assessment of the annual value of the said properties for the year 2003, 2004 and 2005 are valid. The taxes are imposed on this new annual value on the same rate (percentage) that was imposed on the previous years. Therefore the imposition of the rates for the year 2003, 2004 and 2005 by the 1st respondent on the properties of the petitioner is lawful. The petitioner cannot challenge assessment value of the petitioners property in this application for several reasons. One is that these proceedings is a judicial review proceedings and the challenge can only be on the basis of legality or illegality and not on the basis that the decision is right or wrong; *Best Footwear (Pvt) Ltd. and Two Others* v *Aboosally, former Minister of Labour and Vocational Training and Others*(1). As there is no illegality in the assessment of the annual value and the imposition of rates the petitioner cannot have and maintain this

application. The other is the petitioner has an effective alternate remedy provided by statute to challenge the correctness of the assessment of the annual value; *Jayawardena* v *Silva*[2], *Ishak* v *Lakshman Perera, Director-General of Customs and Others*[3], *Tennakoon* v *Director-General of Customs and Another*[4]. In view of these finding this court dismisses this application without costs.

Application dismissed.

ABEYSINGHE
v
COMMERCIAL BANK OF CEYLON

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 372/2003
DC COLOMBO 8273/M
DECEMBER 9, 2007

Civil Procedure Code Section 402 – Settlement – Consent judgment – Properties seized – Auction – Abatement order – When can a party seek an abatement order? – Failure to prosecute? – Execution proceedings – Ministerial acts?– Failure to reply to business letters – Presumption?

Consent judgment was entered and Court entered *decree.* As the defendant defaulted; steps were taken to seize the properties of the defendant and the properties were put up for auction.

The defendant sought an abatement order under Section 402 – which was refused by the District Judge.

On leave being sought,

Held:

(1) An order of abatement of an action can be made under Section 402 only if the plaintiff fails to prosecute the action for twelve months after the last order. After the judgment is delivered the trial is brought to a close and there is nothing to prosecute. An order for abatement could be made only if the plaintiff failed to prosecute the action, the execution proceedings are ministerial acts.

In the instant case as the matter has been concluded and the judgment and decree had been entered there are no other requirements of law to prosecute the action.

All decrees passed by Court, subject tc appeal are final between the parties and no plaintiff can thereafter be non-suited.

Held further

(2) In business matters, in certain circumstances the failure to reply to the letter amounts to an admission of a claim made therein. The silence of the letter amounts to an admission of the truth of the allegations contained in that letter.

APPLICATION for leave to appeal from an order of the District Judge of Colombo.

Cases referred to-

1. *Saravanamuttu* v *De Mel* 49 NLR 529.
2. *Pathirana* v *Induruwage* 2002 2 Sri LR 63.
3. *Babun Appu* v *Gunawardane et.al* 10 NLR 167.

D.P. Mendis PC with *N. Gunawardane* for substituted defendant-petitioner
S.A. Parathalingam PC with *S. Cooray* and *Ms. S. Parathalingam* for plaintiff-respondent.

Cur.adv.vult

May 30, 2008

WIMALACHANDRA, J.

This is an application for leave to appeal filed by the substituted defendants-petitioner (substituted defendants) from the order of the learned Additional District Judge of Colombo dated 26.9.2003. By that order the learned Additional District Judge dismissed an application made by the substituted-defendants to make an order abating the plaintiff's action.

The plaintiff-respondent instituted this action against the deceased-defendant for the recovery of monies set out in the plaint. The deceased defendant filed answer and thereafter the case was fixed for trial. When the case was taken up for trial on 19.10.1990 the parties indicated to Court a possibility of settlement. The learned Judge made order to call the case on 8.7.1991 to record the terms of settlement. Thereafter this case was called again on 26.8.1991. On that day the parties submitted to Court a consent motion containing the terms of settlement. Thereafter, the consent judgment was recorded and the Court accordingly, entered the decree.

Nevertheless, the deceased defendant defaulted in making payments in terms of the settlement thereby infringing the terms of

the consent decree. The plaintiff took steps to execute the decree and obtained a writ of execution against the deceased defendant. The writ was subsequently executed and certain properties belonging to the deceased defendant was seized and the plaintiff in order to sell the properties seized, an auction was fixed for 9.12.1994. Thereafter the deceased filed a motion in order to suspend the auction. When the matter was taken up on 5.12.1994 in order to support the said application, the deceased defendant agreed to settle the decreed sum of money due to the plaintiff. The deceased defendant again defaulted the payments and the matter was again taken up for inquiry on 5.12.1994. At the conclusion of the inquiry the Court delivered the order in favour of the plaintiff. The deceased defendant preferred an appeal against this order to the Court of Appeal. The Court of Appeal rejected the said appeal on 27.6.1996. The Special Leave to Appeal to the Supreme Court against the said order of the Court of Appeal filed by the deceased defendant was also dismissed.

Thereafter, the plaintiff filed a motion together with the said order of the Supreme Court and supported for the re-issue of the writ against the deceased defendant. The Court allowed the application and the writ was accordingly issued. The fiscal seized certain properties belonging to the deceased defendant and the plaintiff obtained the permission of Court to auction the properties seized by the fiscal. In the meantime defendant died and the Court directed the plaintiff to take steps. Meanwhile, the wife of the deceased defendant had sent the letter dated 30.6.2000 to the plaintiff along with a cheque for Rs. 537,151.97 to the plaintiff. The plaintiff by letter dated 10.7.2000 acknowledged the receipt of the said sum of Rs. 537,151.97 and informed the wife of the deceased defendant, the present 1st substituted defendant to settle the outstanding dues in D.C. Colombo cases bearing Nos. 8272/M and 8273/M. The 1st substituted defendant, who is the wife of the deceased defendant did not make any further payments in settlement of the outstanding dues to the plaintiff-bank. Thereafter the present 1st substituted defendant, the wife of the deceased defendant filed a petition in Court on 26.10.2001(P9) to have her and the children of the deceased, substituted in place and room of the deceased defendant. Along with the aforesaid application for substitution, the substituted defendants also made an application by way of a motion for an order of

abatement under Section 402 of the Civil Procedure Code. The Court fixed the matter for inquiry and the parties agreed to dispose of the inquiry by way of written submissions. The written submissions were accordingly tendered by the parties. Thereafter the learned Judge delivered the order on 26.9.2000, dismissing the application of the substituted defendants. It is against this order the substituted defendants have filed this application for leave to appeal. This Court (Court of Appeal) granted leave on 22.2.2007.

It is not in dispute that the wife of the deceased defendant who is presently the 1st substituted defendant had paid a sum of Rs. 537,151.97 to the plaintiff-bank. The plaintiff-bank by its letter dated 10.7.2000 sent under registered post, accepting the aforesaid sum of Rs. 537,151.97 had requested the 1st substituted defendant to make arrangements to settle the balance amount due to the bank. However, there is no material placed before Court to indicate that the 1st substituted defendant had replied to the said letter sent by the plaintiff-bank. In business matters, in certain circumstances, the failure to reply to a letter amounts to an admission of a claim made therein. In *Saravanamuttu* v *D Mel*[1] Dias, J. held that in business matters, if a person states in a letter to another that a certain state of facts exists, the person to whom the letter is written must reply if he does not agree with or means to dispute assertions. Otherwise the silence of the letter amounts to an admission of the truth of the allegations contained in that letter.

Section 402 of the Civil Procedure Code provides when Court may order an action to abate.

Section 402 states as follows:

> *"If a period exceeding twelve months in the case of a District Court or Family Court, or six months in a Primary Court, elapses subsequently to the date of the last entry of an order or proceeding in the record without the plaintiff taking any steps to prosecute the action where any such step is necessary, the court may pass an order that the action shall abate."*

It will be seen that an order of abatement of an action can be made under Section 402 of the Civil Procedure Code only if the plaintiff fails to prosecute the action for twelve months after the last order. That is unless the plaintiff had failed to take a step rendered

necessary by the law to prosecute his action an order of abatement cannot be entered. In the instant case judgment and the *decree* had been entered. Accordingly, the plaintiff's task of prosecuting the action is over and only the execution proceedings remains.

After the judgment is delivered the trial is brought to a close and there is nothing more to prosecute. An order for abatement can be made under Section 402 only if the plaintiff has failed to prosecute the action. The execution proceedings are ministerial acts. In the case of *Pathirana* v *Induruwage*(2), it was held that an order for abatement can be made under Section 402 only if the plaintiff has failed to take a step rendered necessary by some positive requirement of law to prosecute the plaintiff's action.

In the instant case as the case has been concluded and the judgment and *decree* had been entered there are no other requirement of law to prosecute the action.

It is to be noted that all decrees passed by the Court, subject to appeal are final between the parties and no plaintiff can thereafter be non-suited. It was held in *Baban Appu* v *Gunawardene et.al.,*(3) that a judgment is conclusive, not only as to matters actually pleaded, put in issue and tried and decided, but also as to matters which might and ought to have been pleaded, tried and decided.

In any event, it appears that as the wife of the deceased, the 1st substituted defendant had paid a sum of Rs. 537,151.97 to the plaintiff-bank as part payment due from the deceased defendant to the plaintiff. By letter dated 10.7.2000 the plaintiff-bank has informed the wife of the deceased-defendant to make early arrangements to settle the balance amount due to the bank in terms of the *decree* entered in the D.C. Colombo cases Nos. 8272/M and 8273/M. It seems to me that the plaintiff-bank had not taken steps to substitute the heirs of the deceased defendant to recover the outstanding amounts due to the bank as the bank was expecting the wife of the deceased-defendant to settle the outstanding amounts. In the meantime on 26.10.2001 the heirs of the deceased filed an application seeking to have them substituted in place and room of the deceased defendant and also filed an application to have the action abated.

The whole exercise of the substituted defendants, as it appears to me, is to deprive the plaintiff from recovering the aforesaid sums of

monies due to the plaintiff in terms of the *decree* entered in the above mentioned District Court cases.

On a consideration of the totality of the circumstances in this appeal and for the aforementioned reasons, I uphold the order of the learned Additional District Judge of Colombo. Accordingly, I dismiss the appeal with costs.

The judgment in this case will apply to CALA No. 371/2003.

Application dismissed.

BIBILE
v
BADUGE

COURT OF APPEAL
WIMALACHANDRA, J.
ERIC BASNAYAKE, J.
CALA 496/2005
DC NEGOMBO 4973/L.
JULY 2, 2007

Civil Procedure Code – Section 121 (2) – Section 175 – List of witness' documents – Plaintiffs – Special circumstances referred to in Section 175 – Witness in defendants' list ?

The instant action was filed on 13.12.1994. On 4.12.1996 and 16.7.2001 two lists of witnesses were filed on behalf of the plaintiff. The plaintiff moved for a Commission on 11.3.2001. The trial was on 1.8.2001. Commission was received by Court on 1.4.2003. Trial was taken up on 11.9.2003. After the evidence of the plaintiff was concluded a list containing the name of the Commissioner was filed on 1.02.2005. When the witness was called to give evidence objection was taken that his name was in the list filed long after commencement of the trial. The District Court upheld the objection.

On leave being sought,

Held:

The witness to be called is the Surveyor who made the plan on a Commission issued by Court. The name of the witness and the plans prepared by him were listed in the list of witnesses as well as in the list of documents filed by the defendant.

These are special circumstances referred to in Section 175 (1).

APPLICATION for leave to appeal from an order of the District Court of Negombo.

D.M.G. Dissanayake for plaintiff.

Defendant-respondent is absent and unrepresented.

Cur.adv.vult.

February 11, 2008

ERIC BASNAYAKE, J.

The plaintiff petitioner (plaintiff) is seeking to have the order of the learned Additional District Judge of Negombo dated 1.12..2005 set aside. By this order the learned District Judge had disallowed the plaintiff to call Lakshman Gunasekera Licensed Surveyor as a witness.

On 20.8.2002 the Court issued a commission at the instance of the plaintiff on Lakshman Gunasekera Licensed Surveyor. This commission was returned on 1.4.2003. The trial commenced on 11.9.2003 on which date the plaintiff began his evidence. Her evidence was concluded on 30.9.2004. A list containing the name of this witness was filed in Court on 1.2.2005 this witness was called to give evidence to which the learned Counsel appearing for the defendant objected. The learned Judge upheld the objection and refused to allow this witness to give evidence. One reason for disallowing this witness was that the list containing the name of this witness was filed long after the commencement of the trial in this case. The list was filed after the conclusion of the plaintiff's evidence. Thus depriving the defendant from asking questions based on this plan from the plaintiff.

This action was filed on 13.12.1994. Thereafter on 4.12.1996 and 16.7.2001 two lists of witnesses and documents were filed on behalf of the plaintiff. The plaintiff moved for a Commission on 11.3.2001. This case was taken up for trial on 1.8.2001. The Commission was received by Court on 1.4.2003. Thereafter the case was taken up for trial on 11.9.2003. By this time the name of this witness was not included in to the list. However the defendant named this witness in a list filed by him together with the plan No. 2088 of 23.3.2003.

Section 121 is as follows: *(1) Not reproduced.*

(2) Every party to an action shall not less than fifteen days before the date fixed for the trial of an action, file or caused to be filed in court after notice to the opposite party (a) a list of witnesses to be called by such party at the trial, and (b) Not reproduced.

Section 175 is as follows: *(1) No witness shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in Court by such party as provided by section 121.*

Provided however, that the Court may in its discretion, if special circumstances appear to it to render such a course advisable in the interest of justice, permit a witness to be examined, although such witness may have been included in such list aforesaid.

Provided also that any party to an action may be called as a witness without his name having been included in any such list.

The witness to be called is a Licensed Surveyor who made a plan on a commission issued by Court. The name of this witness and the plan prepared by him were listed in the list of witnesses as well as in the list of documents filed by the defendant. These could be considered as special circumstances referred to by the aforesaid section.

Considering the above facts I am of the view that the learned Judge had erred in disallowing this witness. Further I cannot understand why the learned Counsel appearing for the defendant objected to this witness being called after having named him in their own list. The order of the learned District Judge is therefore set aside with costs. This application is allowed.

WIMALACHANDRA, J. - I agree.

Application allowed.

RANJITH PERERA AND ANOTHER
v
DHARMADASA AND OTHERS

COURT OF APPEAL
SALAM, J.
CA 1754/2004
DC HORANA 5387/P
JANUARY 8, 2008

Partition Law 21 of 1977 – Section 48 (4), Joint statement of claim – Trial date – Registered Attorney absent – One claimant taking part in the proceedings – Sections 24, 27(2) Civil Procedure Code – Applicability – Procedural Law – Its importance – Investigation of title? – Permission to conduct his own case – Not recorded? – Fatal?

The 3rd and 4th defendants-petitioners who had jointly nominated a registered Attorney-at-law and filed a joint statement of claim sought to revise the judgment and the interlocutory decree, on the basis that, they were unrepresented at the trial, and that the trial Judge should not have put the 4th defendant-petitioner into the witness box without legal assistance and permitted him to cross examine when he had a registered attorney on record. The petitioners also allege that, there was no investigation of title, and that, there was no settlement.

Held:

(1) As long as a party to a case has an Attorney-at-law on record, it is the Attorney-at-law on record alone, who must take steps and also whom the Court permits to take steps.

When the 4th defendant-petitioner attended Court without being represented by his Attorney-at-law or a Counsel (Section 27(3)) the trial Judge should have considered him as a party having failed to appear at the trial as the Court has chosen to do so in the case of the 3rd defendant-petitioner.

Further there is no indication pointing to the 4th defendant-petitioner having sought permission of Court to cross-examine the plaintiff or to present his case in person either.

Per Abdul Salam, J.

"As far as the 4th defendant-petitioner is concerned by improperly extending the right of audience to him at the trial. the trial Judge has proceeded on the

basis that the judgment and interlocutory *decree* were entered interpartes, this procedure wrongly adopted by Court has deprived the 4th defendant-petitioner of the right to invoke Section 48 (4)".

(2) The trial Judge had recorded at the commencement of the trial that the parties had resolved the disputes and the Court has proceeded to hear evidence without points of contest, before it was so recorded the trial Judge owed a duty to explain to the 4th defendant-petitioner the manner in which the disputes have been resolved and to make a contemporaneous reference to that fact in the proceedings.

If the 4th defendant-petitioner was a party to the compromise, need for cross examination of the plaintiff by the 4th defendant-petitioner would not have arisen – this clearly shows that the 4th defendant-petitioner was not a party to the compromise recorded at the commencement of the trial.

(3) Omission to give a party to a suit an opportunity of being heard is not merely an omission of procedure but is a far more fundamental matter in that it is contrary to the rule of natural justice embodied. There has been no investigation of title.

(4) The protective character of procedural law has the effect of safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation except in accordance with the accepted rules of procedure – Dr. Amerasinghe in *Fernando* v *Fernando.*

APPLICATION in Revision from an order of the District Judge of Horana.

Cases referred to:

(1) *Seelawathie and Another* v *Jayasinghe* 1985 2 Sri LR 266.

(2) *Hameed* v *Deen and Others* 1988 2 Sri LR 1.

(3) *Fernando* v *Fernando* 1997 3 Sri LR 1.

(4) *Siriya* v *Amalee* 60 NLR 269.

(5) *Punchibanda* v *Punchibanda*

(6) *W.G. Rosaleen* v *H.B. Maryhamy* 1994 3 Sri LR 262.

Chandana Prematilaka for the 3rd and 4th defendant-petitioners.

Rohan Sahabandu with *Piyumi Gunatilaka* for the plaintiff-respondent.

Cur.adv.vult.

March 19, 2008

ABDUL SALAM, J.

The petitioners who were the 3rd and 4th defendants in the above partition action, have presently applied to revise the judgment dated 1 July 2004 and interlocutory *decree* entered thereon. They allege

that they were unrepresented at the trial and hence denied of a fair trial. Their position is that the learned trial judge erred when he proceeded to decide the action interpartes against the 4th defendant. It is averred in the petition that the learned trial judge should not have put the 4th defendant-petitioner into the witness box without legal assistance, when he had a registered attorney on record.

As a matter of law, the petitioners contend that the District Judge concluded the case on the same day it was taken up for hearing and thereby effectively shut out evidence of the 3rd and 4th defendants regarding their title and had compromised his sacred duty to investigate the title.

When unnecessary details are filtered out the factual background relevant to the revision application would appear to be uncomplicated. It involves a fundamental question of law and how pertinently it had been applied in the circumstances peculiar to the revision application.

The petitioners have jointly nominated a registered Attorney to be on record. They filed a joint statement of claim disputing the averments in the plaint. On the date the matter was set down for trial the registered Attorney of the petitioners was absent. Accordingly both petitioners were unrepresented. Yet, the 4th defendant-petitioner was present at the trial.

The learned District Judge in the course of the trial had allowed the 4th defendant to cross examine the plaintiff and also present his case in person. Thereafter he had delivered judgment to partition the land allotting certain undivided rights to the plaintiff and leaving the balance rights unallotted.

Thus, the learned District Judge had obtained the assistance of the 4th defendant to resolve the dispute by effectually making him to participate throughout the trial. The record does not indicate as to whether the 4th defendant-petitioner sought permission of Court to conduct his own case. There is no indication pointing to 4th defendant-petitioner having sought permission of Court to cross-examine the plaintiff or to present his case in person either. In the absence of any specific mention being made in proceedings to the contrary, I consider it as reasonable to assume that the learned District Judge on his own had involved the 4th defendant in the trial proceedings.

The main question that arises for determination in this matter is the applicability of section 27(2) of the Civil Procedure Code. In terms of Section 27(2) aforesaid when an appointment of a registered Attorney is made in terms of Section 27(1) of the Civil Procedure Code, such appointment shall be in force until revoked with the leave of Court and after notice to the registered Attorney by a writing signed by the client and filed in Court.

The effect of an appointment of a registered Attorney under Section 27(1) has been considered by this court on many an occasion. Suffice it would be to cite the judgment in *Seelawathie and Another* v *Jayasinghe*[1] and *Hameed* v *Deen and Others*[2] where in the former case it was authoritatively held that as long as a party to a case has an Attorney-at-law on record, it is the Attorney-at-law on record alone, who must take steps, and also whom the Court permits to take steps. It is a recognised principle in Court proceedings that when there is an Attorney-at-law appointed by a party, such party must take all steps in the case through such Attorney-at-law. Further, the established principle is that a party, who is represented by an Attorney-at-law, is not permitted to address Court in person. All the submissions on his behalf should be made through the Attorney-at-law who represents him.

The learned Counsel of the petitioners has also cited the judgment in the case of *Hameed* v *Deen (supra)* in which it was held that when there is an Attorney-at-law appointed by a party, every step in the case must be taken through such Attorney-at-law. The appointment of the Attorney-at-law under Section 25 of the Civil Procedure Code remains valid in terms of Section 27(2) until all proceedings in the action are ended or until the death or incapacity of the Attorney. The registered Attorney or Counsel instructed by him alone could act for such party except where the law expressly provides that any party in person should do any particular act.

The 4th defendant-petitioner has been suddenly called upon to cross examine the plaintiff and later to present his own case by the learned District Judge, immediately after the closure of the plaintiff's case, disregarding the fact that there was a registered Attorney on record. When the 4th defendant attended Court without being represented by his registered Attorney or a Counsel as contemplated under Section 27(3) of the Civil Procedure Code, the learned District

Judge should have considered him as a party having failed to appear at the trial, as the court had rightly chosen to do in the case of the 3rd defendant-petitioner.

It is quite significant to advert to the adverse consequences that flow from the learned judge's approach to identify the proceedings as interpartes. As far as the 4th defendant-petitioner is concerned, by improperly extending the right of audience to the 4th defendant-petitioner at the trial, the learned District Judge has proceeded on the basis that the judgment and interlocutory *decree* were entered interpartes. This procedure wrongly adopted by Court has deprived the 4th defendant petitioner of the right to invoke Section 48(4)(iv) of the Partition Act, No. 21 of 1977. Had the learned District Judge followed the provisions of the Civil Procedure Code and considered the 4th defendant-petitioner as a party who had failed to appear at the trial or as a party in default of appearance, the 4th defendant-petitioner could have legitimately exercised his rights under 48(4)(iv) of the Partition Act to obtain Special Leave of Court to invoke the jurisdiction of the original Court to amend or modify the interlocutory *decree* to such extent and in such manner as the Court could have accommodated the entitlement, if any, of the 4th defendant-petitioner.

On the contrary, the irregular procedure adopted by Court compelling the 4th defendant-petitioner to participate at the trial in person has ended up in a miscarriage of justice, in that the 4th defendant-petitioner had to forego the right conferred under 48(4)(iv) of the Partition Act.

It is of much importance to observe that the learned trial judge recorded at the commencement of the trial on 1 July 2004 that the parties have resolved the disputes and the Court proceeds to hear evidence without points of contest. Before it was so recorded the learned District Judge owed a duty to explain to the 4th defendant-petitioner the manner in which the disputes have been resolved and to make a contemporaneous reference to that fact in the proceedings. As there is no such reference found in the proceedings, I am not disposed to take it for granted that the learned District Judge has either consulted the 4th defendant-petitioner regarding the settlement or enlightened him as to its consequences. Had the learned District Judge taken the precaution to ensure that the 4th

defendant-petitioner also would be bound by such a settlement, he would have specifically referred to the 4th defendant as a party to the settlement.

On the other hand, if the 4th defendant-petitioner was a party to the compromise, the need for cross-examination of the plaintiff by the 4th defendant-petitioner would not have arisen. Above all, when the 4th defendant-petitioner had purportedly cross-examined the plaintiff posing only one question suggesting that Johanis was entitled to only 1/6th share and not 1/2 as claimed by the plaintiff, the learned trial judge ought to have realized that the 4th defendant-petitioner was trying to resile from the compromise. Without clarifying this from the 4th defendant-petitioner as to whether he was trying to pull himself out from the compromise the learned Trial Judge appears to have simply raised two points of contest and answered the same on the same day. This clearly shows that the 4th defendant-petitioner was not a party to the compromise reached at the commencement of the trial and the learned District Judge in fact should have raised points of contest at the commencement of the trial itself.

The learned District Judge does not appear to have taken into account the miserable plight of the 4th defendant-petitioner who should not have been held responsible for the dereliction of duty of the registered Attorney. The 4th defendant-petitioner was in his eightieth year when he was suddenly called upon to cross-examine a witness in a contested partition case and to present his case too. Even a lawyer with experience cannot be expected to discharge his functions satisfactorily if he is confronted with the difficulty which the 4th defendant-petitioner had to face.

The learned District Judge possibly in his enthusiasm to dispose of the case without delay has lost sight of the importance of the law of Civil Procedure. As has been stated by Dr. Amerasinghe, J. in *Fernando* v *Fernando*(3) **"civil procedural laws represent the orderly, regular and public functioning of the legal machinery and the operation of the due process of law. In this sense the protective character of procedural law has the effect of safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation except in accordance with the accepted rules of procedure"**.

Although recklessness on the part of the 4th defendant-petitioner and dereliction of duty by the registered Attorney cannot be denied, yet the irregular procedure adopted by the learned Judge is totally unwarranted and unjustifiable.

In *Siriya* v *Amalee et.al*[4] it was held that an omission to give a party to a suit an opportunity of being heard is not merely an omission of procedure but is a far more fundamental matter in that it is contrary to the rule of natural justice embodied in the *maxim audi alteram partem.*

In the result the manner in which title has been investigated by Court does not appear to be consistent with the law that is required to be followed in the investigation of such title.

In the circumstances it is my view the irregular procedure followed by the learned District Judge has ended up in a miscarriage of justice which transcends the bounds of procedural error.

It is appropriate to quote the relevant passage from the judgment of Soertsz, J. *Punchibanda* v *Punchibanda*[5] that has been cited with approval by his Lordship S.N. Silva, J. (as he then was) in *W.G. Rosalin* v *H.B. Maryhamy*[6] which reads as follows:

> "This Court has often pointed out that when settlements, adjustments, admissions, &c., are reached or made, their nature should be explained clearly to the parties, and their signatures or thumb impressions should be obtained. The consequence of this obvious precaution not being taken is that this Court has its work unduly increased by wasteful appeals and by applications being made for revision or *restitutio in integrum.* One almost receives the impression that once a settlement is adumbrated, those concerned, in their eagerness to accomplish it, refrain from probing the matter thoroughly lest the settlement fall through. This is a very unsatisfactory state of things and it is to be hoped that a greater degree of responsibility will be shown on these matters by both judges and lawyers".

For the foregoing reasons it is my view that the application of 4th defendant-petitioner should be allowed. The 3rd defendant-petitioner has no ground to challenge the propriety of the

impugned judgment by way of revision as he is entitled to invoke section 48(4)(iv) of the Partition Act. Hence the application of the 3rd defendant-petitioner is refused.

The judgment and interlocutory *decree* are accordingly set-aside and the learned District Judge is directed to investigate the title afresh, affording both the 3rd and 4th defendant petitioners an opportunity to participate at the trial.

I make no order as to costs.

Application allowed.

Judgment/interlocutory decree set aside.
Trial to proceed.

SOMAWATHIE
v
WIMALARATNE

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.
DISSANAYAKE, J.
AMARATUNGA, J.
S.C. APPEAL NO. 6/2001
H.C. BALAPITIYA 114/2000
M.C. ELPITIYA 54578
NOVEMBER 3, 2006

Maintenance Ordinance (Cap. 91) Section 2 – Duty cast on the husband by Section 2 to provide maintenance for his wife – If the alleged marriage is invalid by reason of some legal impediment on the part of the husband, can the innocent party (wife) claim maintenance against her husband under Section 2 of the Maintenance Ordinance or under common law? – Putative Marriage – Action for damages for injuria?

The appellant, claiming to be the wife of the respondent filed an application under and in terms of section 2 of the Maintenance Ordinance in the Magistrate's Court to obtain maintenance from her husband, the respondent. The respondent admitted his first marriage to one Anulawathie and had further admitted that he had been convicted of bigamy. It was common ground between the parties that at the time the respondent got married to the appellant he had been already married to said Anulawathie. The Magistrate Court granted the reliefs prayed for by the applicant – The High Court allowed the appeal of the respondent. The main issue before the

Supreme Court was whether an innocent party to a bigamous marriage can claim maintenance against her spouse who had contracted a bigamous marriage.

Held:

(1) The duty cast on the husband by section 2 of the Maintenance Ordinance is to provide only for his wife, upon proof of the husband's failure or neglect to maintain his wife.

(2) If the alleged marriage of an applicant for maintenance is invalid by reason of legal impediment which makes the woman stand in some lesser relationship to the alleged husband than his "wife", it is plain from the wording of section 2 of the Maintenance Ordinance that she is not entitled to claim maintenance for herself.

(3) Magistrate had to decide whether there was a valid marriage between the respondent and the appellant creating the husband and wife relationship between them with all its attendant duties and obligations.

(4) Since a bigamous marriage which was void *ab-initio* did not create any legal result, a Court was not entitled to rely on an admission made by the respondent to invest the respondent's second marriage with any validity it did not and could not have in law.

(5) The word "wife" used in section 2 of the Maintenance Ordinance does not empower a Court to interpret that word to include a person who stands in a lesser relationship than that of a wife. Hence the appellant has no right to come under section 2 of the Maintenance Ordinance to obtain maintenance for herself. Her remedy, if at all, would be an action for damages for *injuria* or breach of promise against deceiver.

per Gamini Amaratunga, J.

"A putative marriage means a marriage contracted in good faith and in ignorance (on one or both sides) that impediments exist which render it unlawful" ...

"The rule that a marriage which is null and void *ab-initio* has none of the consequences of a valid marriage, is subject to two exceptions in the case of a putative marriage. The first exception is that children of a putative marriage are considered legitimate and a Court is entitled to declare this status. This exception has received judicial recognition. The other exception is that if the parties to a putative marriage have not entered into an ante nuptial contract, it must be presumed that they intended to be married in community of property."

APPEAL from the judgment of the High Court of Balapitiya.

Cases referred to:

1) *Subramaniam* v *Pakkiyaladchumy* 55 NLR 87.
2) *Fernando* v *Fernando* 70 NLR 534.
3) *Ngobeni* v *Gibitwayo*, 1946(2) PH B 58 W.
4) *Locke* v *Locke*, 1951(1) SA 132 N.
5) *Vlook* v *Vlook* 1953(1) SA 485 W.
6) *Morrison* v *Morrison*, 1978(2) SA 185C.

Cur.adv.vult.

November 03, 2006

GAMINI AMARATUNGA, J.

This is an appeal, with leave granted by the High Court, against the judgment of the learned High Court Judge of Balapitiya allowing the respondent-appellant-respondent's (the respondent) appeal against the Order of the learned Magistrate of Elpitiya directing him to pay Rs. 1500/- per month to the applicant-respondent-appellant (the appellant) as maintenance.

At the time this appeal was argued the learned Counsel for the respondent raised a preliminary objection with regard to the validity of this appeal. This objection was based on the judgment delivered by this Court on 15.6.2006 in SC Appeal No. 44 of 2005, where this Court held that where leave to appeal has been granted by the High Court, the petition of appeal has to be filed in this Court in terms of Rule 28(2) of the Supreme Court Rules of 1990. In the present case, there is no separate petition of appeal and the only petition available in the record is the petition filed in the High Court to obtain leave to appeal to this Court. The learned Counsel for the appellant had no prior notice of the preliminary objection. This Court therefore permitted her to file additional written submissions on the preliminary objection. Since both parties had earlier filed their written submissions on the merits of the appeal, the Court heard arguments of both learned Counsel on the merits of the appeal and decided to consider the merits of the appeal and the preliminary objection together. I therefore decided to consider the merits of the appeal before I deal with the preliminary objection.

The appellant, claiming to be the wife of the respondent, filed an application, dated 22.4.1994, in the Magistrates Court in terms of section 2 of the Maintenance Ordinance (Cap. 91) to obtain maintenance for herself from her husband, who is the present respondent. The respondent who appeared in the Magistrates Court to answer the claim for maintenance admitted his marriage to the appellant. Since the appellant was not prepared to accept the respondent's invitation to come back to live with him, the learned Magistrate had held an inquiry.

The appellant's evidence was that she was earlier married to one Ariyaratna who had later disappeared during the reign of terror that existed in the country in 1989. Thereafter on 26.3.1993 she married the

respondent before the Registrar of marriages and lived in the respondent's house as his wife. About eight months later she came to know that the appellant had earlier married one Anulawathie. Later the respondent started to ill-treat her and assault her. Due to this harassment she left the appellant's home.

In his evidence the respondent had admitted his first marriage to Anulawathie which he had contracted under the name of Geeganage Wimal Senadheera. He had further stated that the said Anulawathie had filed a maintenance case against him and that he had been convicted of bigamy.

At the inquiry, it was the common ground between both parties that at the time of the respondent's marriage to the appellant, the former had already married one Anulawathie. In fact the certificate of that marriage was before Court marked P1.

In terms of section 2 of the Maintenance Ordinance, a Magistrate is empowered to order the husband to pay maintenance upon proof of the husband's failure or neglect to maintain his wife. The duty cast on the husband by section 2 is to provide only for his "wife". If the alleged marriage of an applicant for maintenance is invalid by reason of some legal impediment which makes the woman stand in some lesser relationship to the alleged husband than his 'wife', it is plain from the wording of section 2 that she is not entitled in law to claim maintenance for herself. In *Subramaniam* v *Pakkiyaladchumy*(1), it has been held that a woman, who contracts a second marriage before the *decree nisi* entered in divorce proceedings is made absolute, cannot claim maintenance from the person with whom she contracted the second marriage.

Section 18 of the General Marriages Ordinance (Cap 112) enacts that:

> *"No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void."*

The existence of a prior marriage is an absolute impediment to a second valid monogamous marriage contemplated by the General Marriages Ordinance. There was no evidence before the Magistrate – or even at least a suggestion – that at the time of the respondent's marriage to the appellant, his first wife Anulawathie was dead or that the first marriage had been dissolved by the decree of a competent Court.

Thus the legal position apparent from the evidence before the Magistrate was that the respondent's marriage to the appellant, being a bigamous marriage, was void *ab inito*.

The learned Magistrate had not considered this aspect at all. Instead he had relied on the respondent's admission of his 'marriage' to the appellant as a sufficient basis to hold that a husband and wife relationship existed between the parties. The learned Magistrate had held that having first admitted the second marriage, the respondent was not entitled to subsequently contend that the second marriage was invalid. To support his view the learned Magistrate had relied on the doctrine of approbation and reprobation, which is also expressed in the Latin *maxim Allegans contraria non est audiendus*;

He is not to be heard who alleged things contradictory of each other. The relationship of husband and wife is a legal status acquired by the parties when there is a valid marriage. On the evidence available before him the learned Magistrate had to decide whether there was a valid marriage between the respondent and the appellant creating the husband and wife relationship between them with all its attendant duties and obligations. This was a question of law. Since the bigamous marriage which was void *ab initio* did not create any legal result, a Court was not entitled to rely on an admission made by the respondent to invest the respondent's second marriage with any validity it did not and could not have in law. The respondent's so-called admission, when viewed in the light of the evidence of his previous marriage, was nothing more than an admission that he purported to marry the appellant. Its legal effect was a question of law that should have been decided by Court. The learned Magistrate's failure to address his mind to this vital question of law and his decision to act solely upon the so-called admission disregarding the evidence of the respondent's previous marriage completely vitiated his finding that the appellant was entitled to claim maintenance from the respondent.

The learned High Court Judge, having considered the evidence of the respondent's previous marriage has rightly held that the appellant was not the 'legal wife' of the respondent and accordingly set aside the learned Magistrate's order directing the present respondent to pay maintenance to the appellant.

When the present appellant filed a petition in the High Court seeking leave of the High Court to prefer an appeal to this Court, the learned

High Court Judge had directed to forward the record to this Court. The record does not indicate the questions upon which leave to appeal was granted. *When leave to appeal to this Court is granted, it is the duty of every High Court Judge to clearly and precisely specify the questions of law upon which leave to appeal is granted.* In the absence of any such questions specified by the learned Judge, this Court has to presume that leave to appeal had been granted upon all five questions set out in the appellant's application for leave to appeal. Those questions are as follows.

1. Was the interpretation given to section 2 of Act No. 37 of 1999 correct in law?
2. Did the High Court err in interpreting the word "spouse"?
3. Was the decision to set aside the order of the Magistrate under section 2 of the Maintenance Ordinance correct in law?
4. Was the interpretation given by the High Court to the word cruelty correct in law?
5. Did the High Court err in considering the weight to be attached to the admission of marriage?

Question No. 1 specifically refers to section 2 of the Maintenance Act No. 37 of 1999 and question No. 2 refers to the word 'spouse' appearing in section 2 of the said Act in place of the word 'wife' used in section 2 of the Maintenance Ordinance repealed by the Maintenance Act No. 37 of 1999. The appellant's application for maintenance had been filed under section 2 of the Maintenance Ordinance. Whilst the inquiry was pending in the Magistrate's Court, the new Maintenance Act had come into operation. The new Act, by section 19, repealed the Maintenance Ordinance. Section 20 of the new Act provides that all proceedings instituted under the Maintenance Ordinance and all appeals from orders made under that Ordinance and pending on the day preceding the commencement of the new Act shall be heard and disposed of as though the Maintenance Ordinance had not been repealed. In view of this provision this appeal has to be decided according to the provisions of the repealed Maintenance Ordinance and as such the interpretation of section 2 of the Maintenance Act No. 37 of 1999 and the word 'spouse' appearing in section 2 thereof has no relevance to this appeal. I therefore reject questions No. 1 and 2 as they are irrelevant.

In his judgment the learned High Court Judge had not specifically dealt with the weight to be attached to the respondent's admission of his marriage to the appellant but the learned Judge's conclusion that in view of the respondent's first marriage, there was no valid marriage between him and the appellant clearly shows that the learned Judge did not attach any significance to that bare admission which had no legal basis. I have already pointed out that the respondent's so-called admission had no relevance to the question of law to be decided by the Magistrate. I accordingly answer question No. 5 in the negative.

In considering question No. 3, it is pertinent to state that at the argument before us, the learned Counsel for the appellant did not contend or seek to argue that the respondent's marriage to the appellant was valid. The learned Counsel for the appellant sought to invoke the aid of the common law concept of putative marriage to salvage the case of the appellant.

A putative marriage means a marriage contracted in good faith and in ignorance (on one or both sides) that impediments exist which render it unlawful. *Black's Law Dictionary* 5th Edition. "The putative marriage is a device ad *misericordiam* to tamper with the chill wind of invalidity to a man or a woman who has entered into a marriage relationship in *bona fide* ignorance of a legal impediment such as a subsisting marriage or a relationship within the prohibited degree." *Hahlo, The South African Law of Husband and Wife,* 2nd Edition, Page 483. The rule that a marriage which is null and void *ab initio* has none of the consequences of a valid marriage, is subject to two exceptions in the case of a putative marriage. The first exception is that the children of a putative marriage are considered legitimate and a Court is entitled to declare this status. This exception has received Judicial recognition in Sri Lanka. See *Fernando* v *Fernando.*(2) The other exception is that if the parties to a putative marriage have not entered into an antenuptial contract of property. This exception has no application in Sri Lanka where the system of community of property is not longer a part of the law relating to married persons' property.

Apart from the above exceptions, there is no exception recognised by common law which enables a Court to regard the innocent female party to a putative marriage as a wife for the purpose of imposing or enforcing a duty of support. Thus the concept of putative marriage cannot be of any avail to the appellant under the present state of the

common law. In addition, the clear and unambiguous word 'wife' used in section 2 of the Maintenance Ordinance does not empower a Court to interpret that word to include a person who stands in a lesser relationship than that of a wife. Accordingly the appellant has no legal right to come under section 2 of the Maintenance Ordinance to obtain maintenance for herself.

The learned Counsel for the appellant submitted that if an obligation to maintain the appellant is not imposed on the respondent he would stand to benefit from his own wrongdoing. However much this Court may dislike the insensitivity and moral depravity of the respondent and the absence of any regard for the consequences of his behavior to the appellant this Court is unable to grant any relief to the appellant in these proceedings. Her remedy, if at all, would be an action for damages for *injuria*. As pointed out by Hahlo, citing South African and English authorities, "if one of the parties took advantage of the other's innocence by inducing him (or her) to enter into a marriage which the deceiver knew, but the deceived did not know to be null and void, the innocent party may have an action for damages for deceit (fraud), *injuria* or breach of promise against the deceiver." *South African Law of Husband and Wife* 5th Edition, page 107.

For the reasons set out above I answer question No. 3 in the affirmative. In view of the conclusion reached on question No. 3, the necessity to consider question No. 4 and the preliminary objection raised on behalf of the respondent does not arise. I accordingly dismiss this appeal without costs.

Hon. Tilakawardane, J. has written a separate judgment dismissing this appeal for the reasons stated therein.

DISSANAYAKE, J. - I agree.

Appeal dismissed.

SHIRANEE TILAKAWARDANE, J.

This appeal is against the judgment of the learned High Court Judge of Balapitiya allowing the respondent-appellant-respondent's (the respondent) Appeal against the order of the learned Magistrate of Elpitiya directing to pay Rs. 1500/- a month as maintenance to the applicant-respondent-appellant.

The appellant filled an application under Section 2 of the Maintenance Ordinance No. 19 of 1889 as amended by the

Maintenance Act No. 37 of 1999 for maintenance, against her husband, the present respondent, in application dated 22.04.1994 before the Magistrates Court. The appellant claims that she married the respondent before the Registrar of Marriages, on 26.03.1993, and lived in the respondent's house as his wife. About eight months later she came to know that the respondent has previously married one Anulawathie. Later, the appellant was forced to leave the respondent's home due to the ill treatment meted out to her by the respondent.

The respondent has admitted his marriage to the appellant during the subsistence of his previous marriage to Anulawathie, on account of which he has pleaded guilty to the charge of bigamy. The respondent relies on his conviction for the crime of bigamy to contest the claim for maintenance brought by the appellant. The respondent claims that since his marriage to the appellant has been rendered void by his bigamous conduct, no claim for spousal maintenance could be validly raised against him.

The primary issue before this Court concerns whether an innocent party to a bigamous marriage can claim maintenance against his or her purported spouse under either statute or common law; and what impact does the nullity of a marriage have on a claim for maintenance or support by either party? Analysis of the general principles governing the effect of a void marriage as well as certain common law exceptions thereto would be relevant to the determination of the aforesaid issue.

There is clarity under both statute as well as common law that, the existence of a prior subsisting marriage of either party renders the second marriage void *ab initio*. Section 18 of the General Marriage Ordinance provides that "no marriage shall be valid where either of the parties thereto shall have contracted a prior marriage, which shall not have been legally dissolved or declared void."

A void marriage does not entail any of the legal consequences of a marriage. There are no reciprocal rights and duties of support arising out of such a marriage. The nullity of a marriage is absolute and it may be relied on by either party or by any interested third party even after the death of one or both parties. (Vide, H.R. Hahlo, *The South African Law of Husband and Wife*, 4th Edition, Page 488).

The Maintenance Ordinance, under which the present claim has been filed, contemplates the provision of maintenance to a "wife" claiming under a valid marriage. Neither the Ordinance nor the Maintenance Act of 1999 contemplates the payment of maintenance to a person who stands in a relationship other than that of a wife or spouse. Where the term "wife" or 'spouse" has been used with clarity and without ambiguity by the legislature, this court is unable to expand its meaning in order to include those claiming under a void marriage, who do not share a spousal relationship with the person against whom, a claim is made.

Common law does provide a notable exception to the general principle that a void marriage is of no legal effect. Where one or both parties to the marriage are innocent and have entered into the marriage with *bona fide* intent, the court may declare that at the instance of the innocent party certain consequences of a valid marriage may attach to it under the principle of *matrimonium putativum*. (Vide, H.R. Hahlo, *The South African Law of Husband and Wife*, 4th Edition, Page 488).

The court has no power to validate an invalid marriage, but under the circumstances certain consequences of a valid marriage would attach to a putative marriage. However these consequences are limited in that they pertain only to the legitimacy of children born into such a marriage and the presumption regarding community of property, the latter of which has no application in Sri Lanka. Prevalent jurisprudence does not support the extension of consequences, under a putative marriage to permit the granting of maintenance to an innocent party. (Vide, H.R. Hahlo, *The South African Law of Husband and Wife*, 4th Edition, Page 496).

The position appears to be different under English Law. Section 23 of the Matrimonial Causes Act, 1973 provides that where a court is called upon to grant a decree of nullity of marriage, the court may, in its discretion, make financial provisions for either party to the marriage.

The position of the innocent party to a bigamous marriage has also been examined under the common law. The decisions centered largely on whether the guilty party could sue for nullity of the marriage (*Ngobeni* v *Gibitwayo*[3] or in anyway gain advantage from his or her wrongful act, (*Locke* v *Locke*[4]). Courts have

concluded that a person guilty of bigamous conduct is not precluded from suing for the nullity of his or her second marriage (*Vlook* v *Vlook* 1953(5); *Morrison* v *Morrison*(6)). However, these decisions were concerned primarily with the determination of the status of the marriage, and not regarding the avoidance of legal duties and liabilities flowing to the guilty party therefrom.

Regrettably though, Sri Lankan statute law at present does not provide for the protection and maintenance of the innocent party to a bigamous marriage. Neither does common law principle of putative marriage come to her rescue given its limited scope. The Appellant in the instant case therefore is compelled to seek remedy in damages on ground of fraud, *injuria* or breach of promise, as no remedy in her favour is available to her under statute or common law.

The law as it stands, only penalizes the bigamous conduct and fails to take account of the plight of the victim spouse, namely the innocent spouse in such situations. Not only does it fail to provide substantive protection for the victim spouse, it also supplies the guilty party with advantageous gain by such person's wrongful act. This anomaly militates against the principles of justice and equity as well as fundamental principle of legal jurisprudence that no man or woman can benefit from his or her own wrong. It is imperative that the Law Commission of Sri Lanka, in its review of marriage laws in Sri Lanka, takes account of this anomalous situation and undertakes effective steps to rectify the same at the earliest, in order to avoid a further miscarriage of justice.

Appeal is accordingly dismissed. No costs.

Appeal dismissed.

MOHAMED AZWAR HASSIM
v
SAMPATH BANK LIMITED

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
FERNANDO, J. AND
AMARATUNGA, J.
S.C. (C.H.C.) APPEAL NO. 17/2000
H.C. (CIVIL) 176/96(1)
MARCH 13, 2007

Mortgage Act – Section 85(1) – A credit agency could sell any of the movables in the possession and custody of such agency – Section 85(2) and 85(3) – Restrictions that should be taken into consideration prior to such sale – Section 86 – Notice of demand of payment prior to the exercise of power of sale.

The respondent-Bank filed action in the High Court (Civil) against the appellant for the recovery of a sum of Rs. 3,280,209/80 together with interest until payment in full and a sum of Rs. 445,366/65 together with interest thereon being the amounts claimed to be due to the respondent-Bank from the Appellants respectively on account allegedly of a pledge loan granted to the appellants and an overdrawn balance in the current account of the appellants.

The High Court held in favour of the respondent-Bank and granted the respondent Bank the reliefs prayed for and dismissed the defendant-appellants claim in reconvention.

When this matter was taken up for hearing it was agreed that the appeal would be considered on the following ground:-

> "Was the learned judge of the High Court right in holding that the respondent-Bank was acting in compliance with the provisions of section 85(2) of the Mortgage Act, in not proceeding to sell the pledged goods and seeking an order of Court to sell, without considering the effect of clause 11 of the "Pledge Agreement" which confers on the respondent-Bank the right to sell the pledged property.".

Held:

(1) According to section 85(1) of the Mortgage Act, it is apparent that, a credit agency could sell any of the movables in the possession and custody of such agency. The restrictions that should be taken into consideration, prior to such a sale have been referred to in sections 85(2) and 85(3) of the Act.

(2) On an examination of sections 85(1), 85(2) and 85(3) of the Mortgage Act, it is quite clear that mortgagee, if it is an approved credit agency could sell property which is in its possession, if provision is contained in the instrument of mortgage or in an agreement between the parties, which refers to section 85(2) of the Mortgage Act and empowers the agency to exercise the power of sale.

(3) The basic requirement in terms of section 85 of the Mortgage Act is the availability of the instrument of mortgage or an agreement between the parties with reference to section 85(2) of the Mortgage Act and due notice being given to the mortgagor by way of a notice of demand granting him one month time to make a payment to the relevant credit agency.

(4) It is the duty of the party, who is entitled to claim damages to take all reasonable steps to minimise the loss consequent to breach of contract.

Cases referred to:

(1) *Compania Naveira Maropan S.A.*v *Bowaters Lloyd Pulp and Paper Mills Ltd.* (1955) 2 Q.B. 68 at 98-99.

(2) *British Westinghouse Electric Co.* v *Underground Electric Railways* (1912) A.C. 673).

(3) *Noorbhai and Co.* v *Karuppan Chetty* (1924) 26 NLR 161.

(4) *Wimalasekera* v *Parakrama Sundra Co-operative Agricultural Production and Sales Society Ltd.* (1955) 58 NLR 298.

(5) *Town Council, Chavakachcheri* v *Devabalan* (1962) 68 NLR 10.

APPEAL from the judgment of the Provincial High Court of the Western Province holden in Colombo.

Faiz Musthapha, P.C. with *N.M. Saheid and Faizer Markar* for defendant-appellants.

Chanaka de Silva for plaintiff-respondent.

Cur.adv.vult.

July 28, 2008

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Provincial High Court of the Western Province holden in Colombo (hereinafter referred to as the High Court) dated 22.09.2000. By that judgment learned Judge of the High Court held in favour of the plaintiff-respondent

(hereinafter referred to as the respondent) and granted the respondent the reliefs prayed for and dismissed the defendants-appellants (hereinafter referred to as the appellants) claim in reconvention. The appellants appealed to this Court.

The facts of this appeal as submitted by the appellants, *albeit* brief, are as follows:

The respondent filed action in the High Court against the appellants for the recovery of,

a) a sum of Rs. 3,280,289/58 together with interest on the capital sum of Rs. 2,582,406/- at 28% per annum from 01.09.1993 until payment in full and turnover tax and defence levy on such interest at 5% and,

b) a sum of Rs. 445,366/65 together with interest thereon at 28% per annum for 01.09.1993 until payment in full and turnover tax and defence levy on such interest at 5%,

being the amounts claimed to be due to the respondent from the appellants respectively on account allegedly of a pledge loan granted to the appellants and an overdrawn balance in the current account of the appellants.

The appellants in their answer prayed for a dismissal of the respondent's action and claimed in reconvention a sum of Rs.222,351/- with legal interest. The position taken up by the appellants were that,

a) by reason of the fact that the goods imported are pledged with the respondent and the respondent is in possession thereof, the respondent cannot have and maintain this action;

b) the respondent has wrongly paid an additional sum exceeding Rs. 300,000/- to the Sri Lanka Customs without reference to the appellants.

When this matter was taken up for hearing, it was agreed that the appeal would be considered mainly on the following grounds:

> "Was the learned Judge of the High Court right in holding that the respondent was acting in compliance with the provisions of Section 85(2) of the Mortgage Act, in not proceeding to sell the pledged goods and seeking an order of Court to sell, without considering the effect of

clause 11 of the Pledge Agreement (P4) which confer on the respondent the right to sell the pledged property?"

The contention of the learned President's Counsel for the appellants was that the High Court had failed to understand and appreciate the scope and ambit of Section 85(2) of the Mortgage Act and the respondent had acted unreasonably and/or negligently and/or contrary to law in not selling the goods pledged to it by the appellants even though such goods were in the custody and possession of the respondent and that the respondent was entitled in law to sell the goods and set off the proceeds against the amounts due.

Learned Counsel for the respondent submitted that there are only two considerations for the Court to decide on the defence taken up by the appellants. Those defences included the following:

a) whether the respondent was under an obligation to immediately sell the goods and mitigate losses; and

b) whether the respondent has the right to recover the sums paid as revalued customs duty since the respondent did not obtain the specific approval of the appellants to make such payments.

Learned Counsel for the respondent therefore submitted that both these defences would fail on the basis of the overwhelming evidence and material before this Court.

Having stated the contentions of both learned President's Counsel for the appellants and the learned Counsel for the respondent, I would now turn to examine the question that has been raised before this Court.

The following facts were undisputed and agreed upon by the appellants and the respondent:

a) the appellants had applied for certain facilities from the respondent;

b) upon the application, the respondent entered into a Pledge Facility Agreement (P2) with the appellant for a sum of Rs. 2,500,000/- which was disbursed to the appellants;

c) under and in terms of the said Pledge Facility Agreement, the appellants executed a Promissory Note (P3) and the pledge document (P4);

d) The respondent bank took steps to clear the consigned goods, incurring related expenses;

e) the respondent bank has granted to the appellants credit facilities amounting to Rs. 2,582,406/52;

f) the respondent bank in fact expended the amounts set out in the plaint on account of the facilities granted to the appellants; and

g) the statement of accounts produced by the respondent bank in the action filed in the original Court is correct and accurate.

Accordingly, the only question that has to be considered would be as to whether the respondent was entitled in law, to sell the goods in terms of the Mortgage Act and the agreement entered into between the appellants and the respondent.

Section 85(1) is contained in Part V of the Mortgage Act, which deals with mortgages of movables and reads as follows:

> *"Where a mortgage of any corporeal movables is created in favour of an approved credit agency, it shall be lawful for the agency, subject to the provisions of sub-sections (2) and (3), to sell any of the movables subject to the mortgage which may for the time being be actually in the possession and custody of the agency.*

On a plain reading of Section 85(1) of the Mortgage Act, it is apparent that, a credit agency could sell any of the movables in the possession and custody of such agency. The restrictions that should be taken into consideration, prior to such a sale have been referred to in Sections 85(2) and 85(3) of the Act. These two Sub-sections are as follows:

> *"85(2) The power conferred on the agency by Sub-section (1) to sell any movables shall be exercised only if the instrument of mortgage or an agreement between the parties contains provision referring to this section and empowering the agency to exercise the power of sale conferred thereby, and if either of the following conditions is fulfilled,*
>
> *that is to say –*
>
> *(a) where the mortgage is created as security for the payment of any moneys stated to be payable on*

demand, if the mortgagor fails to make payment of the moneys due and payable under the mortgage within one month of the issue to him by the agency of a notice of demand in accordance with the provisions of section 86; or

(b) where the mortgage is created as security for the payment of any moneys stated to be payable on a specified or ascertainable date, if the mortgagor fails to make payment of the moneys due and payable under the mortgage within one month of the issue to him by the agency, after that date, of a notice of demand in accordance with the provisions of section 86.

(3) Every sale in exercise of the power conferred by subsection (1) shall be by public auction, and it shall be the duty of the agency to take such steps as are necessary to ensure –

(a) that a notice containing a description of the movables to be sold and specifying the date fixed for the sale, is published in two issues of a daily newspaper circulating in Sri Lanka at least one week before the date fixed for the sale, and

(b) that the sale takes place on the date so specified, or if the sale is postponed, that a further notice containing the particulars specified in sub-paragraph (a) is published at least one week before the date to which the sale is postponed."

Section 86 of the Mortgage Act, refers to the notice of demand of payment prior to the exercise of power of sale and reads as follows:

"86(1) The power of sale conferred by section 85 shall not be exercised unless the instrument of mortgage contains an address to which notice of demand of payment may be sent to the mortgagor by the agency; or where there is no such instrument unless the mortgagor has in writing signed by him furnished an address as aforesaid to the mortgagee:

Provided, however that upon any change of address, the mortgagor may notify his new address to the agency, and such new address, if acknowledged in writing by the agency, shall for the purposes of section 85 be the address to which a notice of demand of payment may be sent.

(2) Every such notice of demand of payment shall be sent by registered post in a letter to the address of the mortgagor as stated in the instrument of mortgage or the writing referred to in subsection (1), or to such new address as may, for the time being have been notified and acknowledged as provided by that subsection."

On an examination of Sections 85(1), 85(2) and 85(3) of the Mortgage Act, it is quite clear that a mortgagee, if it is an approved credit agency could sell the property, which is in its possession, if provision is contained in the instrument of mortgage or in an agreement between the parties, which refers to Section 85(2) of the Mortgage Act and empowers the agency to exercise the power of sale.

It is common ground that the appellants and the respondent had entered into a Pledge Agreement (P4) on 03.08.1992. Learned Judge of the High Court while referring to the said Pledge Agreement had held that the said 'instrument does not contain provisions empowering the agency (the respondent) to exercise the power of sale conferred'. Learned Judge of the High Court had also referred to the relevant requirement in Section 85(2) of the Mortgage Act and had stated that, Section 85(2) does not empower the respondent to sell the pledged goods by itself without first obtaining a judgment from a competent Court.

Accordingly, the important question that has to be examined is whether there is provision contained in the Pledge Agreement (P4) regarding a sale in the event of non-payment and whether Section 85(2) of the Mortgage Act empowers the respondent to carry out such a sale and if so whether there is a necessity to first obtain an order from a competent Court.

On an examination of the Pledge Agreement (P4), it is evident that clause 11 of the said Agreement refers to Sections 85(1), (2)

and (3) of the Mortgage Act and therefore it would not be correct to state that the Pledge Agreement 'does not contain provisions empowering the respondent to exercise the power of sale conferred'. The said clause 11 clearly empowers the respondent to exercise the statutory power of sale conferred by Sub-section 1 of Section 85 of the Mortgage Act, with regard to the securities held by the respondent subject to the observance of the provisions of Sub-sections 2 and 3 of the Mortgage Act. Clause 11 reads as follows:

> "That upon the moneys due to the Bank upon the said Cash Credit Account becoming payable (whether under the provisions of the 9th or 10th clauses of this Agreement) it shall be lawful for the Bank to exercise the statutory power of sale conferred by Sub-section 1 of section 85 of the Mortgage Act in respect of the Securities held by the Bank subject to the observance of the provisions of Sub-sections 2 and 3 or if the Bank shall think fit so to do forthwith or at anytime thereafter and without any notice to the Borrowers to sell or otherwise dispose of all or any of the Securities either by public auction or by private contract and subject to such conditions as the Bank shall think fit under the express authority to do so which the Borrowers hereby give the Bank. The nett proceeds of such sale (whether made in exercise of the statutory power conferred by Section 85 of the Mortgage Act or of the contractual power hereby conferred) shall be applied in liquidation of the balance then due to the Bank upon the said Cash Credit Account."

In the event, if after executing the respondent's right of sale, there is insufficient funds from the nett sum realized by the sale to cover the balance due, clause 12 would permit the respondent to apply any other money in the hands of the Bank standing to the credit of the appellant. If there is any surplus of the nett proceeds of sale after payment of all principal and interest due by the appellants, in terms of clause 14 of the Agreement such amount is directed to be paid to the appellants.

Section 85(1) of the Mortgage Act, referred to above, stipulates, quite clearly that the mortgagee could sell the subject that has been

pledged. This is however subject to conditions, which are stated in Sections 85(2) and 85(3) of the Mortgage Act. On an examination of all three (3) Sections, the conditions stipulated by the relevant provisions for a sale stated in Section 85(1) of the Mortgage Act could be summarised as follows:

1. the pledged property must be corporeal movables;
2. mortgage should be in favour of an approved credit agency;
3. such property at the time material, must be in the possession and custody of the approved credit agency;
4. the instrument of mortgage or the agreement between the parties in regard to the mortgage should contain provision referring to Section 85(2) pf the Mortgage Act and empower the credit agency to exercise the power of sale conferred; and either of the following condition should be fulfilled -
   A. the mortgage is created as security for the payment of money stated to be payable on demand and if the mortgagor had failed to make payment within one month of the issuance of a notice of demand by the agency in terms of Section 86 of the Mortgage Act;

      or

   B. Where the mortgage is created as security for the payment of any money to be paid on a specified or ascertainable date and if the mortgagor had failed to make payment within one month of the issuance of a notice of demand by the agency in terms of Section 86 of the Mortgage Act;
5. Section 86 of the Mortgage Act specifies the need of having an address contained in the instrument of mortgage to which notice of demand of payment may be sent to the mortgagor by the agency and the process in which such demand should be sent and the steps that must be taken in the event of any change of address.

Accordingly it is apparent that none of these provisions refer to the requirement of first obtaining an order from a competent Court as stated by the learned Judge of the High Court. The basic requirement in terms of Section 85 of the Mortgage Act is that the availability of the instrument of mortgage or an agreement between

the parties with reference to Section 85(2) of the Mortgage Act and due notice being given to the mortgagor by way of a notice of demand granting him one months time to make a payment to the relevant credit agency.

It is not disputed that the pledged property, comes within the category of movables and that the mortgage was in favour of an approved credit agency. It was also common ground that the property in question was in the possession and custody of the respondent. As stated earlier, the instrument of mortgage being the Pledge Agreement, had referred to Section 85(2) of the Mortgage Act. Accordingly it is apparent that considering the provisions contained in Section 85 of the Mortgage Act and the contents of this appeal, the respondent was empowered to exercise the power of sale conferred to it and the only issue that has to be examined is whether due notice in terms of Section 85(3) had been issued.

On a perusal of the documents filed by both the appellants and the respondent, it is evident that several reminders from the respondent about the payment and the requests from the appellants to grant further time had been made during the period of October 1992 and November 1993. Thereafter on 11.11.1993, the respondent had issued the notice of demand to the appellants (P16), which clearly stated, *inter alia*, that,

> ".... Accordingly I have been advised by my client to demand Rs. 3,725,656/23 being the total amount outstanding from the Pledge Loan Facility and the Overdraft Facility as at 31/08/93 together with interest thereon from 01/09.93.
>
> Therefore I do hereby demand that you pay my client the said sum of Rs. 3,725,656/23 along with the interest thereon and Rs. 315/- being the Letter of Demand charges on or before 14.12.93...."

The Letter of Demand had been sent under Registered Post to the address of the appellants as stated in the Pledge Agreement in terms of Section 86(2) of the Mortgage Act.

It is therefore apparent that statutorily as well as contractually, the respondent had the authority to sell the pledged goods and depending on the amount realized by the sale the respondent

should have taken steps as provided by clauses 12 and/or 14 of the Pledge Agreement.

Notwithstanding the above, the material placed before this Court on the basis of the evidence that was before the High Court further strengthens the position that the respondent had the authority to sell the pledged goods, in terms of the Mortgage Act and in terms of the Pledge Agreement.

The witness of the respondent, one Mr. W.A. Don Keerthithilake, who was a Senior Manager in his evidence given on 15.09.1999 had clearly testified to this effect,

"Q : If not settled in three months what would you have done?
A : We would have sold the goods.
Q : That is the basic concept in a pledged facility?
A : Yes.
Q : You were keeping the goods and you were seeking to recover the money given to the defendants?
A : Yes.
Q : For almost eight years you have not sold the goods?
A : Yes.
Q : The pledged facility you gave him was Rs. 2.5 million?
A : Yes.
Q : You are now seeking to recover Rs. 2.5 million with interests for eight years and also keeping the goods?
A : Yes.
Q : As a prudent Banker can you do that – can you keep the goods with you and also at the same time recover the money you have been given as the pledged loan?
A : No.
Q : That is what you have done in this case."
A : Yes."

Further to the aforementioned, it is to be noted that the appellants had not objected, when the respondent made an application to sell the pledged goods, to the High Court on 20.03.1997, provided the sale proceeds were set off against the amounts claimed by the respondent.

The proceedings of 20.03.1997, which is re-produced below, clearly supports the aforementioned position:

"නඩු අංකය : 176/96(1) 1997.03.20 දින

පෙනී සිටීම පෙර පරිදි.

මේ අවස්ථාවේදී පැමිණිලිකරුවන් වෙනුවෙන් මෙම ඉල්ලීම ඉදිරිපත් කර සිටී.

'එනමි, මෙම නඩුවේ විත්තිනරුවන්ගේ භාන්ඩ තොගයක් පැමිණිලිකරුගේ භාරයේ ඇත. එම භාණ්ඩ ප්‍රසිද්ධ වෙන්දේසියේ විකුණා ලැබෙන මුදල විත්තිකරුගෙන් අය වීමට ඇති මුදලින් අඩු කර ගැනීමට පැමිණිලිකරු අදහස් කර ඇත. මෙම භාණ්ඩ ප්‍රසිද්ධ වෙන්දේසියේ විකිණීමට ඒ අනුව ගරු අධිකරණයෙන් ඉල්ලා සිටිමි.'

ජනාධිපති නීතිඥ පරතලිංගම් මහතා මෙසේ කියා සිටී:

මෙම ඉල්ලීම සම්බන්ධයෙන් හේතු වශයෙන් දක්වා ඇති කරුණු පිළිබඳව මම එකඟ නොවෙමි. මගේ අදහස වන්නේ, මෙම භාණ්ඩ පැමිණිලිකරු විසින් විකිණීමට විත්තිකරුවන්ගේ කැමැත්ත හෝ අනුමැතිය අවශ්‍ය නොවන බවය. කෙසේ වෙතත් විත්තිකරුගේ උත්තර වාදය ඉදිරිපත් කළ කුවිතාන්සි වලට, අගති රහිතව පැමිණිලිකරුවන් විසින් එවැනි පියවරක් ගෙන භාණ්ඩ විකුණා මෙම මුදල් විත්තිකරුගෙන් අය විය යුතු යැයි කියන මුදලෙන් අඩු කර ගැනීම ගැන, විත්තිකරුගේ විරෝධතාවයක් නැති බව ගරු අධිකරණය වෙත දන්වා සිටිමි.

....

මෙම තත්ත්වය යටතේ, පැමිණිල්ල විසින් මෙම පියවර ගෙන, ඉන් උද්ගත වන තත්ත්වය සම්බන්ධයෙන් අධිකරණයට වාර්තා කිරීමට නියම කරමි.

නඩුව විභාග රෝලෙන් ඉවත් කරමි. ඒ අනුව, අද දින සහ 24 වෙනි දින විභාග දිනයන්ද ඉවත් කරමි.

නඩුව කැඳවන්න : 1997.06.13 වෙනි දින."

Irrespective of the fact that the respondent was given time to take steps and report, the respondent had failed to file a report, when the case was called on 13.06.1997. No steps to that effect were taken even thereafter. It is not disputed that the goods that were imported under the Pledge Agreement remained in the

custody and possession of the respondent and was not handed over to the appellants.

Considering all the aforementioned circumstances it is abundantly clear, as stated earlier, that in addition to the authority granted to the respondent under and in terms of the clause 11 of the Pledge Agreement (P4) and Sections 85 (1), (2) and (3) of the Mortgage Act, the appellants also had not objected to the sale of the pledged goods.

Accordingly it is evident that the learned Judge of the High Court had erred when he considered the applicability of Section 85(2) of the Mortgage Act and the effect of clause 11 of the Pledge Agreement and therefore I answer the question on which this appeal was considered in the negative.

There is one other matter that I have to consider, before I part with this judgment.

Learned President's Counsel for the appellants also contended that the customs surcharge paid by the respondent cannot be claimed from the appellants.

The contention of the learned President's Counsel for the appellants was that the respondent claimed a sum of Rs. 445,366/65 on the basis of an additional payment by way of customs surcharge, This payment had been made by the respondent on a revaluation of the said goods by the Sri Lanka Customs.

Learned Counsel for the respondent however took up the position that the appellants had not protested about the payment of customs duty by the respondent Bank. Learned Counsel for the respondent had referred to the document marked P10 in support of his contention.

The letter marked P10 is a document sent by the 1st appellant to the respondent. It was addressed to Mr. W.A.D. Keerthithilake and the relevant paragraphs reads as follows:

"....

2. Regarding your additional payment of Rs. 320.228/- you are aware that you made the Payment without consulting us. In fact we were informed about the

payment only after it was made."

...."

It is therefore evident that the appellants had not been aware of the said payment by the respondent. Moreover the proceedings of 15.09.1999 further strengthens the contention of the learned President's Counsel for the appellants that they had not agreed to pay the additional amount.

"Q : Did you inform your client before you were going to pay the additional customs duty?

A : No.

Q : If you informed the defendants he would have objected to the payment of additional customs duty?

A : Yes.

Q : You only informed the defendants after your payment of additional customs duty.

A : Yes.

Q : You admit that payment was outside the agreement regarding the pledged facility you gave the defendants.

A : Yes.

It is therefore abundantly clear that the additional payment made by respondent was not only outside the purview of the Pledge Agreement, but also had been paid without any prior authority from the appellants. Moreover, as conceded by the respondent it had not taken any steps to mitigate the damages as the officer, who represented the respondent had categorically stated that if they had sold the pledged goods in 1994, the outstanding dues would have been considerably less. The question that has to be examined therefore is that whether the respondent is responsible for not taking steps to minimize the loss.

Admittedly, the respondent had claimed an additional sum of money. It is also clear on an evaluation of the evidence of the representative of the respondent that the damages could have been minimized if the respondent in terms of the accepted banking practice had taken action to sell the goods, which were in its custody in terms of the provisions of the Mortgage Act, the Pledge

Agreement and moreover as the appellants had no objection in such action.

Learned President's Counsel for the appellants relied on several authorities in support of his contention that it is the duty of a party claiming damages to take all steps to minimize loss consequent to a breach of contract.

Cheshire and Fifoot (Law of Contract, 13th Edition, pg. 632) clearly refer to the consequences when acting unreasonably in given circumstances and had stated that,

> "Alike in contract and in tort a plaintiff may claim compensation only for the loss caused by the defendant's wrongful act; any loss created by his own unreasonable conduct he must bear himself. In a case in 1955, Hodson LJ. had to consider the question,
>
> > "Whether the damages flow from the breach in accordance with the ordinary law of damages for breach of contract. Were they the natural and probable consequences of the breach? If not, they are too remote .... The question is one of causation. If the master, by acting as he did, either caused the damage by acting unreasonably in the circumstances in which he was placed, or failed to mitigate the damage, the [defendants] would be relieved, accordingly from the liability, which would otherwise have fallen upon them.' [*Compania Naveira Maropan S.A.* v *Bowaters Lloyd Pulp and Paper Mills Ltd.*(1) at 98-99]"

Prof. C.G. Weeramantry (The Law of Contracts, Vol. II, pg. 906) has also taken the view that regarding mitigation of damages that 'it is the duty of a party claiming damages to take all steps to minimise the loss consequent to a breach of contract'. Professor Weeramantry had referred to the decision of Lord Haldane in *British Westinghouse Electric Co.* v *Underground Electric Railways*(2), where it was stated that,

> "There are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain .... is to be placed, as far as

> money can do it, in as good a situation as if the contract has been performed .... but this first principle is qualified by a second, which impose on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

This position had been considered by our Courts in several cases. For instances in *Noorbhai and Co.* v. *Karuppan Chetty*(3), Jayewardene, A.J. had held that,

> "But the law casts on the seller in such a case the duty of minimizing the damages resulting from a breach of contract to purchase."

Again in the cases of *Wimalasekera* v *Parakrama Samudra Co-operative Agricultural Production and Sales Society Ltd.*(4), and *Town Council, Chavakachcheri* v *Devabalan*(5), the Supreme Court had held that it is the duty of a party, who is entitled to claim damages to take all reasonable steps to minimise the damages.

The appellants' position was that if the respondent had taken steps to sell the pledged goods at the time the question arose and especially at the time the High Court had sanctioned the sale, the damages could have been minimised.

The appellants had made a claim in reconvention stating that a sum of Rs. 222,351/-, which amount was advanced to the respondent had been lost due to the respondent's failure to sell the pledged goods.

Learned Judge of the High Court had held that the appellants had not adduced evidence in support of their claim in reconvention and dismissed the application for the claim in reconvention.

The proceedings of 15.09.1999 referred to the respondent's evidence stating that a sum of Rs. 222,351/- had been paid to the respondent by the appellants as the 10% margin of the letter of credit and other statutory charges. After the High Court had stated that no evidence had been adduced by the appellants in support of the contention, it is not disputed that one of the admissions of this matter is that the appellants had paid the respondent a sum of Rs.222,351/-. The proceedings of 16.01.1997 clearly indicated that

the appellants had adduced sufficient evidence in support of their claim in reconvention.

For the reasons aforesaid this appeal including the claim in reconvention is allowed and the judgment of the High Court dated 22.07.2000 is set aside.

I make no order as to costs.

RAJA FERNANDO, J. - I agree.

AMARATUNGA, J. - I agree.

Appeal and the claim in reconvention allowed.
The judgment of the High Court set aside.

SRI LANKA INSURANCE CORPORATION LTD.
v
JAYATHILAKE

SUPREME COURT.
S.N. SILVA, C.J.
SHIRANEE TILAKAWARDANE, J. AND
SOMAWANSA, J.
S.C. APPEAL NO. 23A/2008
S.C. (H.C.) L.A. NO. 32/2007
H.C.A.L.T. NO. 1037/2005
L.T. NO. 02/418/2004
FEBRUARY 11th, 2008

Refusal to extend an otherwise expired contract of employment – Does it amount to an 'unjust termination' or 'constructive termination' of employment of the workman? – Does it warrant relief under the Industrial Disputes Act? – Reasons for refusal not given – Is it fatal?

The Supreme Court granted leave to appeal in recognition of the fact that there had been, and continues to be, a growth of similar such claims in the Labour Tribunals, which seek judgment against the employer for refusing to extend an otherwise expired contract of employment as an "injust" termination or "constructive termination" of employment.

Held:

(1) When a contract of employment expires, it ends by the operation of the law, and privileges which could not be reasonably envisaged with the terms of the contract cannot be assumed or obtained beyond the scope of the ambit of the contract unless any rules or policies adopted by the employer-employee contract permits an extension of employment.

(2) In adjudicating claims such as the present one, equity also permits the corporate world the freedom to operate within a mutually agreed contact, as long as the dominant power of the employer is not used to exploit the services of the workman, as the just and equitable relief must be assured to both parties who seek redress to the labour courts.

(3) Where employers choose to provide employees with the right to apply for extensions of employment, they are under a duty to decide upon such extensions in a reasonable and just manner, even when such decisions are within their sole discretion.

(4) In determining the merits of a decision to refuse an extension, the following three matters have to be considered and examined by the Court through consideration of evidence and testimony proffered by both parties as to the existence or non-existence of each.

(i) There has been no employee misconduct alleged or if misconduct has been alleged, employer failed to adequately investigate and resolve the matter.

(ii) Employer does not have a policy of evaluating applications or extensions of employment that includes consideration of factors such as absence of misconduct, length of employment and employee ability.

(iii) Employer failed to evaluate the application for extension of employment.

If, and only if, the Court finds that the employee is able to establish no less than two of the above considerations in its favour, then the Court is able to apply the principal of constructive termination as contained in the Industrial Disputes Act upon the grounds that, as a matter of law, the employer has made an unreasonable refusal to extend employment, and by so doing has constructively terminated the employee.

Per Shiranee Tilakawardane, J.

"It is my view that the petitioners failure to provide reasons for denial of the respondents application may indicate a less than optimal business operation, but does not by itself necessarily suggest. Let alone require one to conclude, the inverse proposition namely, that the application was denied without reason."

Cases referred to:

1. *Sri Lanka Insurance Corporation Limited* v *D.N.W. Jayasundara* HCALT 98/2006, SCLTA.
2. *Shanmugam* v *Maskeliya Plantation Limited* 1996 1 Sri LR 208.

APPEAL from judgment of the High Court (exercising provincial appellate jurisdiction).

Sanjeewa Jayawardane for the appellant.
Chamantha Weerakoon Unambuwa with *Dhammika Jayawardane* for the respondent.

Cur.adv.vult.

June 26, 2008

SHIRANEE TILAKAWARDANE, J.

This Court granted the respondent-appellant-petitioner (hereinafter referred to as the "Petitioner") special leave, on the question of law stated in paragraph 23(a) of the petitioner's petition, namely, whether the High Court (as defined herein) fell into substantial error by holding that the petitioner's refusal to extend the respondent's service gave rise to a "constructive termination" of the applicant-respondent-respondent (hereinafter referred to as the "respondent").

This Court granted leave to appeal in recognition of the fact that there had been, and continues to be, a growth of similar such claims in the Labour Tribunals, which seek judgment against an employer for refusing to extend an otherwise expired employment contract as an "unjust" termination or "constructive termination" of employment.

The High Court dismissed the petitioner's Appeal to set aside the Labour Tribunal's order dated 1st August 2008 and upheld the order of the Labour Tribunal that the petitioner's refusal to grant the respondent's application for continued employment was an unjust and unreasonable "termination", warranting relief under the Industrial Disputes Act.

A review of the written submissions to both this Court and the lower Courts as well as a review of the evidence submitted at the lower court hearings, reveals the facts of the case relevant to this Court's decision to be as follows:

(i) Though successor to a government corporation, the petitioner is now a private limited liability company duly incorporated under the laws relating to Companies in Sri Lanka.

(ii) Until the petitioner's refusal to extend respondent's employment, the respondent worked for the petitioner as a Grade III employee in the post of "Executive", having commenced employment with the petitioner's predecessor in 1970 as a Grade V employee.

(iii) Though the Respondent's employment contract does not contain express rules on retirement, it does, however, expressly bind respondent to agreement and compliance with the petitioner's corporate policies and rules, as they may be amended from time to time.

(iv) An amendment dated 4th June 1998 to Clause 1 of Chapter VII of the Administrative Procedural Handbook of the petitioner, sets out a policy of retiring an employee at the age of 55, subject to the approval of the employee's application for extension of employment. Under cross-examination at the Labour Tribunal hearing, the respondent conceded his awareness of this amendment and the Policy it contained.

(v) The respondent's letter of warning alleged that the respondent had violated his duty of loyalty to the petitioner by attempting to divert business from the corporation for personality remunerative reasons, and this resulted in a deferment of the respondent's salary increments.

(vi) On or about December 2003, the respondent filed an application for extension of his employment past the age of 55 years. This was refused and having informed him, the respondent's services with the company ended on 20th March 2004, the day he reached the age of 55.

In the area of employment and Labour law, the law must serve two, often competing purposes and must do so by achieving a precarious balance between the two. On one hand, the courts are duty-bound to protect the rights of the workman from corporate bullying and an abuse of corporate power, as the workman is clearly the lesser-empowered of the two parties. Indeed the very creation of Labour law itself is a result of the need to place checks and balances on capricious abuse of the more dominant power of the employer's action. However, in seeking to achieve such protection, the courts must take care to avoid eroding upon the right of employers and, indeed, corporations in general, to freely negotiate the relationship they choose to hold with their employees and the autonomy they are afforded as private entities under the laws governing corporate existence.

In adjudicating claims such as the present one, equity also permits the corporate world the freedom to operate within a mutually agreed contract, as long as the dominant power of the employer is not used to exploit the services of the workman, as the just and equitable relief must be assured to both parties who seek redress to the labour courts. When a contract expires, it ends by the operation of the law, and privileges which could not be reasonably envisaged within the terms of the contract cannot be assumed or obtained beyond the scope of the ambit of the contract unless any rules or policies adopted by the employer-employee contract permits an extension of employment. In *Sri Lanka Insurance Corporation Limited* v *D.N.W. Jayasundera*[1], where the facts were very similar to the present case and against the petitioner, the court noted that:

> "*When the contract of employment has come to an end there would be no termination of the contract. Thus it would be an automatic ending of the contract by the operation of the law as a result of ending the life span of the contract of service. The discretion to grant an extension is with the employer and the refusal to grant an extension would not affect the status of the former contract as the former contract remains expired and unchanged. Even if the extension in fact had been*

granted by the employer it would only either renew the former contract by extending the life of the former contract or replace the former contract with a new contract all together."

Learned Counsel for the petitioner essentially submitted that this settled the matter. But while viewing refusals of extensions under the purview of contract law preserves the integrity of "the contract" as a product of free will and desire of those who choose to become party to one, the aforementioned balance between employer and employee rights, in terms of the spirit of the Industrial Disputes Act, requires that this Court recognizes the power imbalance between the two, and the very real means by which an employer can effect termination of an employee without affirmatively acting in that regard. In doing so, this Court has repeatedly held that where employers choose to provide employees with the right to apply for extensions of employment, they are under a duty to decide upon such extensions in a reasonable and just manner, even when such decisions are within their sole discretion. in the case of *Shanmugam* v *Maskeliya Plantations Limited*[1] reference was made to this in the following manner:

"*Mr. Mustapha (Counsel for the appellant) rightly conceded that the appellant has no contractual right to an extension in service after the optional age of retirement, namely 55 years. Admittedly, the appellant was granted 3 extensions of service after he reached 55 years but was refused his 4th extension of service. The question then is whether the refusal of the 4th extension was justified in the particular facts and circumstances of this case. This was the true issue before the arbitrator and I agree with Mr. Mustapha that the arbitrator erroneously viewed the dispute largely, if not, entirely, as a matter of contractual entitlement."*

In determining the merits of a decision to refuse an extension, I hold that three matters have to be considered and examined by the court, through consideration of evidence and testimony proffered by both parties as to the existence or non-existence of each if, *and only if,* the court finds that the employee is able to

establish,by a preponderance of the evidence, *no less than two of the considerations* in its favour, then the court is able to apply the principal of constructive termination as contained in the Industrial Disputes Act (and award appropriate relief) upon the grounds that, *as a matter of law*, the employer has made an unreasonable refusal to extend employment and, by so doing, has constructively terminated the employee. The three matters that need to be considered when arriving at a determination on this matter are:-

1. *There has been no employee misconduct alleged or if misconduct has been alleged, employer failed to adequately investigate and resolve the matter.*
2. *Employer does not have a policy of evaluating applications or extensions of employment that includes consideration of factors such as absence of misconduct, length of employment, and employee ability.*
3. *Employer failed to evaluate the application for extension of employment.*

On these principles, and on analysis of the facts of this case, it is pertinent that at the Labour Tribunal inquiry the Learned Counsel for the respondent submitted, and the High Court later found that one instance of misconduct was alleged against the respondent as evidenced by a warning letter (*X-4* in the proceedings of the Labour Tribunal), though no evidence of any formal inquiry or official corporate resolution of the matter was presented by the petitioner that would establish its claim of refusing the extension due to the respondent's prior misconduct. The High Court's rejection of the petitioner's contention was, in effect, a determination that the respondent had established the first of the three matters listed above. However, unlike the High Court who saw fit to affirm the Labour Tribunal's order based, in large part, upon finding the petitioner's misconduct claim invalid, our scrutiny and analysis of the instant case must extend to the second and third matters set out above.

A review of the evidence submitted by learned Counsel for the petitioner reveals the submission of a 4th June 1998 amendment (the

"Amendment" to Clause 1 of Chapter VII of the Administrative Procedural Handbook of the petitioner (*X-2* in the proceedings of the Labour Tribunal), which in turn reveals that the petitioner holds a policy of retiring an employee at the age of 55, subject to the approval of the employee's application for extension of employment. According to the Chapter, approval of such extensions lay in the sole discretion of the Chairman (or the Board of Directors, if so decided by the Chairman), and in either case, the decision will take into account several factors relating to the health, ability and history of service of the employee. Furthermore, the Chapter reiterates that an employee's failure to submit an application or to obtain approval of an application for extension results in the retirement of the employee. By this evidence, petitioner has unequivocally established that petitioner indeed has a policy regarding extension applications that requires deliberation and evaluation in the decision-making process. Respondent is *per se* unable to counter the 2nd requisite set out above, and in fact, conceded under cross-examination his awareness of both this Amendment and of the Policy.

The only submission by the learned Counsel of the respondent relating to the petitioner's alleged failure to evaluate the respondent's application is his contention that no reasons are provided to the respondent in the letter notifying him of the petitioner's denial of his application. It is my view that the petitioner's failure to provide reasons for denial of the respondent's application may indicate a less-than-optimal business operation, but does not by itself necessarily suggest, let alone require one to conclude, the inverse proposition – namely, that the application was denied without reason. While this Court recognizes the need to place limits on the extent of corporate autonomy in the context of employment procedures, we are not willing to extensively intrude on ministerial practices such as the manner and format of employee notifications. The petitioner, by its own policy, does not require reasons for denial to be made known upon issuances of extension denials, and I do not see reason to mandate otherwise. Accordingly, the respondent failed to establish at least two of the grounds set out above, and having only established one of the three grounds. I conclude that the High Court erred, as a matter of

law, in holding that the employer's mere denial of an extension was an unreasonable refusal constituting a "constructive termination" of employment.

It may be apparent from the above analysis that the above tests – in essence a codified and expanded version of the analysis already used by the courts – places a significant burden upon the employee, as it requires the employee to clearly establish multiple failures on the part of the employer in order establish the "wrongdoing" of an employer.

I think that it is important to establish this burden for multiple reasons. First, as such allegations of employer purported wrongdoings can be fiscally and reputationally disastrous to the Employer Company, the task of establishing wrongdoing on the part of an employer to whom an employee has voluntarily joined, should, in fact be an explicit requirement in order to preclude frivolous and baseless allegations. Indeed placing such an increase in the threshold requirement, which claims must pass in order to seek relief will, this Court believes, serve to reduce the number of these "extension refusal" cases being initiated to only those that are truly with merit. Second, to ease the existent burden of the employee in establishing employer wrongdoing would, in effect, shift the burden to the employer to establish its own innocence, creating several "perverse incentives" for the employer – false accusations and inquiries of misconduct, as one example – that would ultimately harm all employees in the long-run.

For the reasons above, I hereby set aside the decision of the High Court and dismiss the respondent's application to the Labour Tribunal with costs.

S.N. SILVA, C.J. - I agree.

SOMAWANSA, J. - I agree.

Appeal allowed, decision of the High Court set aside.
Respondents application to the Labour Tribunal dismissed.