



THE
Sri Lanka Law Reports

**Containing cases and other matters decided by the
Supreme Court and the Court of Appeal of the
Democratic Socialist Republic of Sri Lanka**

[2011] 2 SRI L.R. - PART 10

PAGES 253 - 280

- Consulting Editors** : HON J. A. N. De SILVA, Chief Justice
(retired on 16.5.2011)
HON. Dr. SHIRANI A. BANDARANAYAKE
Chief Justice (appointed on 17.5.2011)
HON. SATHYA HETTIGE, President,
Court of Appeal (until 9.6.2011)
HON S. SRISKANDARAJAH President, Court of Appeal
(appointed on 24.6. 2011)
- Editor-in-Chief** : L. K. WIMALACHANDRA
- Additional Editor-in-Chief** : ROHAN SAHABANDU

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company Printers (Private) Ltd.

Price: Rs. 25.00

DIGEST

	Page
CIVIL PROCEDURE CODE – Section 88 (2) – Dismissal on day fixed for ex-parte hearing - Counsel held up in another Court – Plaintiff absent – Application to set aside order – Plaintiff not cross examined? – Judicial discretion? Thomas vs. Samarakoon	253
CIVIL PROCEDURE CODE – Section 46(2) – Court may reject the plaint, when the plaint having been returned for amendment within a time fixed by the court is not amended within such time – Section 93 – Wide discretion to Court to amend the pleadings City Properties (Pvt) Ltd. V. Edirisinghe	273
CONSTITUTION – Article 9 – Duty of the State to protect and foster Buddha Sasana – Buddhist Temporalities (Amendment) Act, No. 42 of 1981 Section 5, Section 41 – Commissioner of Buddhist Affairs – Powers, functions, rights and obligations – Application for a Writ of Certiorari – Who are Necessary parties - Buddhist Affairs 258 Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others	258
MAINTENANCE ACT NO. 37 OF 1999 - Section 2(3) - A parent having means neglects or refuses to maintain his or her adult offspring - Section 2(5) - Where an order is made by Court for the payment of an allowance, when such allowance be payable? - Section 4(1) - Application for maintenance - Section 22 - Classifications - Who is an adult offspring for the purpose of the Maintenance Act. Don Tilakaratne vs Indra Priyadarshanie Mandawala (Continued in Part 11)	280

THOMAS VS. SAMARAKOON

COURT OF APPEAL
ABDUS SALAM, J.
CA 1162/2003 (F)
DC AMPARA M/1459
JANUARY 10, 2006

Civil Procedure Code – Section 88 (2) – Dismissal on day fixed for ex-parte hearing - Counsel held up in another Court – Plaintiff absent – Application to set aside order – Plaintiff not cross examined? – Judicial discretion?

The case was fixed for ex-parte hearing. On the said day instructing attorney submitted a letter to Court from the Counsel and moved for a postponement of the ex-parte trial, on the ground that the Counsel was held up in Badulla/Passara Magistrate's Court. The plaintiff was also absent. The trial Judge dismissed the plaintiff's action.

The plaintiff moved to have the order of dismissal vacated. The explanation offered by the plaintiff was that as his car was not roadworthy and the Counsel was faced with the difficulties in making himself available at the District Court of Ampara, as he had to appear in a specially fixed case in which he was opposed to a Counsel travelling from Colombo. The plaintiff was not cross examined.

The District Judge refused the application. On appeal,

Held:

- (1) The District Judge should have taken into consideration the fact that the plaintiff has to travel from Colombo to Ampara and that his Counsel has had an engagement in some other Court.
- (2) The District Judge has failed to appreciate that the registered attorney-at-law has appeared for the plaintiff in deference to Court, and endeavoured to discharge her duties by her client by moving for a postponement which the trial Judge should have considered favourably as the discretion vested in him demanded such a course.

- (3) When the matter of the application of the plaintiff came up for hearing, the plaintiff has not been subjected to cross-examination.

APPEAL from the judgment of the District Court of Ampara.

Wijaya Niranjana Perera for plaintiff-appellant.

W. Dayaratne for defendant-respondent.

June 26st 2007

ABDUL SALAM, J.

The plaintiff-appellant (hereinafter referred to as 'the plaintiff') has preferred this appeal in terms of Section 88(2) of the Civil Procedure Code. The appeal, arises on the dismissal of the plaintiff's action by the learned District judge on the day it was fixed for *ex-parte* hearing.

The plaintiff sued the defendant *inter alia* for damages in a sum of Rs. 411,000/-. The case record bears out that at least on ten occasions summons had been issued on the defendant to effect personal service but without success, as the defendant was living abroad. However, immediately upon the return of the defendant from abroad, summons was issued by way of substituted service, returnable on 3.3.2003. After service of summons by way of substituted service, as the defendant failed to respond, as required by law, the matter was fixed for *ex-parte* hearing against him for 21.7.2003.

On 21.7.2003 when the matter was taken up for *ex-parte* hearing, the plaintiff was absent while Mrs. Kamini Ratnayake the registered Attorney-at-Law of the plaintiff was present. On that day she submitted a letter to court from

the instructed Attorney and moved for a postponement of the *ex parte* trial, on the ground that the counsel was held up in Badulla/Passara Magistrate's Court. The learned District Judge without making any order on the application, kept the case down to be mentioned later in the course of the day. The case was called once again at 12.10 on the same day and on the grounds that the plaintiff was absent and not ready for trial, the learned District Judge dismissed the plaintiff's action.

Thereafter, on behalf of the plaintiff an application was made as evident from journal entry dated 18.9.2003, to have the order of dismissal vacated on the ground that the plaintiff had reasonable grounds to be absent from Court on the day the matter was fixed for *ex parte* hearing. According to the explanation offered by the plaintiff, he was absent on that day as his motor car was not road worthy and his counsel was faced with the difficulty in making himself available at the district court of Ampara, as he had to appear in a specially fixed case, in which he was opposed to a counsel travelling from Colombo.

The learned District Judge refused the application of the plaintiff to set aside the order of dismissal and to have the case restored to the trial roll on the grounds that,

- (1) the plaintiff has not made the application for restoration of the case within a reasonable period of time and
- (2) that he has failed to make out a case that warranted the order of dismissal vacated.

Before venturing to consider the merits of the plaintiff's appeal, in passing, I feel obliged to state that the plaintiff

would not have been compelled to resort to the luxury of having to invoke the appellate jurisdiction of this Court, against the order of the learned District Judge, had the discretion vested in the Court was rightly considered in favour of the plaintiff, when application was made for postponement on the first day, it was fixed for *ex-parte* hearing. The learned District Judge should have taken into consideration the fact that the plaintiff had to travel from Colombo to Ampara and that his Counsel has had an engagement in some other Court. Even if the Counsel was available on that day, yet it would not have been possible to take up the *ex-parte* trial as the plaintiff was absent. The learned District Judge has failed to appreciate that the registered attorney at law has appeared for the plaintiff in deference to Court. She has also endeavoured to discharge her duties by her client by moving for postponement, which the learned trial Judge should have considered favourably, as the discretion vested in him demanded such a course.

As regard the application made by the plaintiff, the learned District Judge has emphasized that the delay of 48 days in the presentation of the application by the plaintiff under Section 88(2) is an obstacle in the way of the plaintiff to have the order of dismissal set aside.

In terms of Section 87(3) of the Code, the plaintiff is entitled to apply to have the dismissal set aside within a reasonable period of time. When the matter of the application of the plaintiff, came up for hearing, the plaintiff had not been subjected to any cross-examination. According to the proceedings maintained by the learned District Judge, the matter of the application has come up for support on 18.9.2003 and the learned Counsel of the plaintiff has made

submissions on the uncontradicted position taken up by the plaintiff. The affidavit of the plaintiff discloses that he is a businessman and had gone abroad immediately after the dismissal of the action and that he has taken steps to have the order of dismissal vacated, immediately after his return. The learned counsel who appeared at the *ex-parte* hearing had informed Court of his difficulty to appear as his services had been sought in a case where he was opposed to a Counsel travelling from Colombo.

Taking into consideration the matters urged in the petition and affidavit of the plaintiff, the learned District Judge should not have dismissed the application on the grounds attributed by him in his order dated 20.10.2003, which is appealed against.

In the circumstances, it is my considered view that justice could effectively be meted out, only by setting aside the order of the learned District Judge dated 20.10.2003 and substituting it with the finding that the plaintiff has had reasonable grounds for his default of appearance on that day. Hence, the order of the learned District Judge dated 20.10.2003 is set aside on the uncontradicted affidavit of the plaintiff. The learned trial Judge is directed to restore the case to the trial roll.

The trial Court will give priority to this matter and conclude the *ex-parte* hearing without undue delay and then if need arises notify the defendant of its decision, to enable the defendant to purge his default, upon his electing to do so.

Appeal allowed.

**WIJERATNE (COMMISSIONER OF MOTOR TRAFFIC) V. VEN.
DR. PARAGODA WIMALAWANSA THERO AND 4 OTHERS**

SUPREME COURT

AMARATUNGA, J.,

SRIPAVAN, J. AND

CHANDRA EKANAYAKE, J.

S.C. APPEAL NO. 84/2007

C.A. APPLICATION NO. 1978/2004

JULY 29^T, 2009

Constitution – Article 9 – Duty of the State to protect and foster Buddha Sasana – Buddhist Temporalities (Amendment) Act, No. 42 of 1981 Section 5, Section 41 – Commissioner of Buddhist Affairs – Powers, functions, rights and obligations – Application for a Writ of Certiorari – Who are Necessary parties – Buddhist Affairs

The Petitioner, a Buddhist priest made an application to the Commissioner of Motor Traffic for a driving license in his name and in the capacity of a Bhikku. The Commissioner of Motor Traffic, whilst expressing the view that according to the Motor Traffic Act there is no impediment for a Bhikku to obtain a driving license, inquired from the Secretary to the Ministry of Buddha Sasana whether he has any objection to issuing a driving license to the Petitioner as the Petitioner is a Bhikku. The Commissioner of Motor Traffic also addressed a communication in this respect to the Commissioner of Buddhist Affairs. The Commissioner of Buddhist Affairs informed the Commissioner of Motor Traffic that it had been decided by the Samastha Lanka Sasanarakshaka Mandalaya that it would be inappropriate to issue driving licenses to Bhikkus. Accordingly, the Commissioner of Motor Traffic informed the Petitioner that it is not possible to issue a driving license to the Petitioner.

The Petitioner thereafter filed an application in the Court of Appeal seeking a writ of Certiorari to quash the decision of the Commissioner of Motor Traffic not to issue a driving license to the Petitioner.

The Court of Appeal by its order dated 20.7.2007 decided to hear the Petitioner's application on its merits. Against this order, the Commissioner of Motor Traffic sought Special Leave to Appeal from the Supreme Court and the Supreme Court granted Special Leave to Appeal.

Held:

- (1) The first rule regarding the necessary parties to an application for a Writ of Certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a Respondent to the application.
 - (i) If it is a body of persons whose decision or exercise of power is sought to be quashed, each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made a Respondent. The failure to make such person or persons as Respondents to the application is fatal and provided in itself a ground for the dismissal of the application *in limine*.
 - (ii) If the act sought to be impugned had been done by one party, who has power granted by law to give such direction, the party who had given the directions is also a necessary party and the failure to make such party a Respondent is fatal to the validity of the application.
- (2) The next rule is that those who would be affected by the outcome of the Writ application should be made Respondents to the application.
- (3) A necessary party to an application for a Writ of Mandamus is the officer or the authority who has the power vested by law to perform the act or the duty sought to be enforced by the Writ of Mandamus. All persons who would be affected by the issue of Mandamus also shall be made Respondents to the application.
- (4) The Commissioner of Buddhist Affairs has no statutory powers or duties under the Motor Traffic Act with regard to issuing of driving licenses.

Per Gamini Amaratunga, J. -

“The official designation Commissioner of Buddhist Affairs does not make the holder of that office the repository of all powers relating

to Buddhism, Buddha Sasana or Buddhist Affairs in Sri Lanka or with regard to the conduct of the Maha Sanga. The Commissioner of Buddhist Affairs has only those powers conferred on him by statute and nothing more.”

- (5) Article 9 of the Constitution sets out the policy of the Republic of Sri Lanka relating to Buddhism. It cannot be used to argue that this Article confers undefined powers on the Commissioner of Buddhist Affairs in respect of Buddhism, Buddha Sasana and Maha Sanga in the Republic of Sri Lanka.

Article 9 of the Constitution is not relevant in deciding, as a matter of law, whether the Commissioner of Buddhist Affairs is a necessary party to the legal validity of the Petitioner’s Writ application.

- (6) The Commissioner of Motor Traffic cannot invoke Article 9 of the Constitution to contend that the Commissioner of Buddhist Affairs is a competent authority in relation to all Buddhist affairs in addition to the specific powers conferred on him by Statute.

Per Gamini Amaratunga, J.

“I adopt and quote with respectful agreement what H.N.G. Fernando, C.J. (in *Attorney General vs. Kodeswaran*⁽⁹⁾) has quoted from U.S. decision *Burton vs. United States* ⁽¹⁰⁾, to the effect that “it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of a case.”

Cases referred to:

- (1) *Jamila Umma v. Mohamed* – 50 NLR 15
- (2) *Karunaratne v. Commissioner of Co-operative Development* – (1979) 2 NLR 193
- (3) *British Ceylon Corporation v. Weerasekera* – (1982) 1 SLR 185
- (4) *Mudiyanse v. Christie Silva, Government Agent, Hambantota* – (1985) 2 Sri L.R. 52
- (5) *Abeydeera v. Dr. Stanley Wijesundara and another* – (1983) 2 Sri L.R. 267
- (6) *Farook v. Siriwardene* – (1997) 1 Sri L.R. 145

- (7) *Cardron v. Government Agent, Western Province* – 46 NLR 237
- (8) *Gunathilaka v. Government Agent, Galle* – 47 NLR 549
- (9) *Attorney General v. Kodeswaran* – 69 NLR 121
- (10) *Burton v. United States* – 196 US Reports 296

APPEAL from the judgment of the Court of Appeal dated 20.7.2007.

Janak de Silva, Senior State Counsel for the Appellant

Uditha Egalahewa for the Interveniend Respondent

A.P. Niles with *Champaka Ladduwahetti* and *Arosha Silva* for the Petitioner – Respondent.

Cur.adv.vult

October 14st 2011

GAMINI AMARATUNGA J.

This is an appeal with special leave to appeal granted by this Court against the decision of the Court of Appeal dated 20.07.2007 overruling the preliminary objection *in limine* raised by the learned Senior State Counsel to the validity of the application filed by the petitioner respondent seeking writs of certiorari and mandamus against the appellant, the Commissioner of Motor Traffic.

The facts relevant to the present appeal are briefly as follows, The petitioner respondent (hereinafter called the petitioner) is a bhikku, a Buddhist priest. He made an application to the Commissioner of Motor Traffic (hereinafter called the C.M.T) for a driving licence in his name and capacity of a bhikku. It appears from document P5 filed in the Court of Appeal by the petitioner, (a letter dated 24.05.2004 addressed to the Secretary to the Ministry of Buddha Sasana by the C.M.T) that the CMT whilst expressing the view that according to the Motor Traffic Act there is no impediment for a bhikku

to obtain a driving licence, has nevertheless inquired from the said Secretary whether he has any objection to issuing a driving licence to the petitioner as the petitioner is a bhikku. It appears from the documents available in the record that the petitioner has addressed several letters to the CMT and to the Secretary to the Ministry of Transport explaining the absence of any impediment for a bhikku to obtain a driving licence. It also appears that the C.M.T has addressed a communication in this respect to the Commissioner of Buddhist Affairs.

The Commissioner of Buddhist Affairs by his letter dated 13.7.2004 has informed the C.M.T. that the petitioner's letter regarding his application for a driving licence has been forwarded to the Samasthe Lanka Sasanarakshaka Mandalaya at its meeting on 06.07.2004 and that the said Mandalaya has decided that it would not be appropriate to issue driving licences to Bhikkus. Then the C.M.T. has addressed a letter dated 27.07.2004 (marked and produced to the Court of Appeal as P11) to the petitioner. In that letter it is stated that he (the C.M.T.) had sought observation from the Commissioner of Buddhist Affairs regarding his (the petitioner's) request for a driving licence and that he (the C.M.T) has been informed that it had been decided by Samastha Lanka Sasanarakshaka Mandalaya on 06.07.2004 that it would be inappropriate to issue driving licences to bhikkus, and as such it is not possible to issue a driving licence to the petitioner.

Upon the receipt of this letter (P11) the petitioner filed an application in the Court of Appeal seeking a writ of certiorari to quash the decision of the C.M.T. not to issue a driving licence to him, as set out in the letter dated 27.07.2004 marked P11 and a writ of mandamus directing the C.M.T to

take steps according to law to issue a driving licence to him. In the objections filed in the Court of Appeal on behalf of the C.M.T a preliminary objection *in limine* has been taken to the validity of the Petitioner's application on the basis that a necessary party, namely the Commissioner of Buddhist Affairs has not been made a respondent to the petitioner's application. In the meantime, four persons have filed papers in the Court of Appeal seeking permission to intervene in the petitioner's application. With regard to the application for intervention there have been certain incidental proceedings which finally ended up in this Court, but for present purpose it is sufficient to state that in view of the Order of the Court of Appeal dated 22.05.2006 the question of intervention remains to be considered after the ruling of the Court of Appeal with regard to the objection on the failure to bring a necessary party before Court by the petitioner.

After hearing the parties relating to the preliminary objection, the Court of Appeal, by its order dated 20.07.2007 has rejected the preliminary objection and decided to hear the petitioner's application on its merits. Against the Order of the Court of Appeal, the C.M.T has sought special leave to appeal from this Court and after hearing both parties this Court has granted special leave to appeal on the following questions of law.

- (a) Did the Court of Appeal err in law in failing to consider the scope of Article 9 of the Constitution?
- (b) Did the Court of Appeal err in law in failing to consider that the statutory duties cast upon the petitioner under the Motor Traffic Act is subject to the overriding positive duty imposed upon the State, its Organs and agents by Article 9 of the Constitution, namely that

the Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana?

- (c) Did the Court of Appeal err in law and/or fact in concluding that the Commissioner of Buddhist Affairs was not a necessary party to the application?
- (d) Did the Court of Appeal err in law and in fact in holding that the Commissioner of Buddhist Affairs may seek permission of Court to be added as a intervenient party to the application having sufficient legal interest in the matter under Article 9 of the Constitution while holding that the Commissioner of Buddhist Affairs was not a necessary party to the application?
- (e) Did the Court of Appeal err in law and in fact in holding that there will be no breach of the rules of natural justice in failing to hear the Commissioner of Buddhist Affairs?
- (f) Did the Court of Appeal err in law and/or in fact in fixing the matter for argument on its merits when the Court had by its order dated 22.05.2006, made order that it will first consider whether the Commissioner of Buddhist Affairs is a necessary party in the application for the respondent to proceed with it and after deciding that question, the intervenients will be permitted to make further submissions and an appropriate order made thereafter?

At the hearing before us both learned Counsel for the applicant and the petitioner and the learned Counsel for the persons seeking intervention made their submissions in addition to the written submissions filed by them.

Before dealing with the questions of law on which leave to appeal had been granted, it is pertinent to examine the functions and the powers of the official known by the designation, the Commissioner of Buddhist Affairs. The pleadings and the written submissions filed on behalf of the C.M.T do not refer at all to the provisions of law which set out the powers, functions and the duties of the Commissioner of Buddhist Affairs. The written submissions filed on behalf of the petitioner states that the office of the Commissioner of Buddhist Affairs was created by the Buddhist Temporalities (Amendment) Act No. 42 of 1981. Section 3 of the amending Act which adds the definition of the phrase “Commissioner of Buddhist Affairs” to section 2 of the principal enactment merely states that

“Commissioner of Buddhist Affairs” means the person for the time being holding the office of the Commissioner of Buddhist Affairs and includes any Deputy Commissioner”.

We have not been referred by the parties to any provision of law which defines the phrase “Buddhist Affairs. In the absence of any such definition, there is no legislative guidance to ascertain the “Buddhist Affairs” over which he has lawful powers, functions and obligations. In so far as the Buddhist Temporalities Ordinance (Cap 318 C.L.E 1956 Revision) is concerned, the amending Act No. 42 of 1981 in section 5(1) provides that,

“All rights, liabilities and obligations of the Public Trustee and the Registrar General under the principal enactment immediately prior to the date of commencement of this Act shall be deemed to be the rights liabilities and obligations of the Commissioner of Buddhist Affairs.”

Under the provisions of the Buddhist Temporalities Ordinance, the Public Trustee had certain powers and functions with regard to temple properties which came within the purview of the said Ordinance and certain supervisory powers over the trustees of temple properties. The Public Trustee had certain powers and functions in respect of the process of electing the Devalas. Under section 41 of the said Ordinance, the Registrar General had the duty to maintain the Register of Bhikkus. In view of the provisions of section 5 of Act No. 42 of 1981, all those rights, liabilities and obligations of the Public Trustee under the principal enactment are now deemed to be vested in the Commissioner of Buddhist Affairs. We have not been referred by the parties to any other law which confers powers and functions on the Commissioner of Buddhist Affairs in addition to those conferred on him by Act No. 42 of 1981.

The next matter to be considered is the role played by the Commissioner of Buddhist Affairs in relation to the petitioner's application to the C.M.T. for a driving licence. The role he has played in this affair becomes evident from his letter dated 13.7.2004 addressed to the C.M.T. By that letter the Commissioner of Buddhist Affairs communicated to the C.M.T. the decision taken by the Samastha Lanka Sasanaarakshaka Mandalaya On 6.7.2004 that it would not be proper to issue driving licences to bhikkus. That letter did not contain any decision, recommendation or even an opinion of the Commissioner of Buddhist Affairs regarding the propriety of issuing driving licences to bhikkus. The C.M.T's letter to the petitioner (P11 dated 27.7.2004) clearly shows that the C.M.T's decision not to issue a driving licence to the petitioners had been based not on any decision or recommendation given by the Commissioner of Buddhist Affairs but on the

decision of the Samasthe Lanka Sasanakshaka Mandalaya as communicated to the C.M.T. by the Commissioner of Buddhist Affairs.

Now I shall turn to the questions of law on which leave to appeal had been granted. I shall first deal with question No. (c) as it directly puts in issue the correctness of the Court of Appeal's conclusion that the Commissioner of Buddhist Affairs is not a necessary party to the petitioner's application. The first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application. If it is a body of persons whose decision or exercise of power is sought to be quashed each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made respondent. The failure to make him or them respondents to the application is fatal and provides in itself a ground for the dismissal of the application *in limine*. *Jamila Umma vs. Mohamed*,⁽¹⁾ *Karunaratna vs. the Commissioner of Cooperative Development*⁽²⁾; *British Ceylon Corporation vs Weerasekara*⁽³⁾. If the act sought to be impugned had been done by one party on a direction given by another party who has power granted by law to give such direction, the party who had given the direction is also a necessary party and the failure to make such party a respondent is fatal to the validity of the application. *Mudiyanse vs. Christie Silva, Government Agent, Hambantota*,⁽⁴⁾.

The second rule is that those who would be affected by the outcome of the writ application should be made respondents to the application, *Abeydeera vs. Dr. Stanley Wijesundara and another* ⁽⁵⁾; *Farook vs. Siriwardena*⁽⁶⁾.

As set out earlier in this judgment, the Commissioner of Buddhist Affairs has not made any decision or determination with regard to the petitioner's application for a driving licence. He has not made any recommendation or has not expressed even an opinion with regard to the propriety of issuing a driving licence to a bhikku. The decision not to issue a driving licence to the Petitioner was C.M.T's own decision based on the decision of the Samastha Lanka Sasanarakshaka Mandalaya communicated to him by the Commissioner of Buddhist Affairs. Having based his decision on the decision of said Sasanarakshaka Mandalaya, what factual or legal basis the C.M.T has to now contend that the Commissioner of Buddhist Affairs is a necessary party to the application filed to quash his decision not to issue a driving licence to the petitioner? The C.M.T has also not demonstrated how the Commissioner would be affected by the outcome of the application for *certiorari*.

A necessary party to an application for a writ of mandamus is the officer or the authority who has the power vested by law to perform the act or the duty sought to be enforced by the writ of mandamus. All persons who would be affected by the issue of mandamus also shall be made respondents to the application. *Carron vs Government Agent, Western Province*,⁽⁷⁾; *Goonetilleke Vs Government Agent, Galle*,⁽⁸⁾; *Abeydeera vs. Dr. Stanley Wijesundara (supra)*.

The Commissioner of Buddhist Affairs has no statutory powers or duties under the Motor Traffic Act with regard to issuing of driving licences. There is no material to indicate how he would be affected by a writ of mandamus issued to the C.M.T with regard to issuing a driving licence to the

petitioner. It appears that the underlying theme of the C.M.T's argument that the Commissioner of Buddhist Affairs is a necessary party to the petitioner's application is based on the mere fact that the designation "the Commissioner of Buddhist Affairs" makes him a necessary party to an application by a bhikku for a driving licence. The official designation "Commissioner of Buddhist Affairs" does not make the holder of that office the repository of all powers relating to Buddhism, Buddha Sasana or Buddhist Affairs in Sri Lanka or with regard to the conduct of the Maha Sanga. The Commissioner of Buddhist Affairs has only those powers conferred on him by statute and nothing more. Much stress had been laid on behalf of the C.M.T on Article 9 of the Constitution which reads as follows.

"The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Article 10 and 14(1) (e)."

This Article sets out the policy of the Republic of Sri Lanka relating to Buddhism. However this Article cannot be used to argue that it confers undefined powers to the Commissioner of Buddhist Affairs in respect of Buddhism, Buddha Sasana and Maha Sanga in the Republic of Sri Lanka. The C.M.T has not produced either to the Court of Appeal or to this Court an affidavit from the Commissioner of Buddhist Affairs showing that he has lawful powers and duties in respect of Buddhist affairs other than those powers conferred on him by statute and Rules made thereunder. The C.M.T cannot invoke Article 9 of the Constitution to contend that the Commissioner of Buddhist Affairs is a competent authority in relation to all

Buddhist affairs in addition to the specific powers conferred on him by statute.

For the foregoing reasons I hold that the Court of Appeal was correct in fact and in law in holding that the Commissioner of Buddhist Affairs is not a necessary party to the petitioner's writ application. I accordingly answer question No. (c) in the negative and for the same reasons answer question No. (e) also in the negative.

Questions of law (a) and (b) relate to the scope of Article 9 of the Constitution and its impact on the statutory power of the C.M.T to issue driving licences. Article 9 is not relevant in deciding as a matter of law whether the Commissioner of Buddhist Affairs is a necessary party to the legal validity of the petitioner's writ application? The main matters to be decided in this appeal are covered by the answers to questions (c) and (e). What legal impact Article 9 of the Constitution has on the statutory powers of the C.M.T under the Motor Traffic Act is a question to be considered, if their Lordships of the Court of Appeal are of the view that such consideration is necessary, in dealing with the merits of the petitioner's application and the C.M.T's substantive objections to it. Accordingly I hold that it is not necessary to decide the questions of law (a) and (b) for the present purpose. In this regard I adopt and quote with respectful agreement what H.N.G Fernando CJ (in *Attorney General vs. Kodeswaran*⁽⁹⁾ at 138) has quoted from the U.S. decision in *Burton vs. United States*⁽¹⁰⁾, to the effect that "it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of a case."

Their Lordships of the Court of Appeal having decided that the Commissioner of Buddhist Affairs is not a necessary party to the application have stated that if the Commissioner desires to be a party he may seek permission of Court to be added as an intervenient party having sufficient legal interest in the matter under Article 9 of the Constitution. Question No. (d) had been framed on the basis whether this amounts to an error of law. I answer this question in the negative for the following reasons. When their Lordships held that the Commissioner of Buddhist Affairs was not a necessary party to the petitioner's application what their Lordships meant was that he was not a necessary party to the legal validity of the petitioner's application. However if the Commissioner of Buddhist Affairs desires to be added as an intervenient party having sufficient legal interest in the matter under Article 9 of the Constitution, the opportunity has been left open for him to seek intervention in the application. This manifests the Court of Appeal's readiness to give him a hearing if he satisfies Court that he has a legal interest in the matter. The C.M.T instead of complaining must be happy about this concession granted to the Commissioner of Buddhist Affairs to come in not as a necessary party but as a party having a legal interest in the matter if he can satisfy the Court of Appeal of his legal interest which up to now is not visible from the material available to the Court of Appeal and this Court.

It is not necessary to answer question No. (f). It is open to the persons seeking intervention to invite the attention of the Court of Appeal to its Order dated 22.05.2006 and move Court to hear them and decide their application for intervention. If such an application is made the Court of Appeal is hereby directed to hear and decide the matter relating

to intervention before proceeding to hear the petitioner's application on the merits.

For all the reasons set out above the appeal is dismissed and the Order of the Court of Appeal dated 20.07.2007 is affirmed subject to the direction contained in the preceding paragraph. I make no order for costs.

SRIPAVAN J. – I agree.

EKANAYAKE J. – I agree.

Appeal dismissed, the Order of the Court of Appeal dated 20.7.2007 affirmed.

CITY PROPERTIES (PVT) LTD. V. EDIRISINGHE

SUPREME COURT
TILAKAWARDANA, J.
SRIPAVAN, J. AND
IMAM, J.
S.V. (CHC) APPEAL NO. 34/2008
S.C.H.C.L.A 18/2008
COMMERCIAL HIGH COURT
CASE NO. HC (CIVLI) 47/2006 (01)
FEBRUARY 18TH, 2010

Civil Procedure Code – Section 46(2) – Court may reject the plaint, when the plaint having been returned for amendment within a time fixed by the court is not amended within such time – Section 93 – Wide discretion to Court to amend the pleadings

The Plaintiff – Respondent based his action on an oral agreement which he alleged to have been entered into with the Defendant – Petitioner. When the matter was taken up for trial, the Petitioner objected to issue No. 2 raised by the Respondent on the ground that the plaint did not disclose either the date of the oral agreement or the identity of the person with whom such agreement had been entered into. Thereupon the learned High Court judge made the order marked ‘A6’ Wherein the learned Judge rejected the proposed issue No. 2 as the date or the approximate period during which the agreement was entered into or the identity of the authorized representative of the Petitioner with whom the oral agreement was entered into was not specified with clarity in the plaint.

The Respondent did not prefer an appeal against the said order, but sought to amend his plaint. The Court allowed the amendment sought by the Respondent. One of the requirement of ‘A6’ is the disclosure of the name of the Petitioner’s purported representative with whom the Respondent claims to have entered into an oral agreement. The Respondent did not amend the plaint in accordance with the direction given by Court.

Held:

- (1) A party who had failed to comply with the order made by Court, cannot seek the protection of law thereafter on the same cause of action. He has to face the consequence of non-compliance.
- (2) The provisions contained in Section 93 of the Civil Procedure Code grants a wide discretion to Court to amend the pleadings. Its discretionary power must, however, be exercised subject to the limitations set out in Section 46(2) of the Civil Procedure Code that no amendment is to be made which has the effect of converting an action of one character into an action of another or inconsistent character.
- (3) The Appellate Court would be hesitant to interfere with the exercise of such a discretion by the trial Judge. This discretion could be viewed from the perspective of the flexibility and the choice granted to the trial Judge based upon a consideration of all factors involved. This judicial discretion of the Court must be exercised so as to do justice in a case that is being tried with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist at the time the proceedings were instituted.
- (4) It is the duty of the Court to consider the issues already raised and to allow any fresh issues to be formulated based on the clarification sought by Court only if such a course appears to Court to be in the best interest of justice.

APPEAL from an order of the Commercial High Court of Colombo exercising Civil Jurisdiction.

Harsha Amarasekera with Kanchana Pieris for Defendant – Petitioner
Kuvera de Soysa for Plaintiff-Respondent.

Cur.ade. vult.

June 2nd 2011

SRIPAVAN, J.

The Plaintiff-Respondent (hereinafter referred to as the Respondent) instituted an action in the District Court and against the Defendant-Petitioner (hereinafter referred to as

the Petitioner) seeking to recover a sum of Rs. 12 Million as Commission/brokerage fees due to the Respondent in respect of a sale of a particular property. Upon an objection being raised by the Petitioner to the jurisdiction of the Court, the case was transferred to the High Court of the Western Province exercising civil jurisdiction. The Petitioner filed answer and took up the position that the Respondent did not act as a broker and as such was not entitled to recover any monies from the Petitioner.

It is noted that the Respondent based his action on an oral agreement which he alleged to have been entered into with the Petitioner. When the matter was taken up for trial on 14-05-07, the Petitioner objected to issue No. 2 raised by the Respondent on the ground that the plaint did not disclose either the date of the oral agreement nor did it disclose the identity of the person with whom such agreement had been entered into. The Learned High Court Judge thereupon made the following Order marked A6 (translated into English).

“The Petitioner has objected to the Respondent’s issue No. 2 on the basis that the Respondent has no right to raise such issue as he has not specified the date on which the oral agreement referred to in Paragraphs 4 and 5 of the plaint was entered into. Further, the Respondent has not disclosed the identity of the person of the Petitioner Company with whom the oral agreement was said to have been entered

Having considered the submissions, I feel it is necessary to specify the date or the approximate period during which the agreement was entered into. The Civil Procedure Code requires the Respondent to annex a copy of the written agreement to the plaint where the cause of action arises

out of a written agreement. If this is not done, the Petitioner would not have sufficient opportunity to prepare his defence or establish his rights.

As the Petitioner is a Company, it is also necessary to specify with clarity the identity of the authorized representative of the petitioner with whom the oral agreement was entered into.

Since this has not been disclosed, I reject the proposed issue No. 2.

I grant a date to the Respondent to consider this and take steps”

The respondent did not prefer an appeal against this Order marked A6. However, he sought to amend his plaint. Though the Petitioner, objected to the said amendment, it was allowed by Court after an inquiry. Neither the fundamental character of the suit nor its nature and scope was permitted by the amendment. Accordingly, the Respondent filed a motion dated 21-06-07 and chose to file an amended plaint. The Petitioner filed amended plaint. The Petitioner filed amended answer in response to the amended plaint and both parties thereafter filed their amended issues. The matter came up in Court on 13-05-2008 for consideration of issues and trial.

The Learned Counsel for the Petitioner objected to Issue No. 04 of the Respondent on the following basis:

- (a) the name of the representative of the Petitioner Company with whom the proposed agreement was said to have been entered into had not been specified in the amended plaint,

- (b) the said Issue must be rejected in view of the previous order marked “A6”, and for the same reasons set out therein,
- (c) the issue was not based on the pleadings contained in the plaint, and
- (d) that the issue was vague.

The Learned High Court Judge again made an order marked A16, stating that it was the duty of the Court to frame issues and directed the Respondent to disclose the name of the employee with whom the Respondent entered into an oral agreement. The Petitioner sought leave to appeal against the said Order marked A16 and leave was granted by this Court on 4th July 2008.

It is observed that the Respondent was given an opportunity to consider the steps he wished to take in respect of the Order marked A6. Without appealing against the Order marked A6, the Respondent sought to amend his plaint. Thus, when the Respondent sought an amendment of the plaint, he was duty bound to file an amended plaint in terms of the Order marked “A6”. It is of utmost importance to comply with the directions given by Court in order to ensure that administration of justice in a particular case or matter be protected in the interests of the society.

One of the requirement of A5 is the disclosure of the name of the Petitioner’s purported representative with whom the Respondent claims to have entered into an oral agreement. The failure to disclose the name in the amended plaint amounts to a failure to comply with the Order of Court marked A6. A party who has failed to comply with the Order made by Court, cannot seek the protection of law thereafter on the

same cause of action. He has to face the consequences of such non-compliance. Thus, when the Respondent decided to amend the plaint and was not amended in accordance with the order made by Court, I am of the view that the Court was entitled to make an appropriate order for not complying with its order.

It is significant to note that at the time of filing the amended plaint, the Court did not exercise its discretion under Section 46(2)(J) of the Civil Procedure Code to refuse to entertain the same for not complying with its order. The provision contained in Section 93 of the Civil procedure Code grants a wide discretion to Court to amend the pleadings. Its discretionary power must, however, be exercised subject to the limitations set out in Section 46(2) of the said Code that no amendment is to be made which has the effect of converting an action of one character into an action of another or inconsistent character. A case must be tried upon the issues on which a right decision could be arrived at, raising the real question between the parties. The functions of pleadings enable the Court to clarify the issues so that the real issues between the parties may be tried at the trial.

The impugned order marked A16, directed the Respondent to disclose the date and the name of the employee with whom he entered into an oral agreement. The effect of the clarification sought by Court was merely to find out the real dispute between the correct parties which would facilitate the task of administering justice and will not cause any injustice to the petitioner. The appellate court would be hesitant to interfere with the exercise of such a discretion by the trial Judge. This discretion could be viewed from the perspective of the flexibility and the choice granted to the trial judge based

upon a consideration of all factors involved. This judicial discretion of the Court must be exercised so as to do justice in a case that is being tried with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist at the time the proceedings were instituted.

It must however, be emphasized that it is a prime duty of the court to consider the issues already raised and to allow any fresh issues to be formulated based on the clarification sought by Court only if such a course appears to Court to be in the best interest of justice.

For the foregoing reasons, I hold that the appeal fails. Having regard to the facts and circumstances, I make no order as to costs. The Registrar is directed to forward the Case record to the High Court forthwith so that trial could be proceeded with as expeditiously as possible.

TILAKAWARDENA J. - I agree

IMAM J. - I agree

**DON TILAKARATNE VS
INDRA PRIYADARSHANIE MANDAWALA**

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.
MARSOOF, J. AND
SRIPAVAN, J.
S.C. APPEAL NO. 74/2007
S.C. (SPECIAL) L.A. NO. 102/2007
H.C. PANADURA APP. NO. 23/05
M.C. HORANA NO. 21978
DECEMBER 18TH, 2008

Maintenance Act No. 37 of 1999 - Section 2(3) - A parent having means neglects or refuses to maintain his or her adult offspring - Section 2(5) - Where an order is made by Court for the payment of an allowance, when such allowance be payable? - Section 4(1) - Application for maintenance - Section 22 - Classifications - Who is an adult offspring for the purpose of the Maintenance Act.

The Respondent-petitioner-petitioner filed an application for maintenance for her three children, viz, Upaka (22 years of age), Pushpika (20 years of age) and Ireshika (17 years of age). The 1st and 2nd children were classified as 'adult offspring'. After inquiry, the Magistrate made order directing the respondent-petitioner-petitioner to pay maintenance to the above-mentioned three children. He appealed against the decision of the Magistrate to the High Court. The appeal was dismissed on the basis that a proper appeal had not been filed in the High Court against the judgment of the Magistrate. The petitioner thereafter filed this appeal in the Supreme Court.

The Supreme Court granted leave to proceed on the following question of law:-

- (1) Whether an application under section 4(1)(b) of the Maintenance Act No. 37 of 1999 made on behalf of an 'Adult offspring' should state the reasons as to why the said 'Adult offspring' is incapable of making such an application or should the said reasons be stated in evidence led in support of such an application and if such reasons are not given in the application or in evidence, can the court make an Order for the payment of maintenance in respect of such 'Adult Offspring'?