



DIGEST
TO THE
Sri Lanka Law Reports

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

2007 VOLUME 1

Consulting Editors : HON S. N. SILVA, Chief Justice
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JUDGES OF THE APPELLATE COURTS 2007

SUPREME COURT

HON. SARATH N. SILVA, P.C. (CHIEF JUSTICE)
HON. DR. SHIRANI A. BANDARANAYAKE, J.
HON. J. A. N. DE SILVA, J.
HON. NIHAL JAYASINGHE, J.
HON. SHIRANEE TILAKAWARDENA, J.
HON. N. E. DISSANAYAKE, J.
HON. A. R. N. FERNANDO, J.
HON. R. A. N. GAMINI AMARATUNGA, J.
HON. SALEEM MARSOOF, J.
HON. ANDREW M. SOMAWANSA, J.
HON. D. J. DE S. BALAPATABENDI, J.

COURT OF APPEAL

HON. P. WIJAYARATNE, J.
(President Of Court of Appeal Retired on 27.02.2007)
HON. K. SRIPAVAN, J. (President Court of Appeal from 27.02.2007)
HON. CHANDRA EKANAYAKE, J.
HON. S.I. IMAM, J.
HON. L. K. WIMALACHANDRA, J.
HON. S. SRIKANDARAJA, J.
HON. W. L. R. SILVA, J.
HON. SISIRA DE ABREW, J.
HON. ERIC BASNAYAKE J.
HON. ROHUNI PERERA J.
HON. SARATH DE ABREW J.
HON. ANIL FOONARATNE, J.
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DIGUST

2007 VOLUME 1

ADMINISTRATION OF JUSTICE LAW – SEE CIVIL PROCEDURE CODE (10)

ARBITRATION ACT

Arbitration Act – 11 of 1995 – Section 25, Section 26, Section 31, Section 32(1) – Award – Grounds of Challenge? Award against public policy? It is a ground? – 1958 New York convention.

A dispute in relation to the payment of a certain sum of money by the respondent to the claimant – appellant was referred for arbitration. The matter contested at the arbitration focused on the quality of the body armour supplied by the claimant – appellant, as to whether it met the specification as set out in the tender documents.

The award was in favour of the claimant appellant. The respondent preferred an application under section 32(!) of the Arbitration Act seeking to set aside the award to the High Court. The High Court set aside the award.

In appeal, in the Supreme Court, It was contended by the appellant, that there was a valid award in terms of section 25(2) and that the award was not against public policy and merits or findings of the award could not be challenged.

Held:

- (1) Section 32 contains the sole grounds upon which an award may be challenged or set aside Courts have no jurisdiction to correct patent and glaring error of law in an award unless the error can be established to be a jurisdictional error or can be shown to be of such a nature as to render the award contrary to public policy.

The Arbitration Act – contemplates that the award is not susceptible and not vulnerable to any challenge except that permitted under the Act. This is on the basis that it is conclusive as a judgment between the two parties and could only be set aside on the grounds explicitly set out in section 32.

Per Shiranee Tilakawardane, J.

“In exercising jurisdiction under section 32 Court cannot sit in appeal over the conclusions of the Arbitral Tribunal by scrutinizing and reappreciating the evidence considered by the Arbitral Tribunal. The Court cannot re-examine the mental process of the Arbitration Tribunal contemplated in its findings nor can it revisit the reasonableness of the deductions given by the arbitrator – since the arbitral tribunal is the sole judge of the quantity and quality of the mass of evidence led before it by the parties – the only issue that needs consideration is whether the purported fundamental flaws of the award in question would tantamount to a violation of public policy”

- (2) The doctrine of public policy is somewhat open ended and flexible capable of wide and expansive definition. It is this flexibility leading at times, to inconsistency and unpredictably in application, which has led to judicial censure of the doctrine and earned it the reputation as one of the more controversial exceptions to the enforcement of arbitral awards.

Per Shiranee Tilakawardane, J.

“Public policy is generally those moral social or economic considerations which are applied by courts as grounds for refusing enforcement of the arbitral award, another view would equate public policy with the policy of law, whatever leads to the obstruction of justice or violation of a status or is against the good morals of a society can be deemed as being against public policy and therefore not susceptible to enforcement, further instances such as corruption, bribery and fraud and similar serious cases would constitute a grounds for setting aside an award.”

- (3) It is generally understood that the term public policy which was used in 1958 New York Convention and many other treaties covered fundamental principles of law and justice in substantive as well as procedural aspects.

The Arbitral award is not in violation of the public policy of Sri Lanka.

APPEAL from a judgment of the Colombo High Court.

Light weight Body Armour Ltd Vs. Sri Lanka Navy

CIVIL PROCEDURE CODE

- (1) *Civil procedure Code – Cap 53 – Section 704, Section 706 – Summary Procedure on liquid claims – Defendant objecting to jurisdiction and that promissory note is not valid in statement of objections – Praying for leave to defend unconditionally – Validity – Judicature Act Section 39 – Action barred by positive rule of law – Objections when? – Matters involving Law Merchant, which Court has jurisdiction? – Debtor seeking creditor – Past consideration – No consideration? – Bill of Exchange Ordinance, section 27 and 91 – Prima facie sustainable defence.*

The plaintiff instituted action to recover a certain sum of money with interest owing to him on a promissory note – under Cap 53 of the Code. The petitioner without filing petition/affidavit filed a statement of objections/affidavit and a number of documents praying that, the case be dismissed for want of jurisdiction as the parties were residing outside the jurisdiction of the District Court of Colombo and on the ground that the promissory note was not a valid note. as there was no valuable consideration. The application was dismissed by the District Court.

Held:

- (1) Objection to jurisdiction must be taken at the earliest opportunity if no objection is taken and the matter is within the plenary jurisdiction of the Court, the Court will have jurisdiction to proceed with the matter. Where the action is barred by a positive rule of law objection must be taken before pleading to the merits of the case.
- (2) In a matter involving “Law Merchant” English Law (Common Law) has to be applied. It is the debtor who should seek the creditor. Therefore the plaintiff must file action in the District Court having jurisdiction within which he resides.
- (3) In the instant case, there is ample evidence to show the intention of the parties that the payment must be made at the office of the defendant – petitioner. Evidence indicates that the place of residence of the defendant – petitioner is within the jurisdiction of the District Court of Colombo.

- (4) Although the general rule is past consideration is no consideration there are exceptions to this rule – Sections 27/91 Bills of Exchange Ordinance once the petitioner admitted the receipt of money and a Promissory Note signed in the absence of any documentary evidence to the contrary, it is not in the mouth of the petitioner to argue that he has a prima facie sustainable defence.

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

Ananda Vs. Dissanayake

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- (2) *Civil Procedure Code – Section 121 (@) 175, 175(2) – Document in additional list filled after the case was first fixed for trial – Exceptional, circumstances in exercise discretion – interest of justice – Paramount consideration.*

The plaintiff-petitioner pleaded that, the 1st defendant – respondent entered into a lease agreement with the plaintiff – petitioner in respect of a Toyota bus. Though the defendant – respondent agreed to pay the lease rentals he defaulted. At the trial, the plaintiff – petitioner sought to produce another lease agreement, this was objected to, on the basis that the document had been listed in the additional list but which was filed after the first date fixed for the trial. The District Court held with the defendant-respondent.

Held:

- (1) Provisions of section 121 (2) empowers the Court to require the list of documents to be filled not less than 15 days before the date fixed for trial.
- (2) Section 175 (2) empowers Court to use its discretion and grant leave to produce a document which is not listed in terms of section 121 (2)
- (3) Whether leave should be granted or not is a matter eminently within the direction of the trial Judge.

- (4) The defendant had notice of this document when the plaintiff raised issue No. 12, and further the lease agreement has been pleaded in the replication.
- (5) The principle of filing a list of witnesses is to prevent an element of surprise and thereby not cause any prejudice to the other party
- (6) The 1st defendant cannot be heard to say that she was taken by surprise.

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

Arpico Finance Co. Ltd V. Perera and Other

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- (3) *Civil Procedure Code – Section 75 (e), Section 84, Section 85, Section 87(2) – Section 143 Action dismissed – Counsel gone abroad – Not a personal ground Claim in reconvention postponed – Application to purge default dismissed as earlier application was on the same ground.*

The plaintiff-appellant (State) instituted two actions against the defendant – respondent. The State Counsel made an application for postponement of the trial on personal grounds – Counsel going abroad. This was refused by Court. The claim in reconvention inquiry was postponed as State was not ready.

The application made under section 57(2) was refused by Court stating that, the application is made on the same facts as earlier. Court has no jurisdiction to make any order on the same facts.

Held:

- (1) The District Judge completely misdirected herself on law when she stated that Court had no jurisdiction to vacate the ex parte decree. The Court was unmindful of the fact that it inquired into an application entertained by Court on specific provisions of section 87 vesting jurisdiction in the same Court which entered decree ex parte to make an order either setting aside ex parte decree or refusing to set aside same. There is a clear error of law.
- (2) The adjournment of the hearing of an action is governed by section 143 and undisputedly it is the discretion of the Court to grant an adjournment or not.

- (3) The correct procedure in terms of section 75(e) read with section 84 and section 85 would have been to proceed with the hearing ex parte of the claim in reconvention immediately upon the dismissal of the plaint. Instead the trial Judge had adjoined the hearing of same thereby placing the defendant at an advantage against the plaintiff because even in the event of defendant not been ready to proceed with his claim he gained an adjournment at the expense of the plaintiff who was caused prejudice and loss and damage in the process.

Per Wijyaratne, J. (P/CA)

“This process which cannot be any measure of reasoning, be described or presumed as judicious is a special circumstance of this case that warrants the interference by this Court sitting in appeal over the matter in issue here.”

Per Wijyaratne, J. (P/CA)

“The fact that the plaintiff has made an application by way of motion 5 days earlier has no mention whatsoever on the days proceedings and from the content it is apparent that the Counsel who objected to the application chose to keep mum about this motion a copy of which was received by his client and the Court which received the motion however minuted it much after the trial date.”

- (4) If the fact of the plaintiff not being ready for hearing is not good ground for granting adjournment of trial of the plaintiff's case. It should not justifiably be considered as good ground for adjournment of hearing of the claim in reconvention.

APPEALS from two orders made by the trial Judge in the District Court of Colombo.

Attorney General Vs. Aus Lanka Development and Construction Company LTD

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- (4) *Civil Procedure Code – Section 154 – Evidence Ordinance section 74 – section 83 – Presumption that Surveyor General's plans are duly made – Rejecting Surveyor General's plan for non compliance of section 154 0 Validity? Ingredients necessary for reception of fresh evidence or a new trial.*

The plaintiff – respondent sought a declaration of title to the land in question. The defendant-appellant's position was that it forms a part of a crown land. The Surveyor General's plan/report was rejected since it was not produced in the proper way. The trial Judge held with the plaintiff – respondent.

Held:

- (1) In terms of section 74 of Evidence Ordinance Surveyor General's plan is a public document and section 83 states that, there is a presumption that Survey General's plans are duly made and accurate.
- (2) Court cannot reject the plan and report merely because of non compliance under section 154 of the Civil Procedure Code.
- (3) The presumption under section 83 in favour of such plans/surveys extend to everything necessary to be done in order to make the survey/plan a faithful drawing and manuscript of the land surveyed.
- (4) In a *rei vindicatio* action, plaintiff must prove title and establish his title, as a declaration cannot be granted merely because the defendant's title is poor or not established. Title and identify are important matters to be established to succeed in a *rei vindicatio* action.

Per Anil Gooneratne, J.

It is apparent that, the learned trial Judge has misdirected himself on the plan and report submitted by the Surveyor General. In fact the Surveyor General's witness (if called) would be an essential witness not to prove title of state as such but to ensure the identify of the land in dispute is considered from the proper perspective, to either exclude state properly or include same within the disputed area of land".

Held further

- (5) In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled.
 - (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

- (2) Evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive
- (3) The evidence must be such as in presumable to be believed or in other words it must be appropriately credible although it need not be incontrovertible.

The above conditions may not be exhaustive in a way and also not imperative, but certainly could be used to guide Court in cases where a retrial is ordered”.

Per Anil Gooneratne, J.

“It is may view that the Surveyor General or his authorized representative’s evidence both oral and documentary would be appropriately credible and would have an important influence on the result of the case.”

APPEAL from the judgment of the District Court of Mt. Lavinia.

Dehiwela Mt. Lavinia Municipal Council V. Fernando and others **293**

- (5) *Civil procedure Code – Section 83(1) – Section 93(2) – Amendment of pleadings – What is the day first fixed for trial? Is it the day the trial actually begun?*

Held:

The day first for trial could mean the day the trial actually began. Any amendment made prior to the date the trial was begun comes under 593(1) empowering the Judge granting wide discretion in allowing amendments.

“It is clear that the date of trial is not necessarily the first date on which the case is fixed for trial, but would also include any date to which the trial is postponed”.

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

Karunaratne V. Alsiw

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- (6) *Civil Procedure Code – Section 76 3 (2) amended by Act 53 of 1980 – Section 149 – Judicature Act 2 of 1978 – Section 23 – Amended by Act 37 of 1979 – Writ pending appeal – Substantial loss – Substantial questions of law – Burden on whom – Discretion of Court to make a fit and proper order as justice may demand – issue framed after proceedings were concluded – Bad in law?*

Held:

- (1) The law applicable to stay execution of decree pending appeal is contained in section 23 of the Judicature Act 2 of 1978 as amended by Act 37 of 1979 and section 762 (2) of the Civil Procedure Code as amended by Act 53 of 1980. However these provisions are not linked.

Per Sarath de Abrew, J.

“It goes without saying that if a writ is stayed to avoid substantial loss being caused to the judgment debtor equally anticipated loss or damage to a certain degree would result to the judgment creditor who is unable to enjoy the fruits of his victory after protracted litigation”.

- (2) Court should be satisfied of the probability of substantial loss resulting to the judgment debtor if the writ is not stayed and mere inconvenience and annoyance is not enough to induce the Court to take away from the suffered party the benefits of the decree.
- (3) As far as section 23 of the Judicature Act is concerned, the rule is the execution of the writ whereas the exception is the stay of the writ. Other than the mandatory provision compelling the entering into a bond, section 23 does not spell out or specify any other precautions as to under what conditions writ may be stayed, but leaves the entire exercise to the judicial discretion of the District Judge concerned to make a fit and appropriate order.
- (4) In assessing loss pecuniary or otherwise, the mere expectation or belief of the defendant as recited by him unsupported by other credible material may not be sufficient to satisfy Court of its existence – In the instant case the defendant has failed to discharge his burden.

Held further:

- (5) The learned District Judge by raising an issue without notice to parties after the judgment had been reserved to the effect that what had been leased is the business only and not the premises – raises the question of the existence of substantial questions of law.

APPLICATION for leave to appeal withleave being granted from an order of the District Court of Kalutara.

Molton Silva V. Sumanasiri**346**

- (7) *Civil Procedure Code – Section 46, 48, 38, 93 – Caption read District Court of Mt. Lavinia and the word Mt. Lavinia was struck off – and the word Colombo inserted in handwriting – Application to initial alteration – refused – Dismissal of action – Validity – Should the plaint be amended?*

A preliminary objection was raised stating that the caption of the plaint reads as District Court of “Mt. Lavinia” and the word “Mt. Lavinia” had been struck off and the word “Colombo” has been inserted in handwriting.

The trial Judge inquired from Counsel whether he wishes to amend the plaint, the Counsel indicated that the plaint need not be amended but sought permission from Court to initial/endorse the caption showing the alteration.

This was refused by the Judge and the action was dismissed.

Held:

- (i) There was no necessity to apply to Court to amend the plaint Amendment of pleadings will become necessary only to ascertain the points in issue in case of doubt, function of the pleadings it to clarify the issues so that the real issues between the parties may be tried.
- (ii) It is settled law that cause of justice cannot be thwarted by procedural technicalities. A party cannot be refused just relief mainly because of some mistake, negligence or inadvertence.

- (iii) Court should always be mindful of the fact that merits of the case should be considered unless the objection raised by Counsel indicates a material defect in the pleadings which needs amendments in compliance with section 93.
- (iv) Attitude of Courts should be to avail frivolous technicalities “*Superme Court is a Court of Law which should not be tramelled by technical objections and that it is not an academy of law*” – Chief Justice Abrahams in *Velupillai V. Chaiman, U. C. Jaffna*⁽⁷⁾

APPEAL from the Judgment of the District Court of Colombo.

Perera V. Geekiyana

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- (8) *Civil Procedure Code – Section 114 (3) – Section 154 (3) – Section 187 – Focuments marked become part of the record – Should Court call for documents? Answering of issues – Bare answers – adequate?*

Held:

- (1) The absence of answering the points of contest in a judgment would amount to a clear breach of Section 187.
- (2) The points of determination and the decision thereon needs to be embodied in the judgment which would refer to the reasons for such decision.
- (3) There is a duty on Court to take the documents tendered and marked at the trial to the custody and keep them filed of record – documents marked in evidence become part of the record.

Per Anil Gooneratne, J.

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

APPEAL from the judgment of the District of the District Court of Homagama.

Perera V. Caldera and others

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

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

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

Held:

- (1) In the case of constructive malicious desertion the spouse who is out of the matrimonial house must show the other acted with fixed intention of putting an end to the marriage and the burden of proving just cause in order to assert constructive malicious desertion is on the spouse who alleges constructive malicious desertion.
- (2) To constitute the offence of constructive malicious desertion by the defendant the necessary conduct should be of grave and convincing character.
- (3) It would be for the judge to say whether the fact were capable of being regarded as equivalent to an expulsion from the matrimonial home.

“the function of an appeal Court is to consider the matter without either denying its first Court its special advantages or supposing that it can place itself in the same position by a mere study of the record.”

APPEAL from the judgment of the District Court of Kalutara.

Alevulle Fernando V. Chandrani Fernando

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- (10) *Civil Procedure Code – Section 797, Section 798, Contempt of Court – Accused acquitted – Complainant appeals – Is the written sanction of the Attorney – General required? Criminal Procedure Code – 15 of 1979 –*

Section 318, Section 355 Administration of Justice Law – Act 44 of 1973, No. 22 of 1975 – Section 316, Section 356, Section 664, Section 667 – Compared – Should Section 318 of the Criminal Procedure Code be isolated from Section 798?

The respondent-respondent – accused was charged in the District Court for Contempt of Court under Section 797 of the Civil Procedure Code. The respondent were acquired alter inquiry. The appellant, who is the 3rd defendant and the virtual complainant appealed to have the order of acquittal set aside. The accused raised the objection that no appeal shall be lodged against an acquittal except with the written sanction of the Attorney-General and as the written consent of the Attorney-General has not been obtained the appeal should be rejected *in limine*.

Held:

- (1) The substantive law and procedure relating to appeals against acquittals and convictions on charges of Contempt of Court was identical to the law presently in force, at least from 1898 and was remarkably uniform and significantly consistent, for a period of over a century.
- (2) It has to be borne in mind that the procedure applicable at any given period, regulating the appeals arising out of contempt of District Court was constantly the Criminal Procedure of the point of time.
- (3) The question for determination, whether the entire chapter dealing with ‘appeals’ from Magistrates Court would apply in this case or whether it applies in the exclusion of Section 318, that deals with the requirement of having to obtain the written sanction of the Attorney General – Section 318 of the Code is incapable of being isolated from Section 798 of the Civil Procedure Code and should be strictly followed *mutatis mutandis* in respect of appeals against acquittals recorded by a District Judge.

APPEAL from an order of acquittal from the District Court of Panadura exercising civil jurisdiction, on a preliminary objection raised.

Rubert Appuhamy Vs. Kesbewa Pradeshiya Sabawa and other (1)

- (11) *Civil Procedure Code – Section 754(4), Section 757 – amendment No. 79 of 1986 – Section 765 – Leave to Appeal notwithstanding lapse of time – Bona fide mistake in noting down the date by party and his Attorney-at-Law – cause not within his control?*

Held:

- (1) A mistake or oversight on the part of the Attorney-at-Law or a party to a suit is not such cause within the meaning of Section 765 as would enable such party to the relief under the said provision – Section 765.
- (2) ‘Noting down the wrong date’ cannot be considered as a ground that falls within the purview of ‘causes’ not within his control’.

APPLICATION under Section 765 of the Civil Procedure Code.

Samarasekera V. Indrani

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- (12) *Civil Procedure Code Section 479-763(2) – Act 53 of 1986. Writ pending appeal – Judicature Act 2 of 1979 as amended by Act 37 of 1979 – Ingredients necessary to stay the writ? defendant a minor – Guardian not appointed – It is a substantial question of law?*

Held:

- (1) The law applicable to stay of execution of decree pending appeal is contained in section 23 of the Judicature Act and also in section 763(2) of the Civil Procedure Code/
- (2) Where section 23 of the Judicature Act is concerned the rule is the execution of the writ whereas the exception is the stay of the writ.
- (3) On the other hand section 763(2) which is not linked to the provision of the Judicature Act stipulates distinctive condition as the court may stay the writ, if the judgment debtor satisfies the court that substantial loss may result to him and security is given by the judgment debtor for the due performance of the decree.
- (4) Though if a writ is stayed to avoid substantial loss equally unexpected loss or damage to a certain degree would result to the judgment creditor

who is unable to enjoy the fruits of his victory-however what matters is not the balance of convenience or inconvenience of the concerned parties but the fact on the material placed before court, the judgment debtor should discharge the burden placed on him to the satisfaction of court.

- (5) Even in the absence of substantial loss, the existence of a substantial question of law is sufficient ground to stay execution of the writ.
- (6) There is a duty cast on the judgment debtor to take whatever possible steps to minimize his loss, he cannot fall back on his inaction and inertia and claim substantial loss would be caused to him.

Per Sarath de Abrew J.,

“If the dogmatic and arrogant approach of the judgment debtor is allowed to succeed, no judgment creditor would be safe from the clutches of an unscrupulous judgment debtor who has school going children in a school close to the premises in suit – for if a genuine effort was made, there was a strong likelihood that the judgment debtor could have succeeded in procuring alternative accommodation within striking range of the school his children are attending or was about to attend.

- (7) It is evidence that the 3rd defendant was a minor at the time the plaint was filed. The trial judge has failed to comply with the mandatory provisions of section 479 of the code and failed to appoint a *guardian ad litem* on behalf of the minor defendant before proceeding with the case. therefore a substantial question of law will arise as to whether the judgment or decree would be binding on the 3rd defendant – respondent and what would be the effect it would have on the 1 – 2 defendant – respondents.

Held further

- (8) The amount of security should be such as would reasonably safeguard the interest of the judgment creditor in the event of the judgment appealed from being eventually affirmed in appeal.

APPLICATION for leave to appeal from an order of the District Court of Panadura with leave being granted.

- (13) *Civil Procedure Code – Section 86(2), Section 839 – Vacation of an ex parte judgment – Refusal – Summons Served on the Managing Director – Validity? – Carr-Braint Rule – Failure to serve summons – Fatal?*

The District Judge of Colombo refused to vacate the *ex parte* judgment entered against the defendant – appellant company. The contention of the defendant – appellant was that, summons were not served, the plaintiff – respondent contended that summons were served personally on the Managing Director of the Company the 2nd defendant-appellant.

Held:

- (1) It is clear in company law that the Secretary of the Company is the rightful person to receive summons.
- (2) It is only by service of summons on the defendant the Court gets jurisdiction over the defendant. The failure to serve summons is a failure which goes to the root to the root of the Court to hear and determine the action against the defendant.
- (3) If the Court has no jurisdiction, it is of no consequence that, the proceedings were formally concluded for they are '*Corum Non Justice.*'

Per Rohini Perera, J.

“In cases where the defendant is a company it is always best that the summons be effected by registered post in the first instance, in case of a company, the summons shall also disclose as to whom that summons shall be delivered to. The plaintiff cannot be silent on this and expect any person in the company to accept the summons and expect Court to presume that, the correct person had been served with notice” – When a person is not named on the precepts as the person to whom it should be delivered, it is always safe to deliver the summons by registered post.

- (4) Applying the Carr-Braint Rule—(when Court has to form an opinion as to the truth of such evidence, any fact which may slightly even tilt to one side be regarded as a fact in favour of such party). Upon a balance of probabilities is seen that summons had not been served on the defendant-appellants.

APPEAL from a judgment of the District Court of Colombo.

Universal , Marketing Services (Pvt) Ltd and another V. Indian Overseas Bank

CONSTITUTION

Constitution – Art 3 – Art 126 – 126 (4) Art 12(1) – Non issue of a loudspeaker permit – Police Ordinance Section 80 – Imposing of restrictions – Breach of fundamental rights? National Environment Act 47 of 1980 – Sections 23P – 23R – Amended by Act 56 of 1988 – Penal Code – Section 26 – Sound Pollution – Standards – Directions by the Supreme Court – Public Nuisance.

The petitioners complained that, non issuing of loudspeaker permits under S 80 Police Ordinance of the trustees of the Jumma Mosque Weligame and imposing restrictions on such use is in violation of their fundamental rights.

Held:

Per Sarath N. Silva C. J.

“A perceived convenience or advantage to some bases on a religions practice cannot be the excuse foe a public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity.”

- (1) People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by S23P of the National Environmental Act 47 of 1980 (amended) to safeguard the public from harmful effects of noise pollution – no guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Art 12 (1) have been issued.

The Supreme Court having considered the matters before it, issued specific directions in terms of Art 126(4) of the Constitution.

APPLICATION under Art 126(1) of the Constitution.

Ashik V. Bandula and Other s (Noise Pollution Case)

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CONTEMPT OF COURT

Contempt of Court – Undertaking given by party – issue of an interim injunction by Court of Appeal based on the undertaking – Violation – No charge framed – What is relevant is whether the contemnor breached the undertaking?

Action was instituted to define and demarcate the boundaries of the corpus. It was alleged that the respondent has sought to destroy the Northern boundary and put up a building. The petitioner obtained an enjoining order but the application for an interim injunction was refused. The petitioner sought to revise the said order, and in the Court of Appeal an undertaking was given that, the respondent would not effect further constructions and would maintain the status quo (order Y). The petitioner complained of contempt committed by the respondent breaching/ violating the interim injunction (Order Y).

The respondent raised a preliminary objection as to the sustainability of the application on the basis that there is no charge to which the respondent could plead.

Held:

- (1) The order Y does not specify the location, it is obvious that the order applies only to the Northern side, as that in fact was the disputed area.
- (2) The party had been expressly enjoined from doing a particular thing in a particular location, and if he violates those particular acts, that he would be guilty of civil contempt.
- (3) If the respondent did any act on the Northern boundary which would amount to a constitution – he may then be guilty of contempt of Court. When there is no order with regard to the other boundaries. there cannot be any compliance of such an order, hence no contempt is committed. The pleadings do not indicate with any specificity which part of the boundary, has been destroyed.
- (4) The object of the order Y was to preserve the status quo ante only of the Northern boundary. There is no undertaking with regard to the 'other boundaries' others than the Northern boundary.
- (5) Any undertaking given ex facie curiae is equivalent to a judgment or order from a Court.
- (6) It is a well recognized principle of law that no person ought to be punished for contempt of Court, unless the specific charge against him be distinctly stated and opportunity of answering it had been given to him.

In the matter of Contempt of Court.

CONTEMPT OF COURT – See CIVIL PROCEDURE CODE (10)**COURT OF APPEAL (APPELLATE PROCEDURE) RULES**

Court of Appeal (Appellate Procedure) Rules 1990 Filing of objections - is an affidavit necessary? Objections in the form of an affidavit alone - Does it suffice? Does it deprive the respondent's right to appear in opposition?

Held:

- (1) Respondent when filing objections to an application has to file a statement of objections distinct from an affidavit of the respondent. An affidavit is necessary to support any averment of facts that are averred in the statement of objections.
- (2) An affidavit alone cannot be construed as a statement of objections when he has objected to the application in his affidavit.
- (3) There is no mandatory requirement in the Rules to file a statement of objections. Therefore a respondent who fails to file a statement of objections or files an objection not in compliance with the Rules cannot be deprived from appearing and objecting to the application on grounds of law or to submit to Court on the infirmities of the petitioner's application.

Per Sriskandarajah, J.

“The intention of the framers of the Rule is not to deprive a party to a fair hearing but to maintain the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law.”

APPLICATION for a Writ of Certiorari/Mandamus.

Assemblies of God of Ceylon Urban Council Anuradhapura and another **89**

BURDEN OF PROVING INSANITY See PENAL CODE (3)

CONSTITUTION

Article 14 (c), 12 (1), 35 (1), 80 (3), 105 (1) 154 (A) (2), 152 (3), 155 (2) **38**

Article 12 (1), 29, 126 (4) **101**

Article 3, 126, 126 (4), 12 (1)	191
Article 138 (1), 154 (6)	398

Debt Recovery (Special Provisions) Act 2 of 1990 amended by 9 of 1994 - Section 6, Section 7 - Decree nisi entered to be deposited - Who should begin? Civil Procedure Code - Section 384 - Section 389 - Burden of proof.

The plaintiff filed action in terms of the Debt Recovery (Special Provisions) Act as amended to recover a certain sum. Upon institution of the action, Court entered decree *nisi*, when the decree nisi was served the respondent sought unconditional leave to appeal and show cause. After inquiry, Court granted the respondent leave to appear and show cause against the decree *nisi* upon deposit of a sum of Rs. 50,000/-. Thereafter the Court defected the defendant to begin the case.

On leave being sought

Held:

- (1) The Debt Recovery (Special Provisions) Act. is a special Act introduced by the legislature to expedite the process of recovery of debts by lending institutions.
- (2) In terms of S6 if the Court grants leave to appear and show cause against the decree *nisi* the procedure to followed is laid down in Section 7 of the Debt Recovery Law".

Per Wimalachandra, J.

"Dicta in the burden of proof in my judgment in *Bank of Ceylon V. Kaleel* - 2004 - 1 Sri LR 284 have no application to the circumstances under consideration in the present application. . . . the objections with regard to the question 'who should begin the case' - is obiter dicta, and my observation in the judgment in the *Bank of Ceylon v. Kaleel* ought to stand rectified"

APPLICATION for eave to appeal from an order of the District Court of Kegalle

EDUCATION ORDINANCE *See* **FUNDAMENTAL RIGHT** (1)

Employees Trust Fund Act - 46 of 1980 - Section 28 (1), Section 28 (2), Section 28 (3) - Section 39, Section 41 - Recovery in Magistrate's Court - Written sanction of The ETF Board necessary? When?

The question arose as to whether written sanction of the ETF Board is required when section 28 (3) is resorted to.

On leave being sought

Held:

- (1) Section 28 lays down three methods of recovery. First method is by way of summary procedure section 28(1). The Second method is to file a certificate in the District Court to get a writ executed - Section 28 (2). The Third method is to file a certificate in the Magistrate's Court - Section 28(3)
- (2) When sanction of the Board is required only in the event of instituting proceedings under section 39, section 39 attracts prosecution and punishment. It deals with convictions, Sanction is required only in the event of prosecution. Section 28(3) is not with regard to prosecutions and convictions, therefore sanction of the Board is not required.

In the matter of an application from an order of the Magistrate's Court of Chilaw

Employees Trust Fund Board V. Subasinghe 313

EQD EVIDENCE *see* **LAST WILL****EVIDENCE ORDINANCE**

Section 54, 114	255
Section 105	237
Section 45, 114 (1)	224
Section 27	218
Section 74	293

Section 4 (1) a, b, c, d, 7 (1) a	276
Section 60 (1), (2), 91, 165	273
Section 54, 114	255
Section 44	370
Section 101	13

EVIDENCE ORDINANCE

Evidence (Special Provisions) Act 14 of 1995 - Section 4(1) (a) (b) (c) and (d) Section 7 (1) (a) - Requirements to be satisfied before admission of video evidence? - Is it mandatory to comply with Section 7 where the document is in the possession of the adverse party? - Do the provisions of Act 14 of 1995 override the provisions in any other law - Poisons Oplum and Dangerous Drug Ordinance Act 13 of 1984?

An Application was made to lead evidence of a video recording. The High Court made order directing the petitioner to satisfy Court of compliance with the requirements of Section 4 (1), (b) (c) and (d) of Act 14 of 1995. After inquiry, the High Court made order refusing the application to lead video evidence. The petitioner moved in revision.

Held:

- (1) After the Evidence (Special Provisions) Act 14 of 1995 came into operation admission of video recordings is governed solely under the provisions of the said amendment.
- (2) In accordance with Section 2 it is clear that the provisions of the amending Act 14 of 1995 overrides both the Evidence Ordinance or any other written Law. Therefore Section 4 (1) (a) - (d) have to be complied with.
- (3) It is apparent that
 - (1) Evidence led by both prosecution and defence prove that there was no contemporaneous recording of the raid.
 - (2) Evidence clearly establishes that whatever recording that was made was not kept in safe custody at all material times.

- (3) No sufficient precautions were taken to prevent the possibility of such recording being altered or tampered with.

It is clearly seen that provisions of Section 4 (1) (a) - (d) of Act No. 14 of 1995 have not been complied with - the video cassette is not admissible in evidence.

Abeygunawardene V. Samoon and others 276

FIRE ARMS ORDINANCE See **PENAL CODE** (2)

FUNDAMENTAL RIGHT

- (1) *Fundamental rights - Constitution Article 12(1), Article 29, Article 126 (4) - 13th Amendment - Grade 1 admissions to National Schools - Circular arbitrary unequal and capricious - National Policy - Affirmed by Cabinet of Ministers? Classification - 'Royster formulation' - National Education Commission Act 19 of 1991 - Section 2 - Education Ordinance.*

The petitioners in all the applications allege infringement in respect of the refusal to admit the several children named in the petition to Grade 1 of the respective National Schools. The allegations are related to unequal, arbitrary and capricious application of the Circular. The scheme of the Circular is to state the National Policy for admission of student to schools. The circular also states that the National Policy has been affirmed by the Cabinet of Ministers.

Held:

Quarere

"It is stated in paragraph 1.0 that the National Policy has been approved by the Cabinet of Ministers and reference is made to a letter dated 25.5.2006 of the Secretary to the Cabinet of Ministers, however it is noted that the Circular itself is dated two days prior - this by itself renders it doubtful whether in fact the Cabinet of Ministers considered a National Policy on school admission as claimed in the Circular.

- (1) The principle of equality has a functional dimension as the fundamental right to equality guaranteed by Art 12(1) sets out the positive

element of the right that all persons are equal before the law, and guarantees "the equal protection of the law" and the bar against discrimination on grounds of race, religion, language, caste, sex political opinion or place of birth - the safeguards that assume equality before the law.

- (2) Taken in the context of the Republican principle of equality and the fundamental guarantee thereof the phrase the law in Art 12 has to be interpreted in a wider connotation that the term law and within law in Article 170 to encompass any binding process of legislation.
- (3) The guarantee of the right of equality in Art 12 should extend to any binding process of legislation laid down by the executive or the administrative which affects in its application.
- (4) The law in its primary sense is contained in the Education Ordinance, but the Ordinance has not been amended and the elaborate system of regulations has fallen into disuse, and there is no law that is operative as regards National Schools or for that matter in regard to any School. Education, being the foremost responsibility of the Government has been operating for a long time in a legal vacuum.
- (5) The impugned Circular does not have of the general characteristics that, pertain to policy, it has a classification of 7 categories, from a functional perspective it is the binding process of legislations laid down by the executive as regards the matter of admission to government schools.

Per S. N. Silva, C J.

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

- (6) The classification in the impugned Circular is not based on the suitability and the need of particular child to resume education in it National School or any other State School. It is based on wholly extraneous considerations and the suitability and the need of the par-

ticular student to receive education in the school is not ascertained in the process nor is there any method and criteria specified to ascertain such matters. The system of weighted marking contained in the Circular consequently defeats the objective of providing equal access to education.

- (7) The impugned Circular is inconsistent with the fundamental right to equality before the law and equal protection to the law guaranteed by Art 12(1), in so far it relates to the admission of students to Grade 1 of national/other school to which the Circular has been made applicable.
- (8) Section 2 of the National Education Commission Act 19 of 1991 empowers the President to declare from time to time the National Educational Policy which shall be conformed to be all authorities and institutions responsible for education in all its aspects. The policy has to be formulated on the recommendation and advice of the Commission.

APPLICATION under Art 126 of the Constitution.

Haputhanthrige and others V. Attorney General

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- (2) *Fundamental rights - Art 118, Art 126 (1), Presidents' Entitlement Act 4 of 1986 - S 213 - Conferment of wrongful or unlawful benefits - Executive power exercised in trust for the people - Such wrongful act is an infringement of fundamental right? Locus Standi - Sed quis custodiet ipsos custodiet - Nemo debet sua judix.*

The petitioners three Attorneys - at - law alleged infringement relating to unlawful unreasonable arbitrary and mala fide executive action of the 1st respondent who was at the material time the President of the country and the other respondents who were the then members of the Cabinet in securing for the 1st respondent.

- (a) a free grant of developed land close to the Parliament
- (b) Premise in Colombo 7 from which two public authorities have been ejected to be used as her residence after retirement,

- (c) staff and other facilities purportedly under the President's Entitlement Act.

Held:

Per S. N. Silva, C.J.

"Good governances and transparency characterize democracy and the rule law and where an infringement of equality before the law is alleged by the wrongful and unlawful grant of facilities and benefits at the highest level of the executive, strict rules of pleadings cannot be meted upon"

- (1) Though it is correct that a conferment of a wrongful or unlawu benefit or advantage may attract other offences such as the offence of corruption - the fact that the impugned action may or may not be an offence punishable by law does not mean that a person acting in the public interest is not entitled to seek a declaration from the Supreme Court that the conferment of such benefit or advantage in contrary to the fundamental right to equality before the law.
- (2) The respective organs of government reposed power as custodians for the time being to be exercised for the people. The petitions allege an abuse of power by the incumbent custodian of such power which at all times continues to be reposed in the people - ? *Sed quis ipsos custodies.*"
- (3) The 1st respondent and the Cabinet of Ministers were the custodian of public property and public funds. The property and funds will have to be dealt with according to law for the benefit of the people Therefore, the law itself is the instrumentality through which custodians are guarded. This is the basis postulate of the Rule of Law.

Per Sarath N. Silva, C. J.

"I am of the vire that there is a positive component in the right to equality that where the executive being the custodian of the people's power abuse a provisions of law in the purported grant of entitlements under such laws and secures benefits and advantages that would not come within the purview of the law, it is in the public interest to implead such action before Court.

- (4) The denial of *locus standi* in the circumstances as presented in this case where there has been a brazen abuse of power to wrongfully gain benefits from public resources, would render the constitutions guarantee of equality before the law meaningless.

Per Sarath N. Silva, C. J.

"In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a manner where he has a personal interest"/ *'Nemo debet sua judix'* is a principle of natural justice which has now permeated the area of coproprate governance as well. This sailent aspect of good fovermance has been thrown into the wings by the 1st respondent in initiating seveal Cabiner Memorandum during her tenure of office and securing for herself purported entitlements that would if all ensure only after she lays down the reigns of office."

APPLICATION under Act 126 of the Constitution

Senarath and Others V. Chandrika Bandaranayake Kumaratunga and others

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- (3) *Fundamental rights - Constitution 13th Amendment - Art 4(c) Art 12(1) Art 35(1), Art 80 (3) Art 105 (1) Art 154 A (2) - Art 152(3) & Art 155(2) - Prclamation resulting in merger of two provinces flawed Non-observance of mandatory conditions - Amendment of condition done by Emergency Regulations Ultra vires? - Provincial Councils Act 42 of 1987 S 37(1) 37(2) a, 37(2) b - Amendment 27 of 1990 - S5A - Public Security Ordinance S5 - Time bar - continuing violation.*

The petitioners residents of Trincomalee and in the Digamadulla Districts within the Eastern Province complained that - the proclamation declaring the provisions of S37(1) of the PProvincial Councils Act shall apply to the Northern and Eastern Provinces, which resulted in these two provinces forming one administrative unit-merger-deny the petitioners equal protection of the law guaranteed by Art 12(1)

Held:

- (1) The Constitution reserves the power of affecting a merger strictly within the legislative power of the Parliament to be done by or under any law.
- (2) An exception to the bar on abdication of legislative power is the empowerment of a person or body to make subordinate legislation for prescribed purposes as contained in Article 76 (B).
- (3) The power reposed in the President is in the nature of a delegate legislative power and the proclamation issued has to be characterized as subordinate legislature.
- (4) S37 (1) (b) confers a specific condition to be satisfied prior to the making of a Proclamation declaring that the provisions of sub section (1) should apply to the Northern and Eastern Provinces, which would have the effects of the two provinces being merged as one administrative unit until a poll is held on the question or merger in each of the provinces not later than 31.12.1988. The specific conditions to be satisfied in S37 (1) (b) are the surrender of weapons and cessation of hostilities contained in clause 2.9 of the Info Sri Lanka Accord.
- (5) The President himself had stated that there had been only a formal handing over of arms and the LTTE has violated the agreement. It is beyond and doubt that the two conditions for the merger as stated in S37 (1) (b) had not been met.
- (6) The amendment of S37 (1) (b) by providing an alternative to the two conditions by the President by an Emergency Regulations made under the Public Security Ordinance 6 days prior to, the order effecting the merger is not within the meaning of Art 170 setting out an alternative condition to what was already stated in the law S37(1) (b). It is inconsistent with Art 154 A(3) and is invalid.
- (7) In terms of Art 154A (3) only the Parliament could by or under any law provide for two and three adjoining provinces to form one administrative unit....." The Parliament exercising power reposed in sub Art (3) provided by law - S37 (1) (b) the two special conditions shall apply in respect of the merger, he a further alternative condition could, if at all be provided only by law.

Per S. N. Silva, CJ.

"An Emergency Regulation made by the President would be written law. The term law in Art 154(A) (3) should in my view be restricted to the meaning in Art 170, considering the context in which it occurs in relation to Parliament. Therefore any provision for the merger could be made in terms of Art 154(A) (3) which is in itself an exception to the general rule in Art 154A(1) and (2) that a separate Council be established and constituted for each province only by a law enacted by Parliament."

- (8) Power reposed in the President by S5 of the Public Security Ordinance to make Emergency Regulation amending any law has to be read subject to the provisions of Art 155(2) and an Emergency Regulation cannot have the effect of amending or overriding the provisions of the Constitution. The purported amendment of S37(1) (b) effected by the emergency Regulation in effect overrides the provisions of Art 154A(3) which only empowers the Parliament to provide by law for the merger of two or three provinces.
- (9) The impugned Emergency Regulations cannot be reasonably related to any of the purposes provided in S5(1) of the Ordinance, manifestly it has been made for the collateral purpose of amending another and unrelated law by means of which the President purported to empower himself to act contravention of specific conditions laid down in the law.
- (10) The perclusive clause contained in Art 80(3) which bars judicial review of a Bill that has become law upon certification does not extend to Emergency Regulations being in the nature of delegated legislation.
- (11) The impugned Emergency Regulation is ultra vires and made in excess of the power reposed in the President - it is invalid and of no effect or avail in law.
- (12) The Proclamation made by the then President declaring the merger has been made when neither of the conditions specified in S37(1) (b) were satisfied. The order is therefore invalid.

Held further:

- (13) The right to have a Provincial Council constituted by an election of the members of such Council pertains to the franchise being part of the sovereignty of the people and its denial is a continuing infringement of the right to the equal protection guaranteed under Art 12(1). The objection of the time bar is rejected.

AN APPLICATION under Art 126 of the Constitution.

Wijesekera and Others V. Attorney General

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ISSUE OF INTERIM INJUNCTION BY COURT OF APPEAL BASED ON THE UNDERSTANDING *see* **CONTEMPT OF COURT**

LAST WILL

Last will - Not the act and deed of deceased - Forgery - Suspicious circumstances - Should the suspicious circumstances be pleaded or put in issue? - E. Q. D. Evidence - Is it conclusive proof of the fact of forgery? - Evidence Ordinance, section 101 - Suggestion of fraud - Burden on whom?

The petitioner-appellant-petitioner applied to Court in May 1985 to have the last will of one K. P. Bearing No. 683 proved and further sought the grant of probate. The Common Law wife and a legitimate child of KP objected to the said application on the grounds that the said will is not the act and deed of KP and the same is a forgery. The 1st respondent stated that the deceased by a last will bequeathed all his property to her and the same is the subject matter of another testamentary case. The 2nd respondent sought letters to the state of the deceased as the sole heir at law. The trial Judge found that the last will (No. 683) gave rise to suspicious circumstances and held that the last will is a forgery.

In APPEAL it was contended that -

- (a) Suspicious circumstances were not pleaded nor put in issue.
- (b) That as the suspicious circumstances were neither pleaded nor were put in issue the petitioner had to adduce evidence without precisely knowing that such circumstances as providing suspicious circumstances were the case he had to meet.

- (c) That the District judge abdicated his jurisdiction as he considered the version of the EQD as conclusive proof of the fact of forgery.
- (d) That the EQD has not been believed previously therefore should not have been believed.

Held:

- (1) Every circumstance that is to be considered by Court need not be raised by way of an issue. The real issue that the petitioner was required to meet was whether the impugned last will was a forgery. The allegation of fraud with regard to a last will is an instance which finds an exception to the rule of evidence that the party asserting (fraud) has to prove the fact.

The Rule set up by Courts through the fine of authorities is that when there is a suggestion of fraud even if the evidence is not of such a nature as to justify a finding of fraud the burden is cast on the propounder of the will to dispel all suspicion if he were to have the will proved and probate granted.

- (2) In considering the judgment as a whole and not part by part it is clear that the trial judge did not reject and dismiss the application to have the will proved, on the sole ground of forgery based singularly on EQD's evidence. He has analytically seen circumstances exciting suspicion through the totality of evidence on record which in his opinion was not sufficient to dispel suspicious circumstances.
- (3) EQD who was said not to have been believed previously has explained how he compared the signature on the impugned Last will with admitted signatures appearing in documents read in evidence and the basis of his opinion founded according to scientific examination. Findings of the District Judge are rational and lawful. If the EQD has not been believed in earlier judicial proceedings, it does not mean that he should always be disbelieved if his evidence is based on scientific examination and justified his opinion.
- (4) On the issue of forgery Court may accept a handwriting expert's testimony provided that there is some other evidence direct or circumstantial which tends to show that the conclusion reached by the expert is correct.

- (5) Where there are features which excite suspicion in regard to a will whatever their nature may be it is those who propound it to remove such suspicion.
- (6) Suspicious features may be a ground for refusing probate even where the evidence which cast suspicion on the will though it suggests fraud is not of such a nature as to justify the Court in arriving at a definite finding of fraud. The conscience of the Court must be satisfied in respect of such matter.
- (7) The propounder should dispel all suspicion by explaining the circumstances established by evidence that is pleaded on record.

Ranjith Wanigaratne V. Kaggoda Arachchi

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MOTOR TRAFFIC ACT

Motor Traffic Act as amended by Act 40 of 1984 - section 151 (1) (B), Section 214, Section 216 - Regulations - Breathalyzer test - Quantum of alcohol in the blood - Procedure to be followed - - Death caused by driving a motor vehicle after consumption of alcohol - Penal Code section 298 - Driving after consuming alcohol and driving under the influence of liquor?

The accused was charged with (i) driving a private car on a public highway negligently and causing the death of one R. Offence punishable under section 298 - Penal Code (ii) driving after consuming liquor - under section 215 of the Motor Traffic Act - read with section 151 91) B of Act 31 of 1979 - Punishable under section 216 of the Act and 5 other counts.

The Magistrate found the accused guilty on all counts. The High Court in appeal varied the sentence imposed in respect of counts 2, 3 and 4. The appellant appealed against the conviction and sentence on count 2. Special leave was granted on the questions.

- (i) Does the evidence led to establish that the consumption of alcohol was above the quantum contemplated by regulations?
- (ii) Does the evidence establish that the appellant caused the death by driving the motor vehicle after the consumption of alcohol?

Held:

- (1) In order to establish the concentration of alcohol in the blood the police officer was required to carry out a breathalyzer test using an alcolyser. The procedure to carry out a breathalyzer test using the Alcolyser is found in IG circular 697/87.
- (2) For a positive reading, it is necessary to read that, the yellow crystals have changed to green and the green stain has extended to the red line at the centre of the tube.

There is no mention in the observations of the police officer regarding the green stain extending to the red line at the centre of the tube.

- (3) In terms of the circular the parties in question should blow only once and should not blow thrice as alleged. In order to ascertain as to whether a suspect driver had been under the influence of liquor, it is apparent that, 15 second period of one continuous blowing is extremely important to obtain the reading of an assume content of 0.08 gms per 100 milliliters of blood.

Per Srirani Bandaranayake, J.

"It is evident that a serious doubt has been created as to the concentration of blood in the appellant's blood at the time of the accident.

Held further:

- (4) Section 151(1) B of the Motor Traffic Act was introduced by the Motor Traffic Act 31 of 1979 (amended), with the amendment to section 151, "any person who drives a vehicle on a highway after he has consumed alcohol or any drug and thereby causes death or injury to any person shall be guilty of an offence under the Act."

Prior to the amendment which came into effect in 1979 the known concept was on the basis of "under the influence of liquor - section 151(1) read as "no person shall drive a motor vehicle on a highway when he is "under the influence of liquor" or any drug.

- (5) The question whether the ingredients that has to be proved under section 151(1) B be limited to the appellant having consumed alcohol, driving on the highway and causing the death - a mere statement to indicate that

a person had consumed alcohol is not enough, Section 15(c), section 151(1)B.

Section 151(1c)(a) and section 151 (1C) (c) clearly have provisions for the police either to obtain a breath test or a medical report to ascertain and establish that the driver, whom the police officer suspects had consumed alcohol/drug and in order to facilitate the process of these tests, the amendment had made provision to make regulations - section 151 (1D)

Such regulations in terms of the Motor Traffic Act were introduced under I.G. Circular 697/87 of 1.9.87. The circular clearly stipulated the need for a breath test.

Per Shirani Bandaranayake, J.

"It is evident that when a person is charged in terms of sections 151 for having committed an offence under the said section having consumed alcohol the prosecution has to prove that the said person had a minimum concentration of 0.08 grams of alcohol per 100 milliliters in his blood Regulations 1.3, 1.4, 1.5, 1.6.

- (6) The prosecution has failed to prove that the appellant had a minimum concentration of 0.08 of alcohol per 100 milliliters in his blood - the appellant should be acquitted on count 1.

APPEAL from the Judgment of the High Court of Kandy.

Nalinda Kumara V. Officer-in charge Traffic Police Kandy and another

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PARTITION LAW 21 OF 1977

Partition Law 21 of 1977 amended by Act 17 of 1997 - Section 22, Section 48 (3), Section 49, Fraud and collusion, alleged by persons who were not parties - Revisionary jurisdiction invoked? - Finality of a partition decree - Could it be assailed? Duty to investigate title - Laches - Exceptional circumstances - Restitutio in integrum - Is it available only to a party? Separability - Evidence Ordinance - Section 44

The petitioner who were not parties sought to revise the judgment, interlocutory decree and the final decree and also sought Restitutio in integrum - on the basis of fraud and collusion on the part of the respondents, under section 48(3) of the Petition Law.

Held:

- (1) The powers of revision and Restitutive in integrum are not affected by the provisions of section 48(3) Partition Law, When a partition decree obtained by fraud or collusion has occasioned a failure of justices, the Superior Court are empowered to set aside and strike off such impugned decree in achieving the objective of due administration of justice and correction of errors in order to avert a miscarriage of justice.

Per Sarath de Abrew, J.

"The concept of finality which was unknown to the Roman Dutch Law, has been incorporated into our law borrowed from the English Law drawing inspiration from the English Statute of 1677, however utilizing the proviso to section 48(3) a long line of authorities of the Supreme Court and the Court of Appeal acting in revision and *Restitutio-in-integrum* has tendered to erode the finality of a partition decree, in order to avert a failure of justice for good and valid reasons".

- (2) Revisionary jurisdiction can be invoked even by a person who was not a party to the case in the original Court provided he is an aggrieved person but relief by way of *Restitutio in integrum* cannot be granted if the petitioner has not been a party to the action.

Per Sarath de Abrew, J.

"The petitioners are placed in the jeopardy of forfeiture of their right title and interest in the land in suit due to the impugned partition decree and therefore qualify as aggrieved persons, even though they had no opportunity to participate in the original court proceedings, therefore notwithstanding the relief claimed by way of *Restitutio in integrum*, the relief by way of revision does lie to the petitioners".

- (3) On a consideration of the totality of the repelling circumstances, the balance of proof title in favour of the petitioners in that on a strong prima facie case emerges leading to the conclusion that the respondents acting

in collusion among family members have contrived to obtain partition title to the corpus; when the deeds establish the fact that the legal ownership of the land is in the petitioner.

- (4) The trial Judge has also failed to discharge his paramount duty to investigate title.
- (5) Although the revision application has been filed around 3 years and 7 months later, the circumstances which led to this delay have been explained in the pleadings, therefore the facts and circumstances do not preclude the petitioners' right to relief by way of revision due to laches having regard to the exceptional circumstances that have surfaced which has occasioned a failure of justice.

Per Sarath de Abrew, J.

"A separate case for damages under section 49 is not not possible as more than 5 years have elapsed since the entering of the final decree, in view of section 22 of the Amendment 17 of 1997. therefore injustice will result unless the extraordinary power of revision is exercised to avoid miscarriage of justice."

APPLICATION in revision to set aside the final decree in a partition action entered in the District Court of Mt. Lavinia.

Velum Singho and another V. Suppiah and others

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PARTITION LAW

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

Held:

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

APPEAL from the judgment of the District Court Kalutara

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

Hemasiy Withanachchi with Shantha Karanadasa for substituted plaintiff-respondent.

Jaratissa V. Appuhamy

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PAYMENT OF GRATIUTY ACT 12 OF 1983

Payment of Gratuity Act, 12 of 1983 - Section 5 (1) Amendment 62 of 1992 - section 5 (1) section 5(4) - Companies Ordinance - Conversion of Public Corporations of Government owned Business Undertakings into Public Companies Act No. 23 of 1987 - Section 2 0 Corporation converted into a company - Liability to pay surcharge on gratulty payable to an employee - Is it mandatory? Alternative remedies available - Exceptional circumstances? Rule 3(1) a of the Court of Appeal Rules 1990 - stare decisis.

The petitioner company sought to revise the order of the High Court which held that the petitioner company was liable to pay a surcharge under the Payment of Gratuity Act. The employee concerned was employed by the Distilleries Corporation which was later converted into the petitioner company in terms of the provisions of Act 23 of 1987. The petitioner company contended that, the employee was not entitled to gratuity for the period he served as a workman under the Corporation. The Magistrate's Court held that, the petitioner is liable to pay. The High Court rejected the revision application on technical grounds. The petitioner sought to revise the said orders. It was contended by the respondent that under section 3 2(1) b of Act 23 of 1987 the petitioner is liable in law to pay gratuity for the entire period of service in both the Company and Corporation, and the liability to pay the surcharge is a mandatory provision.

Held:

- (1) Section 5(1) of the Payment of Gratuity Act, No. 12 of 183 imposes on employees' liability to pay gratuity to workman employed under them. The liability arises on termination of the services and gratuity has to be paid within a period of 30 days. Section 5(1) introduced by the amending Act 62 of 1992 makes an employer liable to pay a surcharge if gratuity is not paid as provided under section 5(1).

- (2) Section 32(1)b of act 23 of 1987 clearly envisages that the petitioner is liable to pay gratuity for the entire period of service in both the Company and the Corporation

Per Sarath de Abrew, J.

"Where the Superior Courts interpret the provisions of the Payment of Gratuity Act to mean that the petitioner company is liable to pay gratuity to its employees on termination wven for the period they served under the Corporation, the liability to pay arrears is not from the date of the correct interpretation but from the due date - that is within one month of the termination."

- (3) Invoking revisionary powers of an appellate court is a discretionary remedy and its exercise cannot be demanded as of right unlike a statutory right of appeal.
- (4) The doctrine of *stare decisis* would mean that people in arranging their affairs are entitled to rely on a decision of the Highest Court which appears to have prevailed for a considerable length of time.

Distilleries Company of Sri Lanka V. Deputy Commissioner of Labour

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PENAL CODE

- (1) *Penal Code Section 140, Section 419 - Code of Criminal Procedure Act Section 27, 179, 185, 279, 320(1) - Guilty - Appeal against conviction - Appeal is it after sentence? - Validity - Laches - Alternative remedies - Exceptional circumstances - Petition of appeal irregularly drawn - Presented to wrong Court - Fatal? - High Court of the Provinces (Sp. Pro) Act 19 of 1990 - Section 5(e), Section 9 - Constitution, Articles 138(1) and 154(6) - Document not filed - Fatal?*

The petitioner was found guilty and convicted under section 419 of the Penal Code read with section 179 of the Criminal Procedure Code, and being aggrieved by the verdict of guilty without waiting for the sentence to be imposed on the 14th day after the conviction the petitioner preferred an appeal against the conviction to the High Court in terms of section 320(1). On the following day the Magistrate imposed the sentence and

sent up the record for hearing of the appeal to the High Court. In an objections being lodged that, the High Court lacked jurisdiction since the appeal had been lodged on a date before the imposition of punishment, the appeal was dismissed, for want of jurisdiction.

Held:

- (1) The petitioner has failed to file a copy of the petition of appeal filed in the High Court. It is fatal.
- (2) The petition of appeal filed in the High Court is addressed to His Lordship the Chief Justice and their Lordships in the Supreme Court, though the caption states "In the Court of Appeal bearing a Court of Appeal number."
- (3) The pleadings (petition of appeal and affidavit in the High Court) are in total disarray and are ambiguous. In a revision application the pleadings should not be ambiguous and specific - the petition should be rejected on this ground alone.
- (4) The Court of Appeal does not have appellate jurisdiction in terms of Art 138 (1) read under Art 154(6) in respect of decisions of the Provincial High Court made in the exercise of appellate jurisdiction and it is the Supreme Court that has jurisdiction in respect of appeals from the High Court - Section 9 High Court of the Provinces (Sp. Pro) Act 19 of 1990.
- (5) The petitioner has not pursued the alternative remedy available, by filing a legally tenable appeal before seeking to invoke the revisionary powers of the Court of Appeal.

Held Further:

- (6) The judgement or final order appealable under section 320(1) of the Code does not encompass an order of verdict of guilty as contemplated under section 185 of the Code. section 279 clearly stipulates that in a case of conviction, the judgment comprises of the verdict and sentence. Hence the appealable final order or judgment contemplated in section 320 (1) would necessarily be after the passing of sentence.

Section 279 reads "The judgment. . . shall be pronounced in Open Court

after the verdict is recorded or save as provided in section 203 at some *subsequent time* - therefore the petitioners claim that the fact that the judgment was not pronounced on the day the verdict was recorded was an illegality is clearly unfounded.

Held Further:

- (7) It is also abundantly clear that the petitioner has not specifically of expressly pleaded such exceptional circumstances in the body of the petition other than the substantial questions of law.

Held Further:

- (8) The impugned order is dated 16.3.2006 while the petition has been filed on 24.7.2006 entailing an unexplained delay of 4 months and 8 days - in the absence of an explanation to the contrary this delay be considered unreasonable.

APPLICATION in revision from an order of the High Court of Anuradhapura.

***Elangakoon V. Officer in charge, Police Station Eppawela
and another***

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- (2) *Penal Code - Section 296 -- Criminal Procedure Code - Section 414(1) - Bad Character of deceased wrongfully attributed to accused? - Mistake made by Court by a wrong reference to the accused - Miscarriage of justice? Evidence insufficient? - Fire Arms Ordinance - Section 2(9) - Evidence Ordinance - Section 54, Section 114 - "Ellenborough dictum".*

The accused - appellant was indicted for murder; after trial sentenced to death. In appeal, it was contended that the bad character of the deceased was wrongly attributed to the accused, when the character was not at all relevant, and that the evidence was insufficient to prove the charge and that the trial Judge wrongly applied the "*Ellenborough dictum*".

Held:

- (i) Bad character of the deceased generally is irrelevant.

Per Ranjith Silva, J.,

"This is only a practice hardened to a rule but there is no provision in the Evidence Ordinance of any other enactment which precluded evidence of bad character of the deceased being led."

- (ii) A mistake made by the Trial Judge by a wrong reference to the accused has not resulted in either causing any prejudice to the accused or a miscarriage of justice and is manifestly clear that the Trial Judge did not make any mistake as to who he was referring to.
- (iii) Ellenborough Principle would apply only where there is a '*strong prima facid* evidence already existing against the accused and not to augment or strengthen a weak case and to convert it to a strong prima facie case.
- (iv) The prosecution has made out a strong prima facie case against the accused. The accused failed to explain away the highly incriminating circumstances against the accused.

APPEAL from the judgment of the High Court of Ampara

Karunaratne V. Attorney General

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- (3) *Penal Code - Section 77, 296, 315 --Defence of insanity - Rule in Mc' Naughton's case - Evidence Ordinance - Section 105 - Burden of proving insanity - On whom?*

Held:

- (i) When a defence of insanity is taken under section 77 there must be evidence to prove that the accused was insane and this fact had to be proved on a balance of probability like in a civil case.
- (ii) It is the burden of the accused to prove that he was incapable of (i) knowing the nature of the act (ii) that he is doing what is either wrong or contrary to law.
- (iii) It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extend of unsoundness of mind required

being such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law."

APPEAL from the judgment of the High Court of Matara

Nandasena V. Attorney General

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- (4) *Penal Code - Section 296 - Murder - Dying declaration - inherent weakness not considered - Principles relating to dying declarations - Evidence Ordinance - Section 27 - Discovery in consequence of a section 27 Statement - important of giving reasons".*

The accused-appellant was convicted of murder of his mother-in-law and was sentenced to death.

In appeal, it was contended that the trial Judge had not considered the inherent weaknesses of a dying declaration and that there was an erroneous approach with regard to section 27 Statement of the appellant

Held:

- (i) When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge/Jury must bear in mind the following weaknesses.
- (a) The statement of the deceased person was not made under oath;
 - (b) The statement of the deceased person has not been tested by cross examination,
- (ii) The trial Judge/Jury must be satisfied beyond reasonable doubt on the following matters:
- (a) whether the deceased in fact made such a statement;
 - (b) whether the statement made by the deceased was true and accurate;
 - (c) whether the statement made by the deceased could be accepted beyond reasonable doubt?
 - (d) whether the evidence of the witness who testified about the dying declaration could be accepted beyond reasonable doubt?

- (e) whether the witness is telling the truth;
- (f) whether the deceased was able to speak at the time the alleged declaration was made;
- (iii) The trial Judge had totally failed to consider the principles relating to the dying declaration and the risk of acting upon a dying declaration.
- (iv) The conclusions reached by the trial Judge about the recovery of the iron club removed from a well is erroneous since discovery is consequence of a section 27 statement only leads to the conclusion that the accused had the knowledge as to the weapon being kept at the place from which it was detected;
- (v) The trial Court must declare its reasons for the acceptance of the prosecution evidence and the rejection of the defence evidence

APPEAL from the judgment of the High Court Avissawella.

Ranasinghe V. Attorney General

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- (5) *Penal Code - Amended by Act 22 of 1995 - Section 308A - Cruelty to children - Credibility of victim - contradictions per se and inter se - faulty memory - lack of corroboration - Criminal Procedure Code - Section 414(1) - Proof of age of victim - Evidence Ordinance - Section 45, Section 114(f) - Expert evidence - Evidence not challenged considered as admitted?*

The accused-appellant was indicted for acts of assault committed on one "S" - an offence punishable under section 308(A) Penal Code - cruelty to children.

It was contended by the accused appellant that:

- (i) the victim was coached by the Police and hence unreliable;
- (ii) evidence of the victim was not credible as there were material contradictions;
- (iii) evidence of the victim was not corroborated;
- (iv) no evidence to prove that the victim was below the required age.

Held:

- (i) The only witness to the alleged act of cruelty was the victim, and there are significant contradictions *per se* and *inter se*.
- (ii) But that does not mean that the entire evidence of the victim should be rejected as being false. Contradictions may occur due to various factors, such as faulty memory.

Ranjith Silva, J.,

"It is true that the Police had tutored the victim to state various facts that were not within her knowledge such as the names of the accused and her husband - but I have no doubt that the instances of cruelty alleged by the victim such as the accused pinching and assaulting the victim have taken place if not exactly the way she narrated" at least in some form or other.

- (iii) Even though it transpired in the course of the evidence that the Police has tutored the victim yet there is overwhelming evidence given by the victim in regard to various to her acts of cruelty and ill treatment meted out to her by the accused and the Doctor and the JMO have corroborated the evidence of the victim, the evidence of the two expert witnesses have gone virtually unchallenged.
- (iv) The findings are based largely on credibility of witnesses and the findings of the High Court Judge cannot be branded as perverse;
- (v) According to the facts and circumstances of the case it was not necessary to lead the evidence of the osteologist/anatomist or dental surgeon to prove that the victim was less than 18 years of age at the time of the incident;
- (vi) The evidence with regard to the age of the victim given by the victim herself and the JMO - who is not a qualified osteologist/anatomist or dental surgeon - could be acted upon as what was not challenged when one had the opportunity to challenge has to be taken as admitted especially so according to the facts and circumstances of the case

APPEAL from the High Court of Colombo.

- (6) *Penal Code Sections 32, 315, 294 - Murder - Culpable homicide - Intention contemplated under the 4 limbs of Section 294 - Constitution - Art 138 - Applicability - Common intention ingredients - Sriminal Procedure Code Section 283. Failure on the part of Court either to accept or reject dock statement? Evaluation of evidence.*

The two appellants were convicted of murder of K and C, and to offences under S 315. In appeal it was contended.

- (1) that there was failure on the part of the trial Judge to consider whether there was antecedent probability of death resulting from the injury inflicted as opposed to a mere likelihood of death resulting from the injury inflicted.
- (2) that ingredients relating to the common intention had not been established.
- (3) that the trial Judge had failed to evaluate the evidence and thereby violated S283 of the Criminal Procedure Code.
- (4) that the trial Judge had come to an erroneous conclusion that the 1st appellant had handed over the weapons (P1+P2) to the Police when they were not handed over by him.
- (5) that the trial Judge has not rejected or accepted the dock statement.

Held:

- (1) The intention that is contemplated in the 1st limb of S294 is the intention to cause death which is commonly known as murderous intention, but the intention that is contemplated in the 3rd limb of S294 is the intention to cause bodily injury. This injury should be sufficient, in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury to cause death in the ordinary course of nature and not the intention.

Per Sisira de Abrew, J.

"The ingredients that must be proved by the prosecution in order to prove a charge of murder under the 3rd limb of S294 are that;

- (i) The accused inflicted a bodily injury on the victim.
- (ii) The victim died as a result of the above bodily injury.
- (iii) The accused had the intention to cause the bodily injury
- (iv) The above injury was sufficient to cause the death of the victim in the ordinary course of nature".

In the instant case the prosecution has established all four ingredients of S 294."

- (2) Applying Art 138 of the Constitution, it is apparent that the failure on the part of the trial Judge to consider the above aspect of the law is not sufficient to vitiate the convictions, it has not resulted in a failure of Justice.
- (3) In a case of murder against the main accused under limb 3 of S294 the intention contemplated there, being the 'intention to cause bodily injury', one cannot expect the prosecution to prove the other accused shared common murderous intention when proving the charge against the other accused. In a situation of that nature, what the prosecution is expected to prove is that the other accused shared ' common criminal intention contemplated in limb 3 of S294 - common intention to cause bodily injury.

In the instant case, from the evidence it is crystal clear that the 2nd appellant had entertained a common intention to cause bodily harm to C with the 1st appellant which is the intention contemplated in limb 3 of S294.

- (4) The trial Judge has evaluated the evidence, and had commenced the judgment by referring to the defence suggestion to the witness.
- (5) It is true that the 1st appellant did not personally hand over the weapons to the Police, but the evidence of the Police was that the 1st appellant pointed out the weapon and the Police Officer took them into custody - at the time of recovery the 1st appellant was only 2 feet away from the Police Officer.

Per Sisira de Abrew, J.

"Though we do not condone the failure on the part of the trial Judge to arrive at a conclusion whether to accept or reject the dock statement, such failure has not occasioned a miscarriage of Justice".

APPEAL from the judgment of the High Court of Avissawella.

Vithana and another V. The Republic of Sri Lanka

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- (7) *Penal Code - Section 296 - Convicted - Weapon used not produced - Is it fatal to a conviction? Evidence Ordinance Section 60(1)(2) - Section 91, Section 165 - Statement of Facts made by witness not challenged - What is the conclusion?*

Held:

- (i) Non-production of a material object is not fatal to a conviction.
- (ii) Provisions of the Evidence Ordinance itself have made a clear distinction with regard to the documentary evidence on the one hand and real evidence on the other.
- (iii) Absence of cross-examination of a prosecution witness of certain facts leads to the inference of admission of the fact.

APPEAL from the judgment of the High Court of Negombo.

Wannaku Arachchilage Gunapala V. Attorney General

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PENAL CODE

Section 156, 157	331
Section 32, 315, 394	169
Section 26	191
Section 296	218, 255
Section 77, 295, 315	237
Section 140, 419	398

PRIMA FACIE SUSTAINABLE DEFENCE *See* **CIVIL**

PROCEDURE CODE

(1)

PRINCIPE OF LAESIO ENOMES - See RECOVERY OF LANS BY BANKS (SP. PROV) ACT

RECOVERY OF LOANS BY BANKS (SP. PROV) ACT NO 4 OF 1990

Recovery of Loans by Banks (Sp. Prov.) Act 4 of 1990 - Section 15(1), 15(2), 15(3), 16 - Parate Execution - Property of 3rd parties mortgaged - Cannot be sold - Directors property mortgaged - Could the property be parate executed? Civil Procedure Code - Section 207, Principle of Lasso Enomes - Not applicable when Bank re-sells property? Lifting the veil of incorporation.

The respondents were directors of Company N obtained banking facilities and to secure the loans granted hypothecated the properties belonging to the respondent Directors. As the Company defaulted the petitioner Bank adopted a resolution in terms of Law 4 of 1990, to sell the property by way of parate execution. The defendant-respondents instituted action in the Commercial High Court (CHC 252/2001(1)) and sought an enjoining order to restrain the Bank from conducting the public auction. The enjoining order granted was later dissolved the special leave to appeal application filed in the Supreme Court against the order dissolving the enjoining order was rejected. Later the defendant - respondent withdrew the action.

Subsequently the property was sold by public auction and purchased by the petitioner Bank.

The defendant-respondent instituted action again in the Commercial High Court and sought an order that, the purported auction sale is a nullity and the auction should be declared null and void on the ground of *laesio enomes*.

The Commercial High Court granted an interim injunction, holding that the relief claimed in the present case was different from the case - CHC 252/2001 and that the ratio in Ramachandra V. Hatton National Bank is applicable and the petitioner Bank cannot sell the property of the Directors, mortgaged to secure the loan taken by the petitioner Bank.

Held:

- (1) On examination of the reliefs claimed in Case No 252/2001 (1) and the relief claimed in the instant case, though they do not appear to be identical, but based on the resolution adopted by the Bank and the consequent procedural steps the Bank would take in terms of the resolution, the Commercial High Court erred in holding that the reliefs claimed are dissimilar

Held further:

Per Nihal Jayasinghe, J.

"The 1st and 2nd respondents cannot hide behind the veil of incorporation of Company N whilst being the alter ego" of the said Company of which the 1st respondent has been the Managing Director and the 2nd respondent who is the wife of the 1st respondent has been a Director."

- (2) Although the independent personality of the Company is distinct from its Directors and shareholders Courts have in appropriate circumstances lifted the veil of incorporation. In particular Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a device to defraud creditors.

Per Nihal Jayasinghe, J.

"It is quite obvious that the 1st and 2nd respondents being Directors of the Company benefited from the facilities made available to the said Company by the petitioner Bank and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third party mortgagee." as contemplated in the majority judgments of the Court in Ramachandra V. Hatton National Bank".

Per Nihal Jayasinghe, J.

- (3) In terms of section 19 in the Bank purchased the property the Bank is obliged to resell the property within a reasonable period in order to recover the amount due to the Bank. Since the actual sale of property purchased by the Bank comes after the resale of the property under section 19, and the property is resold by the Bank under section 10 - there cannot be an application to set aside the sale on the basis of *laesio enormis*."

APPEAL from an order of the Commercial High Court.

Hatton National Bank LTD V. Jayawardena and Others

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RENT ACT

- (1) *Rent Act 5 of 1972 - Section 28 - Section 28(1) - Non occupation of premises - Non-occupying tenant - Constructive occupation? - Fenuine and*

lawful cause - Landlord not informed - Possession requires not merely an animus possidendi but a corpus possessionis - Exclusive possession of dependants of the tenant Possession through outsiders - Difference.

Action was filed to evict the defendant-appellant tenant in terms of Section 28 of the Rent Act. The defendant-appellant's position was that he left for Singapore for employment for a total period of 3 years, and the defendant's mother and sister were kept at the premises, and she had the intention to return at the end of the period of employment. It was the position of the defendant-appellant that he had 'constructive occupation' as a result of his mother and sister occupying the premises.

The plaintiff-respondent contended that, the defendant-appellant was not in possession for a continuous period of 4 years, and that there was no reasonable cause for non-occupation, and the electoral registers prove the occupation of the premises by outsiders.

The trial Judge held with the plaintiff-respondent.

Held:

- (1) Section 28 envisages a reasonable cause of the tenant to be absent from the premises in question for a continuous period of 6 months to avoid ejection. It has to be genuine and a lawful cause to get the protection of the statute for a tenant.
- (2) The period spent outside the Island by the tenant is admitted, the version of the tenant does not indicate as to whether the landlord was informed about the departure.
- (3) There is an absence of exclusive possession of the dependants of the tenant. There were outsiders in the premises. Possession by unknown persons should be only with the landlords' consent.

APPEAL from the judgment of the District Court of Colombo.

Kamala Perera V. Liyanapathirana

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- (2) *Rent Act 7 of 1972 as amended by Act 12 of 1980 - 912 - Reasonable requirement Section 22(2) (bb), Section 22(2) (ii) - One year's notice - Is*

it mandatory - Could this be split? - Notice to quit a condition precedent - Purchase of property over the Hand of the tenant - Reasonable requirement - Is it available? - Fresh issues altering scope of action - Permissibility? Blowing hot and cold? Civil Procedure Code section 469(2)1, Action barred by positive Rule of Law? Can the plaint be rejected later?

The plaintiff-respondent sued the defendant-appellant for ejection from the premises in question on the ground of reasonable requirement - after giving him notice of termination of tenancy of 6 months. The District Court after granting the reliefs prayed for by the plaintiff went on to hold that the writ of possession should be deferred by 6 months, to ensure that, no prejudice is caused to the defendant. The position of the defendant was that the length of notice given is inadequate in law to file an ejection suit under section 22(6) - It should be one year

Held:

- (1) In terms of section 22 (6), if the premises is required by the landlord on the ground of reasonable requirement either for himself or for any member of his family, then one year's notice in writing of the termination of the tenancy should be given by the landlord to his tenant.
- (2) This being a condition precedent, to the institution of legal proceedings, has to be complied strictly, prior to the institution of an action. Failure to do so, undeniably renders the purported action of the landlord, a mere futile exercise.
- (3) The pleadings and evidence without any ambiguities point to the fact that the landlord has purchased the property, subsequent to the specified date over the head of the tenant - thus the plaintiff cannot maintain the action.

Held further

- (4) If the suggested issues are permitted, it would not only radically alter the entire basis of the plaintiff's action, but place the defendant-appellant at a remarkably disadvantageous position, causing irreparable loss and immense prejudice to his case.
- (5) Having come to Court on the basis that the provisions of the Rent Act would apply to the premises in suit, the plaintiff cannot be allowed to

rescile from that position and take up an entirely different position. The doctrine of approbate and reprobate forbids the plaintiff-respondent from being allowed to take up the position that the premises in question is excepted from the operation of the Rent Act.

Per Abdul Salam, J.

"Failure on the part of the landlord to give the tenant proper notice to quit, would disentitle the landlord from maintaining an action for section 46(2) (1) of the Civil Procedure Code provided that when the action appears from the statement in the plaint to be barred by any positive rule of law, the plaint shall be rejected".

- (6) Failure of the Court of reject a plaint at the time of presentation, where the cause of action is barred by a positive rule of law does not prevent the Court from rejecting the plaint later when the defect is subsequently brought to its notice - not is the defendant estopped by the earlier acceptance of the plaint from seeking the rejection of the later.

APPEAL from the judgment of the District Court of Batticaloa.

Piragalathan V. Shanmugam

320

Rule against an Attorney -at-Law - Rule 60, 61 of SC (Rules) Conduct of Etiquette for Attorneys-at-Law - Judicature Act S 44 (2). What amounts to professional misconduct? - disgraceful dishonorable conduct - Should an Attorney-at-law who is before Court on allegation of criminal misconduct be precluded from appearing in Court?

Held:

- (1) The Rule is not based on the professional conduct as an Attorney-at-Law but on a personal relationship with his wife.
- (2) As regards charge (s) which relates to Criminal Misconduct - Bigamy - it will not be gone into as Magistrate Court proceedings are still pending.

IN RE ATTORNEY-ATOLAW

STATE LAND RECOVERY OF POSSESSION ACT

State Land Recovery of Possession Act 7 of 1979 - amended by Act 58 of 1981, 29 of 1983 and 45 of 1992 - section 3 - Order of Magistrate's Court canvassed by way of Revision. Should exceptional circumstances be urged?

Held:

- (1) There is no right of appeal against the order of the magistrate's Court when an order is made under the provisions of the State Lands Recovery of Possession Act.
- (2) In a Revision application when there is no alternative remedy available, the appellants need not show exceptional circumstances - but has to show illegality or some procedural impropriety in the impugned order.
- (3) Breach of a procedural or formal rule should be treated as a mere irregularity if the departure from the terms of the Act is of trivial nature.

AN APPLICATION from the judgment of the District Court of Kandy.

Jayatilake V. Ratnayake

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TERMINATION OF EMPLOYMENT OF (WORKMEN) (SPL PROV) ACT

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

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

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

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

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

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

Held:

- (1) S2(2)(b) read with S2(1)b of the TEW Act constitutes the Commissioner of Labour as the sole authority to declare whether to grant or refuse permission to terminate upon an application made by the employer.
- (2) S2(2)b - provides by express and unequivocal statutory language that approval to terminate may be granted or refused by the Commissioner - in his absolute discretion
- (3) S2(2)(e) when dealing with the power of the Commissioner to grant relief when he has decided to grant approval to terminate also renders his decision on this relief well protected, as it also expressly refers to absolute discretion
- (4) In S2(2)(f) the intention of the Act is manifestly clear which is to effect finality of litigation/disputes by providing that such an order is final and conclusive.
- (5) S 20 establishes primacy of this statute over any other written law.

Per Imam, J.

"The Court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended, decisions which are extravagant or capri-

cious cannot be legitimate, but if the decision is within the confine of reasonableness, it is no part of the Court's function to look further into its merits."

- (6) In accordance with the prevailing laws - TEW Act which is *sui generis* and prevails over all other laws with the Commissioner's jurisdiction not being fettered by any other state agency - Central Bank.
- (7) The petitioners have failed to point out any part of the order which exhibits bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice or Chairman as the case may be would or did favour one side unfairly at the expense of the other. The Court will not inquire whether he did in fact favour one side, certainly, suffice it that reasonable people might think he did.

Held further

- (8) An employer has the right to bone fide retrench his employees, on the ground that such employees are redundant to his business. Once the necessity for retrenchment is established the employer is free to decide on the number of employees who would become surplus to his requirement. Retrenchment is a right of the management and is a necessary incident of the industry, so long as it is exercised bona fide, that employer's decision should be accepted.

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

Per Imam, J/

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

AN APPLICATION for Writs in the nature of *Certiorari*.

Kumara Fernando and Others V. Commissioner of Labour and others

WRIT OF CERTIORARI

- (1) *Writ of Certiorari - State Lands (Recovery of Possessions) Act 7 of 1979 - Section 3, Section 9 - Failure to follow guidelines laid down in Circular - Is there a legal duty to follow the guidelines? - Valid permit or written authority under section 9?*

Held:

- (1) The Circular which is claimed to have been issued by the 1st respondent Competent Authority has not been signed.
- (2) The Circular does not prescribe any duty having statutory potential.
- (3) The Circular has not been issued in accordance with any of the provisions of the State Lands (Recovery of Possession) Act, as such there is no legal duty on the part of the 1st respondent to follow guidelines laid down in the Circular before issuing the quit notice.

Held further

- (4) Any person served with a quit notice under section 3 can continue to be in possession/occupation of the land only upon a valid permit or other written authority of the State described in section 9.

APPLICATION for a *Writ of Certiorari*

Aravindakumar V. Alwis and others

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- (2) *Writ of Certiorari/Mandamus - Criminal Procedure Act 15 of 1978 - Section 108 - Coroner - Services terminated without any inquiry - Charge sheet not served - Audi Alteram partem principle - Applicability - Petitioner on extension?*

At the inquest into the death of a school boy - the petitioner - city coroner - returned a verdict of suicide on the evidence before him. A show cause letter was received by him alleging that the petitioner failed to consider relevant materials sufficiently before coming to the said verdict. The petitioner replied the said letter, but his services were terminated without any inquiry.

It was cor.....ded that his services were summarily terminated without any Inquiry is irrational, unfair, unreasonable, arbitrary and tainted with mala fides, for reason that the show cause letter was solely based on the unfounded allegations of the deceased's mother - and that he was not served with a charge sheet and he was not given an opportunity to be heard

Held:

- (1) There is no Rule governing the petitioner's appointment and the appointment, extensions and termination of service as an inquirer is in the discretion of the relevant Minister. The petitioner is in extension of his service and his extension was coming to an end in December 2004 and the petitioner's services were terminated in October 2004, two months before the date on which the petitioner's extension was coming to an end.
- (2) In view of the facts and circumstances of this case the petitioner cannot claim that a charge sheet should have been served on and an inquiry should have been held. The explanation given was not accepted therefore the respondents terminated the services.

Per Sriskandarajah, J.

"The extent and the nature of hearing in relation to a termination of service depends on the circumstances of the case, the nature of the service, the rules under which the respondent is acting, the subject matter that is being dealt with."

- (3) In these circumstances, the petitioner cannot state that the rule of natural justice have been denied to him

APPLICATION for a *Writ of Certiorari*

Jayatwardena V. Seneratne and Other

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Writ of certiorari - Navy Act - Section 70, Section 122 - Court Marshal Conviction - Suppression of Material Facts - Fatal? - Criminal Procedure Code - Section 180 - Charge Sheet defective - Both adduces charged same proceedings - Penal Code - Section 156 - Section 157 - Jurisdictions defect - Cured by Consent and acquiescence? Judicial review? - Scope?

The petitioner and another were charged under section 70 of the Navy Act before a COurt Martial. Both were found guilty and convicted.

The petitioner sought to quash the conviction of forfeiture of seniority by three months. It was contended that the charge sheet was defective as it offend section 180 of the Criminal Procedure Code. It was also contended that, the evidence led was insufficient to convict the petitioner and he only exercised his tight of private defende. The respondent contended that, the petition should be dismissed *in limine* as the petitioner has suppressed material facts.

Held:

- (1) The petitioner before filing this application has appealed to Her Excellency the President to set aside the punishment - but the petitioner has failed to disclose this fact in his petition - it is fatal.
- (2) Since the petitioner by this application seeks to quash both the conviction and the sentence, the fact that he submitted an appeal to Her Excellency the President seeking to set aside the sentence becomes a material fact.

Held further

- (3) Offence described in section 70 of the Navy Act is an offence which one person cannot commit alone. There is evidence to support that the petitioner too was involved in the fight between him and the other officer. Members of the two opposing factions charged with affray may be tried together.
- (4) In any event the petitioner is precluded from raising any objection to the charge sheet since such objection was not raised before the Court Martial.

"In an application for a writ of certiorari in respect of a conviction or sentence entered by a Court Martial the defence of review is not the same as in an appeal from a conviction of a criminal Court - judicial review will lie by way of certiorari only in respect of the legality of the conviction or sentence. The merit of the finding will not be subject of review by Certiorari.

AN APPLICATION for a Writ of Certiorari.

Lt. Commander Ruwan Pathirana V. Commodore Dharmasiriwardena and other

WRIT OF MANDAMUS

Writ of Mandamus - to evaluate and consider appointment to a permanent post - Duty bound to act fairly? Obligations arising out of a contract of employment - Privare Right/ Does writ lie?

The petitioner sought a Writ of Mandamus directing the respondent to take action to have an evaluation and consider the petitioner to be appointed for a permanent post.

The respondent contended that, the petitioner does not have the right to the performance of duty of a public nature.

Held:

- (1) The object of the application is to compel the performance by the respondents of certain obligations out of a contract of employment which existed between the petitioner and the respondents. His claim is merely a dispute about a private right and as such a Writ of Mandamus does not lie. Such matters arising out of contracts of employment are solely matters within the purview of private law and not a matter for judicial review.

APPLICATION for a Writ of Mandamus.

Sivakumar V. Director -General, Samurdhi Authority of Sri Lanka and another

