SRI LANKA
SUPREME COURT
Judgements Delivered
(2005)

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Ratnayake and Others Vs Kumarihamy and Others - SLR - 303, Vol 1 of 2005 [2005] LKSC 5; (2005) 1 Sri LR 303 (2 February 2005)

RATNAYAKE AND OTHERS
VS
KUMARIHAMY AND OTHERS

SUPREME COURT
S.N. SILVA, C.J
UDALAGAMA,JAND
FERNANDO, J.
SC APPEAL 14/2002
CA No. 693/93 (F)
D. C. KURUNAGALA CASE No. 5548/P
10TH DECEMBER 2004

Partition - Extent of land claimed according to kurakkan sowing extent - Plan No. 426 - Challenge to the extent of corpus - Decision of court required to be on a balance of evidence including boundaries shown on previous deeds - Burden of challenging the extent of corpus on defendant's witnesses.

In the above action, the plaintiff claimed a land 4 Lahas Kurakkan sowing extent. As per preliminary Plan No. 426 (Lots 1,2 and 3) the extent of the corpus was 8A 1R 16P.

The defendants claimed that the corpus should be limited to Lot 3 only and amount to 4 acres. The relevant deeds P1, P2, P3 and'P5 showed that some boundaries of the land had been trees which probably disappeared in course of time. Hence the defendants attempted to limit the extent by referring to the names of adjoining owners. Further, children of the 1st defendant (now deceased) claimed only Lot 2 as being outside the corpus.

HELD:

1. The trial court had decided the extent of the corpus correctly as being 8A, 1 Ft, 16 perches on the basis of the oral and

documentary evidence on a balance of evidence. The burden of controverting the extent of the corpus as claimed by the defendants they had failed to do. It was also not specifically put to the plaintiffs that the corpus considered of only Lot 3.

2. It is difficult to proceed on the basis that 4 Lahas Kurakkan sowing extent amounted to 4 acres as claimed by the defendants as the Kurakkan sowing extent would vary from district to district depending on the fertility of the soil and the quality of grain etc.

APPEAL from the judgment of the Court of Appeal reported in (2002)1 SLR 65

Lakshman Perera for 1st, 4th and 5th defendants - appellants
G. R. D. Obeysekera for 2nd defendant - respondent
D. M. G. DISSANAYAKE with C. G. Liyanage for plaintiffs - respondents.

Cur.adv.vult

February 2, 2005
UDALAGAM A, J

The plaintiff instituted D. C. Kurunegala case No. 5548/P to partition the land called Hapugaspitiya watte morefully described in the schedule to the amended plaint and depicted in plan No. 426 dated 12.12.1975 made by W. C. S. M. Abeysekera, Licensed Surveyor, marked X.

Admittedly, the extent vide the aforesaid schedule to the amended plaint was 4 Lahas of Kurakkan sowing and the land depicted in the aforesaid plan showed the extent to be 8A, 1R, 16P. Also admittedly the amended plaint filed on 28.09.1988, after the amended statement of claim filed by the 1st, 4th and 5th defendants on 07.08.1987, contained a 2nd schedule stating therein that the extent of the corpus sought to be partitioned was 8A, 1R, 16P.

The claim of the 1st, 4th and 5th defendants in the District Court vide the aforesaid amended statement of claim appeared to be that the corpus sought to be partitioned was only lot 3 of plan No. 426

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referred to above and that lots 1 and 2 formed a separate land called Rawana ella alias Hapugahapitiya Hena and the 1st, 4th and 5th defendants prayed for a dismissal of the action.

The learned District Judge by his judgment dated 23.04.1993 whilst *inter alia* holding that lots 1, 2 and 3 of plan No. 426 referred to above comprised the corpus sought to be partitioned, decreed that the corpus be partitioned as prayed for by the plaintiff.

Aggrieved by the said judgment the 1A, 4A and 5th defendants - appellants appealed to the Court of Appeal.

The substantial issue for decision in the Court of Appeal, vide paragraph 4(b) of the petition of appeal to the Court of Appeal bearing No. C. A. 693/ 93 (F) was as to whether the corpus sought to be partitioned was the land belonging to Kiri Banda as stated by the plaintiff or whether it was the land belonging to Tikiri Banda as stated by the contesting defendants.

At the hearing of the appeal in the Court of Appeal the contention of the learned Counsel for the defendants - appellants was that the plaintiff - respondent failed to prove the identity of the corpus at the trial court and that the extent of the land shown in the preliminary Plan No. 426 referred to above was 8A, 1R., 16P which was far in excess of the extent described in the schedule to the amended plaint and that the boundaries as stated in the title deeds produced at the trial differed from those as shown in the aforesaid plan.

The Court of Appeal by its impugned judgment dated 09.11.2001 for the reasons stated therein dismissed the appeal with costs.

Aggrieved, the 1A, 4A and 5th defendants - appellants - petitioners sought inter alia special leave to appeal against the judgment of the Court of Appeal dated 09.11.2001 referred to above.

This court on 05.03.2002 granted special leave to appeal on the question as to whether the Court of Appeal erred in law in concluding that the land surveyed and depicted in the preliminary plan 'X' was the same land sought to be partitioned as described in the schedule to the plaint.

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At the argument before this court learned Counsel for the appellants drew the attention of this court to Issues settled at the trial court and adverted to the fact that the extent given in the schedule to the plaint was 4 Lahas of Kurakkan sowing and that 1 Laha of Kurakkan sowing was equivalent to 1 acre. It appears to be the submission of the learned Counsel for the appellants that 4 Lahas of Kurakkan sowing is equivalent to 4 acres but that as the extent shown in the preliminary plan referred to above comprising lots, 1,2 and 3 therein, refers to an extent of 8A, 1R., 16P, that a larger land in fact was surveyed.

Admittedly, the plaintiff - respondent claimed rights to the corpus inter alia on deed of transfer bearing No. 5671 dated 14.12.1975 marked P5 wherein the vendor of the latter deed, S. R. M. Wijesundara Banda Katupitiya, sold to the plaintiff - respondent an extent of 4 lahas of Kurakkan sowing of the land called Hapugahapitiya Hena bounded on the North by Murutha tree and Ketakalagahamula, East by a ditch, south by Mahakongaha Thotilla tree and West by Oya.

Deed No. 71 dated 12.09.1922 (P3), a deed on which the earlier predecessor of the plaintiff - respondent is said to have acquired title significantly had the same boundaries as those in P5 referred to above. The same appears to be true of the boundaries as given in the 2 other deeds upon which the plaintiff - respondent traces title, to wit. P1 and P2.

On a perusal of the boundaries as stated in P1, P2, P3 and P5 the Northern and Southern boundaries are described with reference to trees, it is reasonable therefore to assume that with the advent of time that the trees so named which described the two Northern and Southern boundaries would have been non existant at a later period and the names of owners of the adjoining lands would have been inserted in place of the names of trees, resulting in the title deeds having different boundaries to that of the preliminary plan'X'

The contention of the learned Counsel for the defendants - appellants on the matter of identity of the corpus sought to be partitioned also appeared to be that the trial court had erred in

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deciding the matter on evidence ignoring the deeds and that the court ought to have in fact decided the matter on a consideration of the contents of the deeds and not by oral evidence (page 4 of the written submissions of the appellants)

I would disagree with the above submission as oral evidence under oath and subject to cross examination, is equally important to arrive at a finding.

Perusing the evidence led before the trial court it is abundantly clear that while only the plaintiff - respondent testified in support of the averments in the plaint the defendants - appellants who are now before this court contesting the decision as to the identity of the corpus to be partitioned had on their behalf led the evidence only of one Nimal Ratnayake the substituted 1A defendant. Significantly even in cross examination of the plaintiff - respondent no question had been forthcoming to challenge the testimony of the plaintiff as to the identity of the corpus nor was it specifically put to the plaintiff that the corpus sought to be partitioned consists only of lot 3 in plan X. Also significantly the 2 children of the contesting 1 st defendant (now deceased) had claimed only lot 2 before the Surveyor at the preliminary survey. They appeared to have been remiss in their duty, at the first opportunity available to them, to point out the correct corpus to be partitioned, as claimed by them.

Nimal Ratnayake the aforesaid 1A defendant - appellant under oath in his evidence at page 212 of the brief significantly and specifically states that the land as described in the plaintiffs title deeds P6 and P7 comprises the corpus as shown in plan X. The 3rd defendant who testified after the aforesaid 1A defendant confirmed the plaintiff's evidence in respect of the corpus to be partitioned and the aforesaid testimony taken in its entirety which also refers to the contents of the plan X and its report when considered on a balance of probability, conclusively establishes the fact that the land sought to be partitioned was in fact Lots, 1,2 and 3 of plan X.

I would also reiterate the observations of the President of the Court of Appeal in the impugned judgment that land measures computed on the basis of land required to be sown with Kurakkan vary from district to district depending on the fertility of soil and quality of grain

and in the said circumstances difficult to correlate the sowing extent with accuracy. Thus there cannot be a definite basis for the contention that 1 Laha sowing extent be it Kurakkan or even paddy would be equivalent to 1 acre.

In Paragraph 3 of the statement of claims of the 1st, 4th and 5th defendants filed on 07.08.1987 (page 137 of the brief) they sought to identify lots 1 and 2 in the aforesaid plan marked X as Rawana ella alias Hapugahapitiya Hena which land was said to have been morefully described in the schedule to the statement of claim referred to above of the contesting defendants, importantly with reference to Plan No. 1119 dated 18.05.1929 made by D. H. de Silva Wickrematillaka, Licensed Surveyor, However admittedly no steps have been taken by the appellants to superimpose the said plan upon the preliminary plan marked, X, which procedure would have convincingly cleared any doubt, if any, as to the true identity of the corpus sought to be partitioned. There also appears to be no explanation or reason given as to the failure on the part of the appellant to have done so.

In the aforesaid circumstances I am inclined to the view that the trial court and the Court of Appeal on a balance of probability and on a consideration of evidence together with documents marked and led at the trial court came to a correct finding as to the corpus sought to be partitioned and on the single question to be decided by this court when special leave was granted, I would hold that the Court of Appeal was not in error in concluding that the land surveyed and depicted in the preliminary Plan No. 426 marked X referred to above was in fact the corpus sought to be partitioned, as claimed by the plaintiff - respondent.

This appeal is dismissed with costs fixed at Rs. 5000

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

RAJA FERNANDO, J. - I agree

Appeal dismissed.

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Colgate Palmolive Company Vs Hemas (Drugs) Limited and Another - SLR - 309, Vol 1 of 2005 [2005] LKSC 1; (2005) 1 Sri LR 309 (9 February 2005)

COLGATE PALMOLIVE COMPANY
vs
HEMAS (DRUGS) LIMITED AND ANOTHER

SUPREME COURT,
S. N. SILVA, CJ,
WEERASURIYA.J AND
UDALAGAMA, J,
S. C (CHC) APPEAL No. 6/98
(H. C. CIVIL) CASE NO. 21/96(3),
D. C. COLOMBO CASE NO. 4569/SPL
25TH OCTOBER, 2004

Civil Procedure - Refusal of postponement of trial - Code of Intellectual Property Act - Action for nullity of registration of trade mark - Circumstances justifying postponement of trial.

In the above action which was filed by the plaintiff-appellant on 29.09.1997, the trial was fixed for 10th, 11th and 12th of December, 1997 before the High Court in terms of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

On 5th December 1997 a motion was filed applying for a postponement of the trial due to concerns expressed by 5th witness, a foreigner that he was unable to attend court due to the security situation in the country in view of a bomb blast which had occurred on 15.10.1997. The 5th witness has so informed the registered attorney-at-law. There was no affidavit filed in the matter. In all there were 20 witnesses. The High Court Judge refused the postponement with liberty to the plaintiff to call the other witnesses.

Later on in an affifavit dated 29.01.98, the 5th witness stated that he

had no invitation to attend the trial on the date fixed or at any other time. It was not claimed that the witness was ill.

Held:

1. There was no defect of law or fact in the order of the High Court Judge. The judge has exercised his discretion according to law and justice of the case.

2. The plaintiff's appeal was without merit.

Cases referred to :

1.*Meiyappan Thevar v Arumugam Chettiar and Others* 57 CLW 69

2. *Weerakoon v Hewa Mailika* (1978-79) 2 Sri LR 97

3. *Gardner v Jay* 29 *Chancery Division* 50

4. *Maxwell v. Kenn* (1928) 1KB 645, at 653

5. Dick v Pillar(1934)(1)AER627

K. Kang Iswaran, P . C. with *N. Bartholameus* for plaintiff-appellant

Romesh de Silva, P. C. with *N. R. Sivendran* for defendant-respondents

Cur.adv.vult

February 09, 2005

UDALAGAMA,J.

This appeal arises from the impugned order of the learned High Court Judge of Colombo in H. C. case No. 21/96(3) which case had been filed by the plaintiff-appellant under the provisions of section 130 of the Code of Intellectual Property Act, No. 52 of 1979 seeking inter alia a declaration that the purported registration in the name of the respondent of certain trade marks morefully, described in the

plaint are null and void. The plaintiff- appellant having filed the action originally in the District Court, the action stood transferred to the High Court (Civil) Colombo by virtue of the provisions of section 2 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Admittedly on the 29th of July 1997 the action was specially fixed for trial for 3 consecutive dates, namely the 10th, 11th and 12th of December, 1997 probably to accommodate the 20 witnesses listed by the plaintiff-appellant including the alleged foreign witness to testify on behalf of the plaintiff-appellant. However, by a motion dated 5th December just 5 days before the scheduled 1st date of trial the attorney-at-law appearing for the plaintiff-appellant moved for a postponement which motion appears to have been supported on the aforesaid 1st trial date which had been as stated above, fixed as far back as 29th of July 1997. The basis of the application appears to be the concern expressed by the alleged principal foreign witness, (No. 5 on the list filed on 15.07.1997) for his personal safety in Colombo following a bomb blast admittedly which had occurred on 15th of October, 1997. The learned High Court Judge, however, does not appear to have been satisfied with the reasons for an adjournment and by his impugned order had subsequent to offering an opportunity to the counsel for the plaintiff-appellant to lead the evidence of any other witness in the absence of the purported principal witness and the offer not been heeded to, proceeded inter alia to refuse an adjournment.

Significantly when the issues were settled and the case specially fixed for trial, it is observed that in addition to the list of witnesses filed on 15.07.1997, listing therein 13 witnesses of which the purported principal witness was the 5th witness, a second list appears to have been filed on 10.02.1997 listing therein 4 witnesses altogether totaling 20 witnesses.

It is also observed vide paragraph 12 of the written submissions of the plaintiff-appellant that on or about 02.12.1997 the purported principal witness informed the registered attorney-at-law by telephone that the former would not be attending the trial of the action set for either 10th, 11th and 12th of December in view of the unsatisfactory security situation prevalent in Colombo subsequent

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to a bomb blast which admittedly happened as stated above on or about 15.10.1997. There appears to be no intimation to court until less than a week before the trial date that the said witness was unable to attend court due to the aforesaid reason nor had he given any reason as to why he was unable to intimate to court well in time of his inability to attend court on the date the case was specially fixed for trial. There is also no evidence forthcoming even by way of an affidavit of the fact that the witness was forewarned not to attend court in order to justify and support his apprehension not to attend court on the dates fixed for trial. There is no evidence of any incident of a security lapse after the 15th of October up to the trial date.

Apart from the fact that the application for a postponement on the basis of the absence of one witness was belated considering in addition the failure on the part of the plaintiff-appellant to be ready for trial and considering also the failure on the part of the counsel for the plaintiff-appellant to call even some of the other remaining 19 witnesses as required by the learned High Court Judge, I am inclined to hold that in all the aforesaid facts and circumstances of the application, the trial judge exercised his discretion judicially and properly and refused a postponement.

I would also agree with the learned High Court Judge as adverted to by him in his impugned order that calling of witnesses is entirely a matter for the plaintiff or his counsel conducting the case. I would also hold that by the failure to lead any other witness out of the list of 20 witnesses so listed to testify on behalf of the plaintiff-appellant, that the trial judge having considered all the attendant circumstances correctly exercised his discretion to disallow an application for a postponement of the trial.

Importantly this court needs also to consider the averments in paragraph 4 of the affidavit filed by the absent witness dated 29.01.1998 subsequent to the impugned order which adverts to the fact that the witness never had an intention to testify in this action on the 10th, 11th and 12th of December 1997 or any other time, (emphasis mine)

The submission made on behalf of the appellant that the aforesaid

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words "or any other time" was a typographical error was not established even by a subsequent affidavit. In the respondent's written submissions vide paragraph 39, the latter specifically refuses to admit that the said words could have been typographical error.

The assertion of the learned President's Counsel for the plaintiff-appellant vide his written submission that the counsel for the defendant did not at the trial court object to a postponement is also resisted and in fact vehemently denied by the President's Counsel for the respondent as per paragraph 13 of the respondent's written submission filed on 17.04.1998. In any event the granting of postponements is within the discretion of the trial court judge and considering the facts and circumstances of the application I would reiterate that the learned High Court Judge exercised his discretion within reason and according to law.

The learned President's Counsel for the appellant has referred this court to the case of Meiyappan Thevar vs. Arunasalam Chettiar and Others(1) wherein Basnayaka, C. J. had stated, that

"this court does not interfere in appeal in a case where a court of first instance had exercised its discretion unless it is shown that some error had been made in exercising the discretion. A person invoking the appellate jurisdiction must satisfy that the court of first instance had committed an error in fact or law."

Although in that case the judge of the court of first instance was held to , have been mistaken in thinking that he was bound to refuse an application for adjournment when opposed and resisted, in the instant case the learned High Court Judge does not even refer to any objection to the application for . a postponement but in fact proceeded to dismiss the application inter alia on the basis that the application for a postponement was not to suit the convenience of a party but a mere witness. The learned High Court Judge further reasoned out the insufficient cause shown to consider the application on behalf of a witness said to be resident in India.

The learned President's Counsel for the plaintiff-appellant has also referred to this court the case of Weerakoon vs. Hewa Mallika, (2)

wherein the learned Counsel submitted that Soza, J. in that case following Gardner vs. Jay(3) and Maxwel vs. Kenn(4) held that the exercise of discretion by a trial judge must be on relevant considerations and according to law and justice of the case. It is my considered view that the learned High Court Judge in the instant application did in fact consider relevant facts according to law and justice of the case. An order fixing the date of trial or refusing a grant of an adjournment is a typical exercise of purely a discretionary power and would be interfered with by a court sitting in appeal only in exceptional circumstances and I see no exceptional circumstances to interfere with the order of the learned High Court Judge.

Judicial discretion is the exercise of judgment by a judge of a case based on what is fair under the circumstances and guided by the rules of principles of law.

In another English case of Dick vs. Pillar,(5) also cited by the learned President's Counsel for the plaintiff-appellant, Scott L. J. did pose the question that "if an important witness - a fortiori if he is a party (emphasis mine) is prevented by illness from attending the court for an adjourned hearing at which his evidence is directly and seriously material what is the legal duty of the judge when an adjournment is asked for ?

Scott L J. proceeded to answer the question as follows

"In my view if the judge is satisfied of the medical fact and that the evidence is relevant and important it is his duty to give and adjournment - it may be on terms but he ought to give it unless on the other hand he is satisfied that an injustice would thereby be done to the other side which cannot be reduced by costs."

The facts in that case show the refusal to grant an adjournment being due inter alia to the absence of an affidavit to establish the inability of the party to attend court due to illness. However the facts in the instant case before this court significantly differ in as much as the postponement was sought on the basis of the non presence of a witness and not a party which fact the learned High Court Judge also reiterates in his impugned order. Besides the belatedness of

the application without even an explanation and importantly the additional evidence before this court by way of the averments in paragraph 4 of the affidavit of the absent witness dated 29.01.1998 where in no uncertain terms the witness had stated that he had "no intention to come and give evidence on the 10th, 11th or 12th December 1997 or any other time" which averment by itself would render the submission on behalf of the appellant, that the refusal for an adjournment and the subsequent dismissal of the action resulted in injustice, to be clearly untenable.

Then again it is apparent that the learned High Court Judge was not satisfied with the excuse put forward by the aforesaid witness, to support the latter's absence, was a true one leading to the conclusion that this court ought not to interfere with the decision of the learned High Court Judge which was undoubtedly one based purely on facts and it cannot be an authority for the proposition that an appeal will lie from the decision of a court of first instance on a question of fact and would not justify this court in ignoring a statutory limitation upon its powers which it is an elementary duty to observe.

For the aforesaid reasons I am of the view that the only order which this court in the circumstances could pronounce is that the appeal should be dismissed.

The appeal is dismissed with costs fixed at Rs. 5,000.

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

WEERASURIYA, J. - I agree

Appeal dismissed.

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Ratnayake and Another Vs. Mediwaka, Deputy Inspector General of Police, Kandy and Others - SLR - 323, Vol 1 of 2005 [2005] LKSC 3; (2005) 1 Sri LR 323 (24 February 2005)

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RATNAYAKE AND ANOTHER
vs
MEDIWAKA, DEPUTY INSPECTOR GENERAL OF POLICE, KANDY
AND OTHERS

SUPREME COURT,
BANDARANAYAKEJ,
JAYASINGHE.J.AND,
UDALAGAMA.J,
S. C(FR) 231/2003
3RD JUNE, 2004

Fundamental Rights- Search of hotel on search warrant - Investigation by police consequent to petition dated 03.04.2003 alleging offences being committed at hotel - Instructions of Assistant Superintendent of Police to Kandy Police to investigate and if necessary search on court order - Articles 11, 12(1) and 14(1) (g) of the Constitution.

The petitioners were owners of Hotel "Sunray" Kandy and complained to the Police and the court that on 10.04.2003they had invited about 30 persons to celebrate an award which their son had received from Trinity College. While they were awaiting the arrival of guests, some of whom had arrived, about 30 persons dressed in camouflage uniform arrived with T-56 rifles and entered the hotel and searched it. The 2nd and 3rd respondents who were police officers attached to the Kandy Police were there. They showed a search warrant.

The 2nd respondent Sub Inspector Kandy Police averred that the

raid was carried out on the instructions of the Assistant Superintendent of Police to investigate a petition, dated 03.04,2003 alleging that the hotel was used as a brothel and that a woman used to sell heroin to school children. The Assistant Superintendent also instructed, inter alia, to inquire whether illegal activities were being done with the connivance of Kandy Police or any officer. The 2nd respondent was instructed to investigate if necessary, after obtaining a search warrant and to make a report to court. The search did not disclose any offence and the police party left representing that the matter was settled.

The petitioners also alleged that the search warrant was wrongly issued under section 9(2) of the Code of Criminal Procedure Act when it should have been issued under the Brothels Ordinance. In fact the 1st petitioner had a previous conviction in a related offence several years ago and one Nadeera had been arrested with a small quantity of heroin and fined Rs. 6,000 on 09.04.2003 on pleading guilty. The raid conducted on 10.04.2003 was made

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after reporting the matter to the Magistrate and obtaining a search warrant, on reasonable suspicion based on credible information and preliminary investigation.

In fact the raiding party had only 17 officers, 5 only were in civilian clothes. 12 others including the 3rd respondent (Inspector of Police) were in uniform

The petitioners relied on the decision in Anura Bandaranaike v the IGP which was different as regards the instructions for the impugned search.

The petitioners alleged that they were humiliated by the fact that as a result of the raid their guests left without waiting for lunch.

Held:

1. In the case of Anura Bandaranaike there was no credible evidence for the search. In the instant case there was credible

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information on the basis of which the Magistrate issued a search warrant, which was a judicial act.

2. There were discrepancies between the two complaints made by the 1st petitioner to the police and shortcomings in an affidavit signed by aguest of the petitioners.

3. The fact that the search warrant was issued under a wrong section did not vitiate it.

4. The freedom of the individual has to be reconciled with the interest of the society at large.

5. There was no violation of fundamental rights in the circumstances of the case.

Cases referred to :

1. Anura Bandaranaike v the IGP (1999)1 Sri LR 104

2. Fernando v Parwathi Radan (1908) 1 Weerakoori's Report 15

3. L. C. H. Peiris v The Commissioner of Inland Revenue (1963) 65 NLR 457

4. Chick Fashions (West Wales) Ltd. v Jones 1968 (2)QB 299

APPLICATION for relief for infringement of fundamental rights

D. S. Wijesinghe, PC, with Sanjeewa Jayawardena for petitioners.

Parinda Ranasinghe (Jr), State Counsel, for respondents.

Cur. adv. vult.

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February 24, 2005
SHIRANI A. BANDARANAYAKE J.

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The 1st and 2nd petitioners, being the husband and wife respectively, were the partners of Hotel Sunray, situated at No. 117/8, Anagarika Dharmapala Mawatha, Kandy, They alleged that their fundamental rights guaranteed in terms of Articles 11,12(1) and 14(1.)g of the Constitution were infringed by the actions of the 1st to 5th respondents for which this Court granted leave to proceed in respect of the violation of the aforementioned Articles of the Constitution. Consequent to the conclusion of the oral arguments, learned President's Counsel for the petitioners submitted by way of further written submissions that the petitioners' substantive complaint is against the 1st, 2nd, 3rd and/or 5th respondents only.

The petitioners' version

Hotel Sunray is a multi-storied building situated at a central location in Kandy. The hotel consists of 21 rooms and 2 reception halls which are used for weddings and other functions and the petitioners with their three children resided in the penthouse of the building.

On 10.04.2003, the petitioners' 2nd son, who was a member of the Trinity College Cricket Team, had received the prestigious Trinity Lion' at a special assembly held at the college. In view of this occasion, the petitioners had invited around 30 of their son's friends and their parents for lunch at the petitioners' hotel at the conclusion of the ceremony. Around 1.00 p.m. on that day whilst the 1st petitioner was entertaining their guests, around 30 persons dressed in camourflage uniform and carrying T- 6 rifles had entered the hotel together with 6 other persons who were in civilian clothes. Some of the said soldiers came inside the hotel, whilst several others were in the garden and on the roofs of the adjoining houses with their weapons aimed at the said hotel, creating a scenario resembling a serious military operation.

Everyone who were present at that time, including the invitees for lunch as well as the guests in the hotel were amazed and filled with extreme alarm, fear and apprehension at this armed intrusion. There was so much confusion, that many of the petitioners' guests were screaming in fear.

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Some of the armed officers had also gone Into the petitioners' residence and had entered the petitioners' bedroom with weapons, whilst the 2nd petitioner was dressing in order to come down to attend to her guests who had already arrived. When some of the armed officers attempted to run towards the reception counter of the hotel, the 1st petitioner has attempted to intercept them in order to inquire as to the purpose of their visit. When the said officers were not responding, the 1st petitioner had placed his arm across the door and at that time one officer had aimed his rifle at the 1st petitioner's neck, whilst two others pushed him inside. At that stage, the 1st petitioner had identified the 2nd and the 3rd respondents as officers who are attached to the Kandy Police Station. When he had inquired from the said officers as to why they had made this intrusion, the 1st petitioner was informed that it was to search the petitioner's hotel and on inquiry they had stated that they posses a search warrant for this purpose. The 1st petitioner had seen the name 'Sunray Inn Guest House' in the warrant and had immediately informed that his establishment was Sunray Hotel and not Sunray Inn Guest House. Nevertheless, notwithstanding the 1st petitioner's persistent protests around 20 armed personnel who had entered the hotel proceeded to search all the rooms and other areas of the hotel upon instructions issued by the 2nd respondent. The 1st petitioner had submitted that he was shocked to hear one of the members of the armed officers remarking in Sinhala that there was some suspicion that there was a brothel being run in the said hotel. The 1st petitioner had then produced the relevant business registration, Tourist Board approval, and the guest register to the 2nd respondent which he had refused to read.

By this time there was a crowd of about 30 to 40 persons including neighbors and persons in the area congregated in the vicinity of the hotel.

A little while later the 2nd respondent produced a document for the 1st petitioner to sign. Although he did not want to do so, on the insistence of the 2nd petitioner and his second son, he placed his signature on the said documents without being able to read through its contents. The 2nd respondent had stated that there will be no problems as everything is now settled and that he had just carried

out the DIG's order. Thereafter the 2nd respondent had left the hotel with the other officers.

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Although the petitioners were not informed that they were to come to the Police Station, the 1st petitioner decided to proceed to the Police Station in order to lodge a compliant. At that stage, the 2nd petitioner, who was severely disturbed by the events that took place, fainted and suffered a fall. The effect of the fall was exacerbated by the fact that she had undergone a womb operation a few months ago. By that time the petitioners' guests who had arrived at the hotel had left without waiting for lunch, causing much pain of mind to the petitioners.

On the day following the incident, viz. on 11.04.2003, the 1st petitioner, tried to make a compalint at the Kandy Police Station, but the officers on duty at that time refused to entertain the said complaint, Accordingly the 1st petitioner had addressed a letter to the 5th respondent with copies to Her Excellency the President, the Hon. Minister of Internal Affairs and the 1st respondent referring to the incident and requesting the 5th respondent to inquire into the matter and to take appropriate action. Later on 01.05.2003, the 1st petitioner made a written complaint to the Police Headquarters on the incident which took place on 10.04.2003.

The respondents' version

The 2nd respondent, who was the sub-inspector of police, Kandy, submitted that the raid of Sunray Hotel took place subsequent to a petition dated 03.04.2003 sent by an inhabitant of Talwatta, alleging that the said premises were being used to provide prostitutes and that some armed personnel were also in the habit of frequenting the said premises in search of them (2R9). Upon the receipt of the said petition the Assistant Superintendent of Police, (Crimes and Operations) forwarded the same to the 2nd respondent for investigations with written instructions outlining the matters to be investigated. These instructions included the following :

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The 2nd respondent submitted that he had kept the premises in question under observation for several days and he was convinced that the matters set out in the said petition warranted a complete investigation. The 2nd respondent has submitted the certified extracts of the covert operations carried out by him with other officers on 06.04.2003,07.04.2003,08.04.2003 and 09.04.2003 (2R10, a, b and c). The 2nd respondent further submitted that the inquires he had made within the Department of Police had revealed that the 1st petitioner had a previous conviction in a related offence several years ago. In view of the aforementioned circumstances, the learned Magistrate was moved for a search warrant and the 2nd respondent contended that the said raid on the petitioners' premises was carefully planned on reasonable suspicion based on credible information and preliminary investigations. It was submitted that the raid was never carried out for any collateral purpose and never intended to subject the petitioners or member of their family to any kind of distress or humiliation.

The question of violation of petitioners' fundamental rights

The petitioner's submitted that despite the incident that took place on 10.04.2003, the petitioners were never requested to present themselves at the Police Station nor were any statements recorded from them and no further action has been taken on the matter. The petitioners further submitted that they have a reasonable apprehension that the search operation which was carried out on 10.04.2003 was for a pre-determined, malicious and collateral purpose at the instance of the 1st respondent in order to bring the petitioners and their business establishment into disrepute.

The petitioners prayed from this court for:

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(a) a declaration that the petitioners' fundamental right to freedom from cruel, inhuman or degrading treatment as guaranteed to them in terms of Article 11 of the Constitution ;

(b) a declaration that the petitioners' fundamental right to equality and equal protection of the law in terms of Article 12(1) of the

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Constitution ; and

(c) a declaration that the fundamental right to freedom to engage in a lawful occupation, profession, trade, business or enterprise as guaranteed to them by Article 14(1) of the Constitution.

All-three aforementioned alleged infringements were based on the entering and surrounding of the petitioners' premises by respondents on 10.04.2003, The petitioners allege that the search that was carried out and the manner in which it took place, referring to the number of officers that were brought in, clearly indicates that it was a malicious move to bring disrepute to the petitioners' establishment. Since the petitioners have made these accusations against the respondents on the basis of unequal treatment, now I would turn to examine the said allegations to ascertain whether there has been a violation of Article 12(1) of the Constitution, since that is the main infringement the petitioners have claimed in their petition.

The search carried out by the respondents

As stated earlier, the respondents rely on the anonymous letter received by the Police in early April 2003. The contention of the Counsel for the petitioners is that the respondents cannot rely on an alleged anonymous informant and in support of this contention they have relied on the decision of Anura Bandaranaike v The IGP (1). In that case, the court had held that the 1st respondent failed to satisfy court that he received any reliable information from an informant and that the 2nd and 3rd respondents had failed to satisfy court that they had 'reason to believe' that the suspect had entered the premises of the petitioner. However, the decision taken in Anura Bandaranaike's case (supra) could be distinguished from this case as the material before this court with regard to the present matter is altogether different. In Anura Bandaranaike's case there was no material produced before court referring to any such written document regarding a complaint and the respondents were not in a position even to divulge the details of the information given to the respondents and therefore the

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respondents failed to satisfy the court that reliable information was received by the respondents. In the instant case the 2nd respondent has produced the anonymous letter received by them (2R9). The letter provides information on two aspects; firstly, it speaks about prositution carried out in Buwelikada, Talwatte areas and especially in Hotel Sunray which establishment belongs to the 1st petitioner. The letter also refers to men armed with weapons and guns who frequent this hotel. There is also reference to school girls being provided as prostitutes by the petitioners. Furthermore a request is made to the Police to take steps to stop all these shameless activities-of the petitioners. The writer has also alleged that the petitioner has patronage of the Police. Secondly, the letter refers to a woman who sells heroin to school children near Dharmaraja College. Therefore, the facts in the instant application are different to that in the case of Anura Bandaranaike v The IGP (supra) and as such no reliance could be placed on the said decision.

It is to be borne in mind that the respondents had not merely acted on the receipt of this letter. Immediately after the letter was received, the Assistant Superintendent of Police had directed the 2nd respondent to inquire into the matter, to look into any previous incidents and to obtain a search warrant, if it is required. As pointed out by the learned State Counsel for the respondents, a reference number (CR/00/08/04/04/03) was given to the said letter and the date for reporting to the superior officers has been noted down as 01.05.2003.

The surveillance notes of the Police Officers contain detailed accounts as to their observations and considering the observations of several Police Officers contained in 2R10, it is clear that a reasonable suspicion had arisen in the minds of the investigators that a search of the premises was warranted.

Moreover, the respondents had also taken the precaution to obtain a search warrant for the purpose of carrying out a search on the premises in question. Learned State Counsel for the respondents correctly submitted that the impugned search warrant (2R1) was issued by the learned Magistrate of Kandy on 09.04.2003, based on the information provided by the Police.. More importantly it is to be

borne in mind that the issuing of a search warrant is purely a judicial act, which cannot be examined in proceedings pertaining to an infringement of a fundamental right of a petitioner. It was brought to our notice that although the search warrant

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was issued under section 9(2) of the Criminal Procedure Code, the correct provision of law for the Magistrate to issue such warrant would have been under the Brothels Ordinance. In Fernando v Parawathi Radan (2) a search warrant directing the search for toddy in premises where it was alleged to be sold, failed to aver the quantity of toddy to be searched was in excess of one gallon - an essential element, if the act was to be treated as an offence. The court held that irrespective of the error the warrant was valid and that the officer endeavouring to execute it was acting in discharge of the functions entrusted to him by the court, Furthermore, in L. C. H. Peiris v The Commissioner of Inland Revenue (3) it was held that the mere citing of the wrong provision of law does not vitiate the act performed thereunder.

The petitioners' main grievance was based on the fact that his hotel was raided at a time he was celebrating his 2nd son's achievement of obtaining the coveted Trinity Lion by a large contingent of officers in camouflage uniform. By the said action, the petitioners complained that their fundamental rights enshrined in Article 12(1) of the Constitution were infringed by the respondents.

Article 12(1) of the Constitution states that,

"All persons are equal before the law and are entitled to the equal protection of the law."

The petitioners' allegations against the respondents are chiefly based on the fact that an armed contingent entered the petitioners' premises on . 10.04.2003. As observed earlier, the respondents on the receipt of the anonymous letter had commenced an investigation on the complaint made, took steps to kept premises under surveillance and after establishing that there was a cause to search the premises made an application to the learned Magistrate

for a search warrant. The respondents visited the petitioners' premises only thereafter. In such circumstances, would it be possible to state that the respondents had infringed the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution ? Furthermore, the anonymous letter included a second matter concerning drugs being sold in the vicinity. Learned State Counsel submitted that the respondents had inquired into this complaint and a successful raid was carried out in which a suspect by the name Nadeera Suriyanpala was rrested with a small quantity of heroin for which he was fined Rs. 6,000 on 9.04.2003 upon pleading guilty. This raid was also carried out by the 2nd respondent.

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In the light of the foregoing it would now be necessary to consider the creditworthiness of the position taken up by the petitioners.

Firstly, the petitioners claim that at the time the respondents 'charged into' their hotel, they were to start the reception to celebrate their son's achievement. In the petition it is clearly stated and the affidavit affirmed that, the 2nd petitioner at that time was 'getting ready' to come down in order to welcome their guests, In fact the allegation is that at the time the 2nd petitioner was preparing herself in her room, Police Officer had come into her room without any permission or notice, However, there are several affidavits filed by the petitioners' guests along with the petitioners' counter affidavit, which aver the following :

"At or about 1 p. m. **whilst the party was in progress**, to my utter. surprise and astonishment, suddenly and without any prior warning whatsoever, approximately 25-30 persons clad in camouflage uniform and carrying T-56 rifles entered the premises at which the hotel is located, together with approximately 6 other persons who were in civilian clothes, and one police officer in police uniform."

Thus its is apparent that at the time of the arrival of the respondents with others, 'the party was in progress'. At a time when the party was in progress could it be possible for the hostess to be still inside her room getting dressed up for the occasion ? Furthermore, there

are several other affidavits, the petitioners had filed along with the petition (X1 to X12). Almost all the affidavits are identical in substance and the language that has been used. More importantly the affidavit marked X6 is purported to have been sworn by one Buddhika Sembapperuma of Trinity College, who was a friend of the petitioners' son. According to the affidavit he was invited for the luncheon party along with his parents. This affidavit has been seriously challenged by the said Buddhika Sembapperuma's father by his affidavit dated 26.03.2003 (2R19) in which he alleges that neither his wife, their son nor he had participated at a luncheon organized by the petitioners at their restaurant on 10.04.2003. He has categorically stated that none of them were invited for the said function on 10.04.2003.

It is to be also borne in mind that there are serious contradictions pertaining to the petitioners' allegation against some of the respondents. In his petition the petitioners have alleged that "they have a reasonable apprehension and that they verily believe that the said forced entering and search operation was carried out for a pre-determined malicious and

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collateral purpose at the instances of the 1st respondent, in a manner which action was designed to bring the petitioners' and their business establishment into disrepute", (paragraph 50 of the petition dated 09.05.2003). However, on 11.04.2003, immediately after the alleged incident, the 1st petitioner made a written complaint to several persons including the 1st respondent calling for an. impartial inquiry. In that there were no allegations against the 1st respondent. Three weeks after the 1st written complaint, the 1st petitioner lodged a further complaint at the Police Head Quarters against the Kandy Police. This included the compaint against" the 1st respondent and a perusal of this second document indicates that there were several discrepancies between these two documents which raise doubts as to the credibility of the petitioners' version. Moreover, although the petitioners are alleging mala fide on the part of the 1st respondent, no material has been produced to substantiate such allegations. With regard to the number of Police Officers who entered the restaurant, the respondents' version is that

only four officers actually entered the building, although the police party had consisted 17 officers including 2nd respondent and 3rd respondent. Out of the aforesaid contingent of 17 officers 5 had been clad in civilian clothes and 12 officers including the 3rd respondent were in police uniform. Only 9 officers were carrying arms and none of them had been clad in camouflage uniform. Except for the affidavits tendered by the friend of the petitioners who attended the function on 10.04.2003, there is no other material before us to indicate that we could accept the version given by the petitioners. Considering the inaccuracies of some of the affidavits as well as the discrepancies of the petitioners' own documents referred to above, on a balance of probability, I am inclined to accept the version given by the respondents as to what took place on 10.04:2003.

Considering the contents of the allegation made by the petitioners, it is to be clearly borne in mind that their basic complaint is founded on the raid on their restaurant by the respondents. The respondents on their part had not acted on a mere suspicion. Moreover, although the petitioners complained that the respondents have obtained certain statements and affidavits against the petitioners by several people in the vicinity, under duress, there is other material supported by several documents placed before this court to indicate that the respondents had not acted blindly or in order to satisfy an interested third party.

If the respondents had acted on a mere suspicion, it could have been an arguable situation that the action on the part of the respondents is

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arbitrary and therefore a violation of the petitioners' fundamental rights. But, where there are several other measures taken by the respondents to ascertain whether the complaint or information is worthy of further investigation by searching the premises and for that purpose when they have obtained a search warrant, the action of the respondents has reached judical sanctity and has moved beyond the point of being an arbitrary act. In such circumstances could it be an act of infringement of petitioners fundamental rights ?

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I do not think so, for an act to be arbitrary and volatile of fundamental rights, the decision has to be one without a rational basis or a foundation. Equal protection, enshrined in terms of Article 12(1), means the right to equal treatment in similar circumstances which would include the situations where liabilities are imposed by law. Such protection guarantees safeguards from discriminatory actions by the executive. It is to be borne in mind that an act of discrimination cannot be presumed and it is essential that such action is clearly shown, unless it is apparent on the material available, Even if there is discrimination and thereby unequal treatment, such inequality perse will not violate the provisions of Article 12(1), as for the inequality to offend the principle of equality it is mandatory that there should be an act or acts which are unreasonable and arbitrary. In the instant case there were justifiable reasons for the respondents to take necessary steps to obtain information which they have carried out, in my view, according to the procedure laid down by law.

There is one final-matter, to which I wish to address my mind before I part from this judgment, Search warrants are an important tool with regard to the day to day duties and functions of a Police Officer and several statutes enable Magistrates to issue search warrants for all kinds of offences. In Lord Denning's words, 'search warrants are a necessary tool in the. war against crime'. Having that in mind it would be necessary to stress upon the fact that there should be a great regard for the integrity, freedom and privacy of a person which are jealously guarded from unnecessary interferences, Similarly, it is to be borne in mind that it is in the larger interest of the society that steps should be taken to find out wrongdoers and suppress crime. In fact in Chic Fashions (West Wales) Ltd. v. Jones'41 Lord Denning M. R. referring to a search of a premises on a search warrant stated that,

"We have to consider, on the one hand, the freedom of the individual. The security of his home is not to be broken except for the most compelling reason. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. In

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these present times, with the ever-increasing wickedness there is about, honest citizens must help the police and not hinder them in their efforts to track down criminals"

Having said that, it is also to be borne in mind that the police officers also should act strictly according to the procedure laid down by law with due adherence to the basic fundamental rights guaranteed in terms of the Constitutional provisions. Accordingly, it is not only necessary but also essential to maintain a careful balance between the rights of individuals and the duties carried out by the officers. The lawfulness of the officers' conduct will have to be judged at the time of the alleged act which had taken place, and has to be considered on a case by case basis.

On a consideration of the totality of the circumstances in the instant application and for the aforementioned reasons I hold that the petitioners have not been successful in establishing that there was a violation of their fundamental rights guaranteed in terms of Articles 11,12(1) and 14 (1)g of the Constitution.

This application is accordingly dismissed, but in all the circumstances of this case there will be no costs.

JAYASINGHE,J. - I agree

UDALAGAMA, J. - I agree

Application dismissed.

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Fernando And Others v. Associated Newspapers Of Ceylon Ltd. And Others - SLR - 141, Vol 3 of 2006 [2005] LKSC 21; (2006) 3 Sri LR 141 (24 February 2005)

FERNANDO AND OTHERS
VS.
ASSOCIATED NEWSPAPERS OF CEYLON LTD., AND OTHERS

SUPREME COURT
WEERASURIYA, J.
TILAKAWARDANE, J.
AMARATUNGA, J.
SC 274/2004.
FEBRUARY 24, 2005.

Fundamental rights- Constitution Articles 12(1). 12(2), 14(1)2, 126, 126(4)- Employed on contract - Absorption into permanent cadre assured?-Legally enforceable right as approved to Legitimate expectation - Is that expectation sufficient for constitutional relief? Relationship contractual? differently treated - equal protection denied.

The Petitioners were employed on contract basis in the Respondent company - for a specific period of 6 months. Their services were duly terminated at the end of the 6 month period. The petitioners' complain that, the termination is in violation of their fundamental right to equal protection of the law, as (1) the practice of the Respondent Company is to absorb into the permanent Cadre and confirm in service all persons recruited on temporary basis and (2) that the Chairman of the Respondent Company had in writing assured them that they would be so absorbed legitimate expectation.

HELD:

(1) The Board decisions demonstrate that there was no practice to absorb those in temporary/casual service into the pemanent Cadre. The petitioners have not shown any instance where permanent status has been granted to any employee in accordance with a past practice alleged by them.

(2) The existence of a legitimate expectation as opposed to a legally enforeable right is a relevant factor in considering the just and equitable relief that could be granted under Article 126(4) when it is shown that the action of the executive which frustrates the legitimate expectation amounts to a denial of the right to equal protection of the law guaranteed by the Constitution.

Legitimate expectation could arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

The contents of the letters sent by the Chairman to the petitioners can give the reasonable expectation to his recipient that he would be made permanent upon completing six months service.

Per Gamini Amaratunga. J.

. That expectation also is not sufficient to make the petitioners entitled to the consititutional relief for the infringement of the fundamental rights guaranteed by Article 12(1)" .

(3) The disappointment of the petitioners expectation governed by the said letters cannot by itself bring the petitioners' case within Article 12(2) without proof of the additional element that in deciding to terminate their services the management has treated them differently from those who are similarly circumstanced or that they have been denied the equal protection of the law.

APPLICATION under Article 126 of the Constitution.

Case referred to:

Council of Central Service Union (CCSU) vs. Minister of Civil Service, 1984 3 All ER 935 at 944

J. C. Weliamuna with Shantha Jayawardena for petitioners in SC 274/04, 277/04, 369/04, 370104 and 373/04

Manohara R. de Silva with Shantha Jayawardane for petitioners in SC 275/04. 276/04

A. A. .de Silva PC with Lasitha Jayawardane for 1-3 respondents February 24th, 2005.

Cur. adv. vult.

GAMINIAMARATUNGA, J.

In this application eleven petitioners who are employed on contract basis in the Transport Department of the Associated Newspapers of Ceylon Ltd. (ANCL) seek relief under Articles 17 and 126 of the Constitution against the decision of the management to terminate their services with effect from 30. 06.2004. According to their letters of appointment marked P3A to P3E and P3G to P3K, the 1st to 5th and the 7th to 11th petitioners have been appointed to various posts such as driver, mechanic and mate in the Transport Department of the ANCL with effect from various dates in August 2003 on contract basis for a period of six months. The 6th

petitioner's appointment as a driver is on the same basis for one year with effect from 02.05.2003. (P3F)

All letters of appointment specify the date of commencement of the six months (one year in the case of the 6th petitioner) contract period and the date on which the contract ends. All letters contain a clause that the contracts would automatically expire on the dates specified therein and an extension of the contract period would be made only in writing at the discretion of the management. However the petitioners have stated that they were verbally informed that they would be absorbed into the permanent cadre in the due course. There is no specific reference to the person or the official who gave such an undertaking. By letters marked P4A to P4J, the petitioners' initial six months period of service was extended by further three months with effect from March, 2004. (In the case of the 6th petitioner by six months).

According to Gazette Notification P1, the ANCL is an institution which comes under the Ministry of Information and Media. At the time the petitioners were recruited the said Ministry was known as the Ministry of Mass Communication and Mr. Imthiaz Bakeer Marker was the Minister of Mass Communication. The ANCL came under his ministry. The petitioners have been recruited during his tenure of office. On 04.11.2003 the Ministry of Mass Communication was taken over by H. E. the President, On 05.11.2003 a new Chairman of the Board of Directors was appointed and subsequently a new Board of Directors was also appointed. On 02.04.2004 the Parliamentary General Election was held and the United Peoples Freedom Alliance was returned to power. On23.04.2004the 2ndrespondentwas made the Chairman of the ANCL.On25.05.2004,the letters of termination of services issued to the petitioners.

The petitioners allege that the termination of their services violation of their fundamental rights guaranteed under Articles 12(2) and 14(1)(3) of the Constitution. They seek a declaration the letters of termination of services served on them are null and and a direction to the 1st to 3rd respondents to absorb them into permanent cadre and to confirm them in their posts.

After considering the petitioners' application, this Court has granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution. Byway of interim relief, this Court has issued an order restraining the 1st to 3rd respondents from giving effect to the notices of termination dated 25.05.2004 marked P10Ato P10K. Subsequently the 1st to 3rd respondents have given an undertaking not to discontinue the services of the petitioners until this application is finally disposed of. There are six other applications filed against the same respondents by persons who have received letters of termination of services similar to those served on the petitioners of this application. At the hearing, it was agreed by the parties that the decision of the present application would apply to those applications bearing SC Application Nos. 275/2004,276/2004,277/2004,369/2004,370/2004 and 373/2004.

The letters of appointment issued to the peitioners contain a clause permitting either party to terminate the contract with one months notice to the other party or

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upon the payment of one month's salary in lieu of notice. It appears that the letters of termination have been issued on the basis of this clause. Although the relationship between the petitioner's and the ANCL is contractual, the petitioners seek relief under Article 126 of the Constitution on the basis that the decision to terminate their services is in violation of their fundamental right to the equal protection of the law. Their position is that the practice of the ANCL is to absorb into the permanent cadre and confirm in service those persons recruited on temporary or on contract or on casual basis or. as trainees upon completion of six months service subject to a probation period of six months. The petitioners have further alleged that by letters marked P9A to P9K dated 22.03.2004, the then Chairman of the ANCL assured to them that they would be absorbed into the permanent cadre in due course and accordingly they entertained a legitimate expectation that they would be absorbed into the permanent cadre and confirmed in their posts.

The petitioners allege that the decision to terminate their services is contrary to the practice of the ANCL with regard to those employed on contract basis and is arbitrary and unreasonable. Although there is reference in prayer (b) to the petition to Article 12(2)of the Constitution, there is no specific allegation in the petition that the petitioners have been singled out for discriminatory treatment due to political reasons. Leave to proceed was granted only for the alleged violation of Article 12(1) of the constitution.

Before examining the legal basis upon which the peitioners seek relief, it is pertinent to examine the objections filed on behalf of the 1st to 3rd respondents and especially the position taken up by those respondents with regard to the manner in which the petitioners came to be employed at the ANCL. The third respondent, who is the Head of the Personnel and Human Resources Development Division of the ANCL, has filed an affidavit on behalf of the 1st to the 3rd respondents. It is the 3rd respondent who has signed the letters of appointment issued to the petitioners and the subsequent letters extending the petitioners' period of service and also the letters of termination.

The petitioners in their petition and the affidavit have stated that they made applications for suitable posts in the ANCL and were thereafter called for interviews and after ascertaining their qualifications and experience they were appointed to various posts in the Transport Department of the ANCL.The 3rd respondent in her affidavit has denied the averment that the petitioners were called for interviews on the applications made by them. Her position is that at the time the petitioners were called for interviews, the ANCL was well staffed to carry out its functions but the management had to call the petitioners for interviews due to the pressure brought upon the management by the then Minister of Mass Communication Mr. Imthiaz Bakeer Marker. (Herein after referred to as the Minister) In support of this position the 3rd respondent has produced marked R1 and R2A to R2K letters/ memos sent by the Minister or on his behalf to the Chairman and the Working Director of the ANCL nominating persons for employment at the ANCL.

Document R1 is a letter dated 18.07.2003, sent to the Chairman of the ANCL by the Coordinating Secretary to the Minister seeking employment opportunity for the 2nd

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petitioner Devapriya as a motor mechanic at the ANCL. Document R2A is a letter dated 04.07.2003 sent by the Minister to Mr. Somasiri, Working Director, recommending the names of eleven persons for employment. The names of the 1st petitioner B. V. N. Fernando, the 5th Petitioner Ratnasiri and the 10th petitioner Niroshan are in this letter. Document R2C is a letter sent by the Minister to Mr. Somasiri, recommending the 3rd petitioner W. B. D. F. Fernando (described as "my youth organizer") for employment. Document R4A by which the 3rd petitioner was called for an interview, specifically refers to the Minister's letter. Document R2D dated 01.01.2003 sent to Mr. Somasiri by the Public Relations' Officer of the de Saa. Document R2F dated 22.04.2003, sent by the Minister to the Chairman,ANCL, refers to employment opportunity for the 6th petitioner Refthi as a driver in the ANCL. Document R2G dated 02.07.2003 sent by the Public Relations Officer to the Minister to Mr. Somasiri contains three names recommended for employment. The 9th petitioner Cooray's name is in this list. Document R2K dated 22.07.2003, sent by the Minister to the Chairman, ANCL, refers to the 11th petitioner Liyanaarachchi. Some of the documents referred to above (R2C, R2D and R2K) contain references to telephone conversations the Minister or his Public Relations Officer had with the Chairman or the Working Director of the ANCL before sending those letters.

Some of those letters (R1, R2A. R2C, R2D, R2F,R2G, R21and R2K) contain endorsements made by the working Director to interview the persons named in those letters. Appointment letters of the petitioners have been issued subsequent to the letters of recommendations/ nominations referred to above. The 3rd respondent has further pointed out that except the 2nd petitioner, all the other petitioners are from the Kalutara District from which the Minister was elected to the Parliament as a Member of Parliament. As already pointed out in one letter the Minister has described his nominee as "my youth organizer". Although the petitioners have stated that they made applications to the ANCL for employment, they have not produced at least a single copy of such applications to substantiate their version. The 1st petitioner in his counter affidavit has denied the 3rd respondent's averments relating to the manner in which the petitioners came to be employed at the ANCL. but his bare denial is not sufficient to controvert the 3rd respondent's averments supported by documents.

Thus it is clear that the petitioners have secured employment at the ANCL as the selected nominees of the Minister under whose purview the ANCL came at that time. The petitioners, by stating in their petition and affidavit that they made applications to the ANCL for suitable posts and were called for interviews have deliberately attempted to suppress the manner in which they came to be recruited by the ANCL. By this deliberate suppression of a material fact, the petitioners have attempted to give the impression to this Court that they came to be employed through the regular process set in motion by their applications.

The basis upon which the peitioners claim relief is that in deciding to terminate their services, the management of the ANCL has disregared the practice of the ANCL to absorb into the permanent cadre those persons recruited on contract basis upon completion of period of six months service. They further contend that the written assurance given by the then Chairman in his letter dated 22.03.2004 that

the petitioners would be made permanent in due course, gave them the legitimate expectation that they would get permanent status in their employment.

The existence of a legitimate expectation, as opposed to a legally enforceable right, is a relevant factor in considering the just and equitable relief this Court may grant under Article 126(4) of the Constitution when it is shown that the action of the executive which frustrates the legitimate expectation amounts to a denial of the right to equal protection of the law guaranteed by the Constitution. "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though be has no legal right in private law". *Halsbury's Laws of England, 4th Ed. Vol. 1(1) P. 151, paragraph 81. Lord Fraser in Counsel of Civil Service Union (CCSUO vs. Minister of Civil Service*[(1)] *at 944*, said that a legitimate expectation could arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

An express promise or an undertaking can take the form of (i) a general representation issued either to the 'world' or to a particular class of beneficiaries, or (ii) a specific representation addressed to a particular individual or individuals. Such specific representation may take the form of a letter containing an assurance or a promise of a benefit or a course of action which the authority Intends to follow. See de Smith, *Woolf and Jowell's Principles of Judicial Review; 1999 Ed. p.p. 472 to 478* . The petitioners rely on the practice of the ANCL with regard to those employed on contract basis as well as the assurance given by the former Chairman by his letter dated 22.03.2004 (P9).

In order to establish the practice followed by the ANCL with regard to those employed on contract, on casual/temporary basis or as trainees, the petitioners have produced, marked PS, P6 and PI, three decisions of the Board of Directors of the ANCL. The relevant part of the Board Decision PS dated 02.09.2003 is as follows.

"Appointments on contract or as trainees would be for a maximum period of six months at the end of which period such recruits would be absorbed into the permanent cadre on probation for a minimum period of six months "

This decision would be applicable to those who have already been recuited as well as future recruitments.

" The 3rd respondent referring to the above Board Decision has stated that at the time the said decision was taken by the Board, there was speculation that the Ministry of Mass Communication was going to be taken over by H. E. the President and that the decision in P5 had been taken in anticipation of a possible take over of the Ministry of Mass Communication and a consequent change in the administration of the ANCL, in order to safeguard the interests of those who have been recruited after the Parliamentary General Election held on 02.12.2001. As already stated, the Ministry of Mass Communication was in fact taken over by the President on 04.11.2003.

The 3rd respondent's assertion that the Board Decision PS had been taken to safeguard the interests of those recruited after the General Election held in December, 2001 finds support from Board Decisions P6 and PI, produced by the petitioners. By Board Decision P6 dated 01.03.2003 (Prior to PS), the Board had decided to absorb into the permanent cadre those who have been employed on contract, on casual basis or as trainees for a specific period during 16th December, 2001 and 28th February 2003, if they have completed one year's service (subject to probation for six months) or six months service (subject to probation for one year) by the 28th February, 2003.

On OS.11.2003,the day after the Ministry of Mass Communication was taken over by the President, schedules containing the names of persons who have been recruited on casual/temporary basis, on contract or as trainees after 1st December, 2001 have been tabled at the meeting of the outgoing Board of Directors. The Board had decided to absorb all employees named in those schedules into the permanent cadre and to confirm them in their posts, with effect from 01.11.2003 (document P7). However the new Board of directors on 1S.12.2003 had decided to annul all appointments made by Board Decision dated OS.11.2003 (P7) as those appointments had been made without adopting the proper procedure. (R6 and R7).

It is thus clear that Board Decisions PS, P6 and PI had been taken for the specific purpose of safeguarding the interests of those recruited after the General Election held in December, 2001. If there was a consistent settled practice in the ANCL to confer permanent status to those recruited on contract, on casual/ temporary basis or as trainee after they complete six months service, there was no necessity for the- Board to adopt the decisions PS, P6 and PI. Thus those Board Decisions, instead of supporting the existence of a past practice, demonstrate that there was no such practice.

It was contended on behalf of the petitioners that since Board Decision PS remains unannulled and valid, the 2nd and 3rd respondents have no authority to disregard it. The learned President's Counsel for the respondents contended that one Board of Directors cannot take a decision to bind a future Board of Directors and that a later Board is free not to follow a previous Board Decision. Objections to the petitioners' application have been filed not only on behalf of the 2nd and 3rd respondents but also on behalf of the 1st respondent ANCL. The objections therefore indicate that the present administration, headed by the present Board of Directors, is not inclined to implement the Board Decision contained in PS.

The petitioners have stated that over 10 persons recruited after December, 2001 have been absorbed into the permanent cadre. The 3rd respondent in her affidavit has admitted that certain persons recruited after December 2001 have been absorbed into the permanent cadre. The petitioners have produced marked P8A and P8B, two letters of appointment issued to two persons who were first recruited as trainees. One person was a trainee Assistant Store Keeper on 05.05.2003. Even before he completed six months service, he has been absorbed into the permanent cadre on 01.11.2003 as an Assistant Store Keeper on the

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recommendation of the Chief Store Keeper. The other person recruited in January, 2003 as a Library Clerk has been appointed as Assistant Librarian as she possessed a degree in Library and Information Science. Both those persons have been absorbed into the permanent cadre not on the basis of Board Decision P5 but for special reasons set out in documents R8 and R9. Apart from those two appointments the petitioners have not shown any other appointment made on the basis of Board Decisions P5 and P6.

The petitioners allege that in view of the then Chairman's letter dated 22.03.2004 (P9) they entertained a legitimate expectation that they would be absorbed into the permanent cadre in due course. All copies of P9, individually addressed to the petitioners, are identical. Paragraph one of the letter indicates that it has been issued in response to the requests made frequently by the petitioners to the Chairman at his office to confirm them in service and to an appeal handed over to the Chairman for the same purpose. Paragraph three of the letter states that if the employee has completed a period of six months service on contract or as a trainee, steps would be taken in accordance with the existing Board Decisions to make him permanent subject to a six months probationary period. It is stated in the fourth paragraph that since it is the election time, confirmation of service is not granted during such periods. The letter goes on to state that once the election is over, steps would be taken to confirm him (the employee) in service.

The 3rd respondent in her affidavit has stated that there is no record of the former Chairman's letter P9 in the Personnel Department and that copies of the letters are not filed of record in the personal files of the petitioners in accordance with the normal practice. Those letters are not addressed to the petitioners through the Personnel Division. "Even in the Chairman's Office a copy of that letter has not been filed of record. The 3rd respondent has described P9 as a personal communication between the former Chairman and the petitioners.

However, there is no denial of the genuinness of P9. The contents of P9 can give the reasonable expectation to the recipient that he would be made permanent upon completing six months service. However, is that expectation alone sufficient to make the petitioners entitled to the constitutional relief for the infringement of the fundamental right guaranteed by Article 12(1) of the Constitution? The disappointment of the petitioners' expectations generated by P9 cannot by itself bring the petitioners' case within Article 12(1) without proof of the additional element that in deciding to terminate their services the management has treated them differently from those who are similarly circumstanced or that they have been denied the equal protection of the law.

On the facts, the petitioners have failed to establish a past practice of the ANCL to confirm contract basis employees when they complete six months service. The Board Decisions upon which the petitioners relied demonstrate the absence of any such practice. When Board Decision P5 is viewed in the light of Board Decision P6, it is clear that Board Decision P5 had been taken with a view to safeguard the interests of those who have been recruited after the General Elections held in December, 2001. Confirmations hurriedly granted by the outgoing Board of

Directors to those who have been recruited after 01.12.2001 (P7) on the very next day following the take over of the Ministry of Mass Communication by the President clearly demonstrate the motive behind Board Decisions P5 and P6 as well. Subsequently the new Board on 15.12.2003 has annulled the appoinments made by Board Decision P7 dated 05.11.2003. The petitioners have not shown any instance where permanent status has been granted to any employee in accordance with the past practice alleged by them or on the basis of Board Decision P5.

The two instances cited by the petitioners (P8A and P8B) relate to two trainees. By its very nature the appointment as a trainee is different from an appointment on contract. Those two trainees have been absorbed into the permanent cadre not on the basis of any past practice or on the bas 'is of Board Decision P5, but for reasons set out in R8 and R9 referred to earlier. The petitioners in their counter affidavit have submitted lists of persons appointed in December, 2004 (after this application was filed) on one year probation period to Security, Rotar and Dispatch Departments of the ANCL. However, there is nothing to indicate that they are persons first recruited on contract, temporary or casual basis or as trainees or that their appointments have been made on the basis of the Board Decision P5.

Thus the petitioners have failed to establish that the decision of the management to terminate their services in terms of a clause in their letters of appointment is violative of their right to equality and to the equal protection of the law under the Constitution. The statement contained in the former Chairman's letter P9, issued during the election time, cannot by itself be of any avail to the petitioners, when the indispensable element to bring their case within Article 12(1) of the Constitution is lacking. The application of the petitioners is according dismissed without costs.

In view of this decision SC Applications bearing Nos. 275/2004, 276/2004, 277/2004, 369/2004, 370/2004 and 373/2004 also stand dismissed without costs.

WEERASURIYA. J. - I agree.
TILAKAWARDENE. J. - I agree.

Application dismissed.

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Ranasinghe Vs Rathnasiri and Others - SLR - 315, Vol 1 of 2005 [2005] LKSC 2; (2005) 1 Sri LR 315 (25 February 2005)

RANASINGHE
vs
RATHNASIRI AND OTHERS

SUPREME COURT,
BANDARANAYAKE.J,
DISSANAYAKE.J AND
FERNANDO, J,
S. C (FR) 638/2003
15TH JULY, 30TH, AUGUST AND 16TH NOVEMBER, 2004

Fundamental Rights - Appointment of Registrar of Births and Deaths and Registrar of Marriages - Article 12(1) of the Constitution - Most eligible candidate pointed - Appointment not vitiated - Insufficiency of evidence of alleged infringement of fundamental rights.

The petitioner's father was Registrar of Births and Deaths, Uduwara and Registrar of Marriages, Raigam Korala until his death on 06.11.2001. Thereafter, the petitioner was appointed to act in these posts by monthly extensions.

By Gazette dated 03.05.2002, the 2nd respondent (the Registrar -General) called for applications to fill the aforesaid vacancies. The Gazette prescribed the eligibility criteria, including educational qualifications. Ten applications were received. They were given to the 4th respondent (the District Registrar) for consideration by an Interview Board and recommendations. Next as required, the 2nd respondent submitted the recommendations to the 6th respondent (the Minister) for decision, The Panel of Members for interview of candidates recommended that seven of the candidates had minimum eligibility. The 1st respondent had the best educational qualifications, viz. in addition to more credits than others at the G. C. E. (O/L) Examination (in one sitting) against two sittings specified in the Gazette, she had also passed the G. C. E (A/L) for selection

to the Keianiya University, She was also a trained teacher until her retirement under Circular 44/90 dated 18.10.1990. The 6th respondent Minister decided to appoint her to both posts.

The appointments were impeached under Article 12(1) of the Constitution on the ground that firstly, the Interview Panel had given marks to the candidates which was not required by the scheme of recruitment ; secondly that the 7th respondent (Private Secretary to the Minister) had recommended to the 5th "respondent (Senior Assistant Secretary) that the Minister had instructed the appointment of the 1st respondent which was tantamount to political intervention ;thirdly, that the 1st respondent had no right to be appointed a "public officer" after retirement from Government Service.

The 2nd respondent (Registrar General) averred in his affidavit that (he Minister had decided to appoint the candidate who was educationally the most qualified candidate. The 2nd respondent made the appointment accordingly.

HELD:

(1) There was no legal objection against marks being given at the interview.

(2) The 2nd to. 6th respondents had a discretion in the matter. Hence the decision to appoint the 1st respondent in the circumstances could not be impeached on the ground of political intervention.

(3) As averred by the 2nd respondent, the candidate who had the best educational qualifications had been appointed.

(4) The Minister and other respondents did not act arbitrarily but acted on relevant considerations. Hence the evidence was insufficient to hold that there was an infringement of Article 12(1) of the Constitution.

(5) The first respondent's appointment was not that of a "public officer" and as such the objection taken on that ground fails.

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Case referred to :

1. Breen v Amalgamated Engineering Union (1971) 2 QB 175

APPLICATION for relief for infringement of fundamental rights

J. C. Weliamuna with *Viran Corea* and *Sharmaine Gunaratne* for petitioner.

Saliya Peiris with *Chamath Madanayake* for 1st respondent.

M. Gopallawa, State Counsel for 2nd to 6th and 8th respondents.

Cur.adv.vult

February 25, 2005,

SHIRANI A. BANDARANAYAKE, J.

The petitioner, who was the Acting Registrar of Birth and Deaths of Uduwara Division and the Acting Registrar of Marriages of Raigam Korale Division, for a period of 2 years alleged that, the 2nd to 7th respondents have acted in violation of the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution by the appointment of the 1st respondent as the Registrar of Births and Deaths of Uduwara Division and the Registrar of Marriages of Raigam Korale Division.

This Court granted leave to proceed for the alleged infringement of petitioner's fundamental rights in terms of Article 12(1) of the Constitution

The petitioner's grievance, albeit brief, is as follows:

The petitioner submitted that his father was the Registrar of Births and Deaths of Uduwara Division and the Registrar of Marriages of Raigam Korale Division until his death on 06.11.2001. Thereafter the petitioner was acting in the relevant post from 16.11.2001 (P1) which was extended on the completion of every 30 days,

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Extensions were granted on this basis until November, 2003 and by letter dated 19.11.2003, the 3rd respondent had informed the petitioner that his period of service was extended only for the period from 17th November, 2003 to 30th November, 2003 (P12). The petitioner submitted that by notification published in the Gazette No. 1235 dated 03.05.2002, the 2nd respondent called for applications for the posts of Registrars of Births and Deaths and Registrars of Marriages in several divisional secretariat areas in the Kalutara District including Uduwara (P2). The petitioner submitted that having possessed of the qualifications stated in the Gazette Notification referred to earlier, he had applied for the relevant post and submitted his application to the 4th respondent. Later the petitioner had become aware that the 1st respondent has been appointed to the relevant post by letter dated 13.11.2003 sent by the 2nd respondent to the 4th respondent. On an inquiry, he received a letter from the Additional District Secretary, Kalutara, riting on behalf of the 4th respondent, informing him that the petitioner's services will no longer be required from 30.11.2003 as the 1st respondent has been appointed to the post in question with effect from 01,12.2003.

The petitioner alleged that, according to the scheme of recruitment of Registrars of Birth and Deaths, the 4th respondent is required to make his recommendation to the 2nd respondent upon which the 2nd respondent has to submit his observation together with the relevant documents as well as the interview notes to the 6th respondent, who is the Minister of the relevant Ministry. Upon the 6th respondent granting his approval, the 2nd respondent is required to make the appointment and that must be published in the Gazette (P3). The petitioner alleged that the 7th respondent, who is the private secretary of the 6th respondent Minister, by letter dated 24.06.2003 has requested the 5th respondent to appoint the 1st respondent to the post in question.

It is common ground that applications were called for the post of Registrar of Birth and Deaths of Uduwara Division and the Registrar of Marriages (General) of Raigam Korale Division by Gazette Notification dated 30.05.2002 . According to the said Gazette Notification, the candidates should have possessed the following qualifications.

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1. applicants should be permanent residents in the relevant divisions who possess sufficient assets and have acquired the respect of persons in that area ;

2. applicants should be persons who are not less than 21 years and not more than 60 years of age ;

3. applicants should be married ;

4. applicants should possess the required educational and other qualifications stipulated in the notices displayed at the office of the District Secretary, Kalutara.

The notices calling for applications displayed at the said office at Kalutara stipulated that the minimum educational qualification was six passes at the GCE (Ordinary Level Examination) in not more than two sittings including Sinhala/Tamil as a subject or an examination equivalent or higher to that standard and the ability to work in a second language to meet the requirements of the public of the area.

The 2nd respondent averred that clause 18(c) of the scheme of recruitment (P3) sets out the matters to be examined by the panel of members at the interview and that clause 19 further provides that the said panel should select candidates eligible for appointment based on the material submitted at the interview. He further averred that the panel is expected to only indicate the eligibility of a candidate and that there is no provision made according to the scheme of recruitment for the allocation of marks at the interview. Learned State Counsel correctly pointed out that the petitioner is not entitled to challenge the scheme of recruitment at this stage.

An examination of the Schedule of applicants for the post of Registrar of Births and Deaths of Uduwara Division and the Registrar of Marriages of Raigam Korale Division, reveals that there have been 10 applicants present at the interview. Out of these 10, the panel of members at the interview had recommended as suitable seven (7) applicants, which included the petitioner as well as the 1st respondent (2R2). All seven applicants have satisfied the

minimum eligibility criteria. Except for the remark made stating suitable or non suitable, no other comment was made by the panel.

At the conclusion of the interview, the 4th respondent, based on the findings of the panel of members, had reported to the 2nd respondent and the 2nd respondent had sent the details of the 7 applicants to the 6th respondent informing him that the most suitable candidate out of the 7 eligible candidates be appointed to the post of Registrar (2R3)

According to the 2nd respondent, all the applicants including the petitioner was made aware of the requirements to produce certificates relied upon by them to establish their educational qualifications and this was even referred to in the letter calling them for the interview (P4) Out of the petitioner and the 1st respondent, it is quite clear that the 1st respondent possessed higher qualifications than the petitioner. Whilst the petitioner had obtained six simple passes and one credit pass in two sittings at the GCE (O/L), the 1st respondent had obtained five simple passes and three credit passes in the GCE (O/L) examination in one sitting. Moreover the 1st respondent had also passed the GCE (A/L) examination and the General Arts Qualifying (GAQ) Examination from the University of Kelaniya. Furthermore, the 1st respondent had functioned as a Trained Teacher until his retirement in terms of Public Administration Circular No. 44/90 dated 18.10.1990 (P5).

The petitioner complained that, as the 1st respondent had retired from Government Service in terms of clause 4 of Public Administration Circular No. 44/90 dated 08.10.1990, that he will not be entitled to be appointed to a public post after such retirement. It is to be borne in mind that the provisions of Public Administration Circular No. 44/90 (P5) prohibits re- employment in the Public Service, Provincial Public Service, Statutory Bodies, Public Corporations, State Owned Companies and Government owned Business Undertakings. The posts of Registrar of Births and Deaths and Marriages do not fall within the definition of the term 'Public Officer' as defined in the Constitution and the Establishment Code and are not considered as constituting posts in the Public Service. Moreover the provisions in Public Administration Circular No. 44/90 have been amended and restrictions imposed on the re-

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employment of officers who retired in terms of the said circular have been varied by subsequent Public Administration Circulars such as Public Administration Circular Nos. 44/90(iii) and Public Administration Circular No. 1/03. In the circumstances it would not be correct to say that the 1st respondent is disqualified from being appointed as a Registrar of Births and Deaths and a Registrar of Marriages due to his optional retirement from the Public Service in terms of Public Administration Circular No. 44/90.

The petitioner has alleged that the 7th respondent who is the Private Secretary to the Minister had informed the 5th respondent by letter dated 24.06.2003 that the 1st respondent should be appointed to the relevant post. His allegation is that as the direction to the 5th respondent was given by the 7th respondent, there has been political intervention in the said appointment. Admittedly, the letter in question was written by the 7th respondent, However, he had written the letter in his capacity as the Private Secretary of the 6th respondent Minister and the contents of the letter clearly indicate that he is only conveying the decision of the Minister. The relevant portion of the said letter is reproduced below :

In such circumstances, it is abundantly clear that the 7th respondent was only carrying out the instructions of the 6th respondent Minister, which is within the framework of duties allocated to him in his capacity as the Private Secretary to the 6th respondent.

The main allegation of the petitioner is that the 7th respondent had arbitrarily issued the letter dated 24.06.2003 (P7) to the 5th respondent informing her to appoint the 1st respondent to the post in question.

The petitioner also alleges that there was no scheme of allocating marks to the candidates at the interview and therefore there was no stipulated criteria for the selection.

Admittedly there had been no scheme of allocating marks at the interview and the scheme of recruitment does not refer to any kind of guidelines, rules or principles, which would govern the criteria for the selection. In such circumstances, where no such guidelines for

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selection are laid down to be followed, the officer concerned is bestowed with unrestricted discretion ; if exercised without any fetters, such decision could become arbitrary negating equal protection and discriminating persons who are similarly circumstanced.

According to classical Constitutional Law, wide discretionary power, was incompatible with the Rule of Law. (A. V. Dicey, Law of the Constitution, 9th Edition, pg.202). Coke, described discretion as "scire per legem quod sit justum"; it was a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colorable glosses and pretences and not to do according to their wills and private affections (De Smith's Judicial Review of Administrative Action, 5th Edition 1995, pg. 298). However, in today's context what the Rule of Law demands is not to eliminate the wide discretionary power, but to see that the law is able to control its exercise. This does not mean that utilizing arbitrary power and having unfettered discretion in decision making process can be countenanced. It is to be borne in mind that discretion should be exercised by a statutory body strictly according to law and according to the established procedure and, that means taking into account only the relevant considerations. Having guidelines or principles according to which the discretion is to be exercised would be a clear exhibition of how a public authority has carried out the administrative authority vested in them. Referring to the concept of discretion, Lord Denning, MR,in Breenv Amalgamated Engineering Union.(1) stated that,

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this : the statutory body must be guided by relevant considerations and not by irrelevant"

It is common ground that the 2nd to 6th respondents had unfettered discretion with regard to the selection of a Registrar of Births and Deaths of Uduwara Division and Registrar of Marriages of Raigam Korale Divis`on. However there is no material to indicate that the said respondents had abused such discretion given to them in making the said selection. Although there were no guidelines laid down, instead of any abuse, it appears that they have taken into

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consideration relevant criteria, in arriving at their decision. The sole basis for their selection according to the material available before this court is the qualifications obtained by the applicants. The 2nd respondent, in his affidavit averred that, "......1 state that the 1st respondent is the most eligible candidate amongst all applicants to be appointed to the advertised post of Registrar, whilst all candidates satisfied eligibility requirements relating to residence, age, character, mental status, income, office facilities, handwriting etc., the educational qualifications of the 1st respondent are superior to the petitioner and other applicants (emphasis added)"

It is thus apparent that although no guidelines were given with regard to the selection of candidates in terms of the scheme of recruitment the 2nd to 6th respondents had made the selection not taking into account any extraneous considerations, but on the basis of assessment of educational qualifications of the applicants. This is further established by the letter sent by the 7th respondent to the 5th respondent on 24.06.2003 (P7) which is in the following terms : In the aforementioned circumstances, it cannot be said that the 2nd to 5th respondents had acted arbitrarily abusing the discretion given to them for the appointment of the Registrar of Births and Deaths for the Uduwara Division and Registrar of Marriages for the Raigam Korale Division. When discretion is exercised, taking into account all relevant considerations, then there cannot be a situation where the said decision could be regarded as taken arbitrarily and the said process will not fall into the category which negates equal protection.

On a consideration of the aforementioned circumstances, I hold that the petitioner has not been successful in establishing that his fundamental right guaranteed in terms of Article 12(1) of the Constitution was infringed by the 2nd to 7th respondents. This application is accordingly dismissed, but in all the circumstances of this case, without any costs.

DISSANAYAKE, J. - I agree.

RAJA FERNANDO, J. - I agree.

Application dismissed.

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Machchavallavan v. Oic, Army Camp, Plantain Point, Trincomalee and Others - SLR - 341, Vol 1 of 2005 [2005] LKSC 6; (2005) 1 Sri LR 341 (31 March 2005)

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MACHCHAVALLAVAN
vs
OIC, ARMY CAMP, PLANTAIN POINT, TRINCOMALEE AND OTHERS

SUPREME COURT
BANDARANAYAKE.J.
UDAULGAMA,J.AND
FERNANDO, J.
SC. APPEAL No. 90/2003
HC. APPLICATIONS No. 244/90
AND 245/94
22nd SEPTEMBER AND 19th OCTOBER, 2004 AND 16th MARCH, 2005

Writ of Habeas Corpus - Loss of petitioner's sons after removal by Army - Right to life - Articles 13(4) and 126(2) of the Constitution - Duty of Court of Appeal to have referred the entire matter to the Supreme Court - Article 126(3) of the Constitution.

The appellant sought two writs of habeas corpus from the Court of Appeal in respect of his two sons removed after a cordon and search operation by officers of the Army Camp, Plantain Point and who had thereafter disappeared. These applications were referred to a Magistrate who inquired into them and recommended to the Court of Appeal against issuing the writs as the

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responsibility for the loss of the corpus could not be proved against the 1st respondent or any other army officer individually. The Court

of Appeal issued . rule nisi and after inquiry dismissed the applications, particularly due to the unsatisfactory evidence of the appellant after six years that he too was removed by the army. But the appellant's version was supported by the complaints he made to the police station, Trincomalee on 19.12.1992 (P1), Civilian Information Office Colombo, on 21.09.1990 (P2), and to the President on 06.07.1990(P5) regarding the corpora. They were arrested on 06.07.1990. There is also the evidence of one Jesudasan who was arrested with the corpora.

One of the questions on which leave to appeal was granted was whether the Court of Appeal failed to refer the entire matter to the Supreme Court under Article 126(3) of the Constitution as there was prima facie evidence of violation of fundamental rights in view of the disappearance of corpora in the light of Article 13(4) (right to life) and recent judgments of the Supreme Court in the matter which gave a broad construction to Articles 11, 13(4), 17 and 126(2) granting the right of petition to the legal representatives of the deceased person, affected by violence at the hands of a public officer.

HELD:

(1) There was prima facie evidence of violation of fundamental rights contrary to Article13(4) of the Constitution.

(2) The Court of Appeal should have referred the entire matter to the Supreme Court under Article 126(3).

(3) The burden was on the Court of Appeal to make such reference and hence the time bar in Article 126(2) had no application particularly as the relief sought by the appellant consisted of relief in habeas corpus applications.

(4) There was sufficient evidence that the cordon and search operation was conducted by the Plantain Point Army Camp even if the identity of the respondents was not established.

(5) As the evidence showed that the corpora had been removed by the army, the State was liable for the acts of the army officers and

the State could be ordered to pay compensation and costs to the appellant although in the absence of individual responsibility for the removal exemplary costs may not be ordered against the individual respondents.

Cases referred to

1. Shanthi Chandrasekeram v D. B. Wijetunga and Others (1992) 2 Sri LR 293

2. Sebastian M Hongray v Union of India (Air) 1984 SC 1026

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3. Kotabadu Durage Sriyani Silva v Chanaka Iddamalgoda (2003) 1 Sri LR 14 (preliminary objection)

4. Kotabadu Durage Sriyani Silva v Chanaka Iddamalgoda (2003) 2 Sri LR 63 (merits)

5. Rani Fernando's case SC FR 700/2002 S. C. minutes of 26.07.2004

6. R v. Vrixton Prison Governor Ex-Parte walsh (1985) AC 154

7. R v. Durham Prison Governor Ex-Parte Hardial Singh (1984) 1 WLR 704

APPLICATION for writs of habeas corpus

Dr. T. Thirunavukarasu for petitioner appellant.
Shyamal A. Coilure 1st respondents.
Riaz Hamsa, State Counsel for Attorney-General

Cur.adv.vult

March 31st, 2005

SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated

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01.07.2003. By that judgment, the Court of Appeal refused to grant a Writ of Habeas Corpus as prayed by the petitioner-appellant. On an application by the petitioner-appellant (hereinafter referred to as the appellant), the Supreme Court granted Special Leave to Appeal on two questions which are set out below :

1. At the time the Court of Appeal made the order in respect of which Special Leave to Appeal was sought, there was prima facie evidence of infringement of the fundamental rights of the corpus at least under Article 13(4) of the Constitution caused by the 1st respondent, or by another State Officer, for whose act the State was liable. In those circumstances, it is arguable that the Court of Appeal should have referred the entire matter for determination by this Court under Article 126(3) of the Constitution;

2. Whether the 1st respondent and or the State are liable for the arrest and the subsequent presumed death of the corpora.

The facts of this appeal, albeit brief, are as follows :

The appellant, being the father of the corpora, filed two habeas corpus Applications (HCA 244/94 and HCA 245/94) in respect of his two sons

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namely Machchavailavan Arumugam and Machchavallavan Mahendrarajah, who were arrested at a cordon and search operation conducted by Plantain Point Army, Trincomalee. At the time of the arrest which took place on 06.07.1990 they were aged 22 years and 25 years, respectively.

The Court of Appeal on 11.09.1995, referred the two applications to the Chief Magistrate, Colombo to inquire into and report upon the said arrest and alleged imprisonment or detention in terms of the 1st proviso to Article 141 of the Constitution. The learned Chief Magistrate held an inquiry and submitted his findings to the Court of Appeal on 14.03.1997. In his report the learned Chief Magistrate had concluded that there was no evidence to establish that the 1 st respondent-respondent (hereinafter referred to as the 1st

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respondent) either took part in the round-up operation during which the said corpora were alleged to have been taken into custody or was in any manner responsible for the alleged arrest and detention of the said corpora. However, the Court of Appeal, being satisfied that the corpora were detained at the Plantain Point Army Camp after arrest, issued a Rule Nisi on the 1st respondent on 19.07.2000 directing him to bring up the bodies of the said corpora before the Court of Appeal on 17.05.2001.

In response to the aforementioned position, the 1st respondent filed an affidavit dated 15.05.2001 denying the arrest and detention of the corpora by him. He filed another affidavit on 04.10.2001, further clarifying his defense. The Court of Appeal on 01.07.2003, delivered its judgment discharging the Rule Nisi issued on the 1st respondent and dismissed the applications filed by the appellant, holding that the appellant had not succeeded in discharging his burden of proof.

Having set down the factual position in this appeal, I would now turn to examine the two questions on which Special Leave to Appeal was granted.

1. The Court of Appeal should have referred the entire matter for determination by the Supreme Court under Article 126(3) of the Constitution.

Article 126 of the Constitution, deals with fundamental rights jurisdiction and its exercise and Article 126(3) specifically refers to the applications received by the Court of Appeal and reads thus :

"Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition,

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procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court."

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It is common ground that the appellant preferred his application to the Court of Appeal seeking a mandate in the nature of a writ of habeas corpus directing the respondents who were responsible, for the alleged arrest and the detention of the corpora referred to in the application to produce them before Court.

The 1st and the 4th respondents however were of the view that there was no basis for the Court of Appeal to have referred the application made by the appellant to the Supreme Court. Their position was that, the petition, or the supporting affidavits did not contain any averment or material against any of the respondents cited in the petition. Further it was submitted that, in paragraph (a) to the prayer to the petition, a writ of habeas corpus was prayed for with a direction to the responsible respondents to produce the corpora before the Court of Appeal. In support of this position, learned Counsel for the 1st and 4th respondents relied on the decision in Shanthi Chandrasekeram v. D. B. Wijetunga and others (1) and submitted that, there was no prima facie evidence of an infringement of the fundamental rights of the corpora by a party to the said applications for the Court of Appeal to refer the instant application to the Supreme Court.

Learned Counsel for the 1 st and 4th respondents, also submitted that, the appellant in his original habeas corpus applications has not raised the question of any violation of fundamental rights and did not do so even in his application for Special Leave to Appeal. Further it was submitted that no allegations based in terms of Articles 11, 13(1), 13(2) or 13(4) were taken up by the appellant at any stage.

Learned Counsel for the 1st and 4th respondents, also took up the position that the appellant had not made the applications within the stipulated time, in terms of Article 126(2) of the Constitution
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Article 126(3)of the Constitution, referred to earlier, does not state that all applications in the nature of obtaining writs from the Court of Appeal be referred to the Supreme Court. Such reference is necessary only if there

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is evidence to the effect that there is an infringement or an imminent infringement of fundamental rights. Article 126(3) of the Constitution is quite precise in its position and the said Article states clearly that if it appears to the Court of Appeal, while in the course of hearing an application for orders in the nature of writs of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, that there is prima facie evidence of an infringement or an imminent infringement of fundamental rights, such matter should forthwith be referred to the Supreme Court for determination. In Shanthi Chandrasekeram's case (Supra), in the course of hearing of the habeas corpus applications filed by three petitioners, the Court of Appeal considered that there was prima facie evidence of the infringement of Articles 11,13(1) and 13(2) of the Constitution and made the reference to the Supreme Court. Considering the infringements referred to above, in that case, this Court held that the alleged infringement of Article 11 could not have been the basis of reference under Article 126(3), firstly, because there was only an assertion and no prima facie evidence of such infringements, and secondly because there was no averment or evidence that the infringements, were by a party to the habeas corpus applications. With reference to Articles 13(1) and 13(2), the Supreme Court held that the detainee had been arrested in violation of Article 13(1) and had been detained in violation of Article 13(2).

Accordingly, the notable feature in this provision is that there should be prima facie evidence of an infringement or an imminent infringement in the matter before the Court of Appeal. It would also be necessary that there is an averment or evidence that the infringements were by a party to the habeas corpus application. A question arises at this point as to whether it is necessary that the petitioner should bring it to the notice of the Court of Appeal of such an infringement. Article 126(3) does not refer to any such requirement casting the onus on the petitioner to move Court with his application. Instead, what the Article professes is that, if it appears to the Court of Appeal, that there is prima facie infringement or an imminent infringement in terms of fundamental rights, then the Court should forthwith refer. such matter for determination by the Supreme Court. The burden therefore lies with

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the Court of Appeal and it would be the duty of the Court to decide, in the course of the hearing of a writ application, as to whether there is an infringement of a fundamental right in relation to the complaint made by the petitioner.

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There is one other matter that I wish to state briefly. Learned State Counsel had stated in his written submissions that "if every habeas corpus application, which invariably refers to the arrest and disappearance of a corpus, is to be referred to the Supreme Court in terms of Article 126(3) of the Constitution, it could lead to an abuse of this provision and a mockery of justice".

It is to be borne in mind that, it is not every habeas corpus application that would be referred to the Supreme Court in terms of Article 126(3) of the Constitution. Provision is made in terms of Article 126(3) for the Court of Appeal to refer to the Supreme Court the writ application only when it appears to such Court that there is prima facie evidence of an infringement or an imminent infringement of the provisions of Chapter MI or Chapter IV by a party to such application. Therefore it would not be correct to say that all habeas corpus applications would invariably be referred to the Supreme Court by the Court of Appeal as such reference should strictly be in terms of Article 126(3) of the Constitution.

In the instant application, the complaint made by the appellant related to the arrest, detention and the subsequent disappearance of the corpora. The appellant, being the father of the corpora, had made a complaint to Civilian Information Office on 21.09.1990 giving information regarding missing persons (P2). In that, the appellant had stated that on 06.07.1990, the Army Officers at Linga Nagar took two of his sons, referred to in his appeal, into custody along with him and several others and later they were taken to the Plantain Point Army Camp at Trincomalee. According to the appellant, he was released with two others around 5.00 p.m. in the evening. The appellant had stated in the information sheet that his sons were not released at any stage and that on inquiring from the Plantain Point Army Camp he was informed that his sons are not in the said Army Camp. The appellant had also sent a letter to His

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Excellency the President on 21.09.1990 informing His Excellency the disappearance of his sons. In this communique (P5) the appellant had described how they were arrested on 06.07.1990. According to him the corpora and the appellant were at home on 06.07.1990 when there was a cordon and search operation around6.00 a.m. Thereafter they were taken to Palaiyoothu College until the arrival of the Commander. The appellant had stated that the Grama Niladhari of the area had taken down the details of the persons who were so arrested and a copy of that document was given to the Commander. Thereafter the

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Army personnel took all of them to the Plantain Point Army Camp. The appellant and two others were released around 5.00 p.m. on the same day, but not the corpora. The appellant had repeated the aforementioned details in a statement made to the Police Station, Trincomalee on 09.12.1992 (P1).

The appellant had cited the Officer-in-Charge of the Army Camp at Plantain Point Trincomalee as the 1st respondent in his appeal. At the time the Rule Nisi was issued on the 1st respondent, requiring him to bring up the bodies of the corpora before the Court of Appeal on 17.05.2001, he had filed an affidavit before the Court of Appeal on 15.05.2001. In that he had averred that he was not the Commanding Officer of the Plantain Point Army Camp during the time material to this application claimed by the Rule Nisi, but only the Officer-in-Charge of the Military Police Section . of the said Camp during the said period. In a further affidavit filed on 04.10.2001, Major Channa Etipola averred that, at the time material to this complaint, he was only a Lieutenant attached to the Plantain Point Army Camp and the late Brigadier C. L. Wijeyaratne functioned as the Commanding Officer. He further averred that Plantain Point Army Camp was the Headquarters of the 22nd Brigade of the Sri Lanka Army and that there were two major units at the said Plantain Point Army Camp, namely, the Operational Staff and the Logistic/Administrative Straff and the Military Police Camps had come under the supervision of the latter. He had further averred that as a Military Police Officer he has no authority whatsoever to arrest civilians under any circumstances and hence he had not

arrested the corpora referred to in this appeal.

It is clear on the evidence that the corpora were arrested and detained in or around 06.07.1990 at a cordon and search operation. According to the appellant this was carried out by the Plantain Point Army Camp. The 1st respondent denies any knowledge or involvement in such an arrest but admits that he was attached to the Plantain Point Army Camp situated at Trincomalee. He had further submitted that the said camp consisted of the Headquarters of the 22nd Brigade of the Sri Lanka Army, the Operational Unit and the Logistic/Administration Branch, Therefore on an analysis of the material placed before this Court, although the 1st respondent may not be responsible for the arrest and detention of the corpora and/or that he has no knowledge whatsoever with regard to the arrest and detention, there is a possibility in all probabilities that the corpora would have been arrested and detained by officers in one or both of the other units of the said Camp. This

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fact is clearly supported by the information given in the complaint made to the Trincomalee Police (P1), complaint made in Colombo to the Civilian Information Office (P2) and in the letter sent to His Excellency the President in September 1990 (P5). It is inconceivable that civilians would have been permitted to stay in the Plantain Point Army Camp without the permission/ knowledge of the Army authorities, especially at the relevant time where hostilities were high. Therefore it is reasonable to conclude that the corpora were kept in the Army Camp with the knowledge and connivance of the Army officers. Hence Army authorities are responsible to account for the whereabouts of the two sons of the appellant. In such circumstances, would it be correct to say that the appellant had no right to move the Court for grant of writ of habeas corpus? The writ of habeas corpus is a writ of remedial nature and is available as a remedy in all cases of wrongful deprivation of personally liberty. The basis of the writ of habeas corpus is the illegal detention or imprisonment, which is incapable of legal justification and the appellant's complaint involved the liberty of the corpora.

In the instant application, the complaint made by the petitioner related to the arrest, detention and the subsequent disappearance of the corpora. Whilst Articles 13(1).and 13(2) refer to the arrest and detention of a person according to the applicable procedure laid down by law, Article 13(4) of the Constitution states that no person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The aforementioned Articles are contained in Chapter III which deals with fundamental rights and falls within the category which speaks of freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation.

It is therefore evident that the appellant was complaining of an infringement of the provisions contained in Chapter III of the Constitution. Moreover, it is to be borne in mind that the complaint was against the officers attached to the Plantain Point Army Camp who had carried out the cordon and search operation. Therefore the allegations were made against the State which involved the liberty of the corpora. According to the appellant, the corpora and others along with him were taken to the Plantain Point Army Camp. Although the appellant and some others were released later, he had not thereafter heard anything about his sons. In fact he had referred to this position in all his communications

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regarding the arrest, detention and disappearance of his sons and therefore it was not factually correct for the Court of Appeal to have stated that nearly 6 years after the alleged incident the appellant had at the inquiry whilst giving evidence had stated for the first time that he too was taken into custody. The Court of Appeal had taken the view that the appellant's evidence must fail on the promptness test.

The Chief Magistrate, Colombo who held the inquiry on the reference made by the Court of Appeal, in his report dated 19.11.1996 (P7) has clearly stated that the appellant had submitted that the corpora were arrested by the Plantain Point Army Camp. A witness by the name Titus Jesudasan, had said that he too was taken to the Plantain Point Army Camp and had also stated that the

said operation was conducted by one Colonel Tennakoon and that one Ajith Kumara had questioned them at the time of the arrest. The 1st respondent of course has denied any involvement. Based on the evidence of the 1 st respondent the learned Chief Magistrate had come to the finding that 1st to 3rd respondents are not responsible for the disappearance of the corpora.

Considering the evidence of Titus Jesudasan referred to by the learned Chief Magistrate, Colombo in his report, I am of the view that the said witness has corroborated the position taken up by the appellant.

In the light of the above position, it is abundantly clear that the appellant's main ground was that of the disappearance of his sons. Considering the totality of the circumstances of this appeal, the only inference that could be drawn is that both of them must have met an unnatural death. Prima facie such deaths would have to be taken as offences of murder and the important fact would be not to cast any aspersions on as to who had committed the crime, but as a first step to come to the conclusion that the corpora are not alive and that they have met unnatural deaths. In fact in Sebastian M. Hongray v. Union of India2 where a writ of habeas corpus was issued to produce C. Daniel and C. Paul who were taken to Phungrei Camp by the Jawans of 21st Sikh Regiment, Desai J. referring to the persons who were missing stated that,

"Prima facie, it would be an offence of murder......It is not necessary to start casting a doubt on anyone or any particular person. But prima facie there is material on record to reach an affirmative conclusion that both Shri C. Daniel and Shri C. Paul are not alive and have met an unnatural death."

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In the aforesaid circumstances it is beyond doubt that at the time the Court of Appeal made the order, there was prima facie evidence of an infringement of the fundamental rights of the corpora at least in terms of Article 13(4) of the Constitution caused by some State Officers. Article 13(4) of the Constitution does not deal directly with right to life, but states that,

"No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person pending investigation or trial shall not constitute punishment."

Considering the contents of Article 13(4), this Court has taken the position that no person should be punished with death or imprisonment except by an order of a competent court. Further, it has been decided in Kotabadu Durage Sriyani Silva v. Chanaka Iddamalgoda (3) and 4 and in Rani Fernando's case(5) that if there is no order from Court no person should be punished with death and unless and otherwise such an order is made by a competent court, any person has a right to live. Accordingly Article 13(4) of the Constitution has been interpreted to mean that a person has a right to live unless a competent court orders otherwise.

In such circumstances it was apparent that there was an alleged violation of Article 13(4)oftheConstitution.

Therefore, for the reasons aforementioned, I hold that the Court of Appeal should have referred the entire matter for determination by the Supreme Court in terms of Article 126(3) of the Constitution.

2.Whether the 1st respondent and/or the State are liable for the arrest and the subsequent presumed death of the corpus

The appellant stated that his sons were taken into custody on 06.07.1990 by the Plantain Point Army in the course of a cordon and search operation. According to the appellant after the arrest, his sons were detained in the Plantain Point Army Camp and since then he has not received any information of his sons.

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Learned Counsel for the 1st respondent made several submissions to indicate that the 1st respondent is not responsible for the alleged disappearance of the corpora and that the appeal should be dismissed.

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In support of his submissions, learned Counsel for the 1st respondent has relied upon the following positions:

(a) The appellant in his original application for the writ of habeas corpus did not take up the question of violation of his fundamental rights in terms of Article 13(4) of the Constitution ; and

(b) The appellant has not made the complaint within the stipulated time limit of one month from the disappearance of his children.;

<u>(a) The appellant in his original application for the writ of habeas corpus did not take up the Question of violation of his fundamental rights in terms of Article 13(4) of the Constitution ;</u>

The appellant, it is to be borne in mind, preferred an application for a writ of habeas corpus to the Court of Appeal, on the basis of the arrest, detention and the subsequent disappearance of his two children. The appellant therefore did not come before the Court of Appeal and later to the Supreme Court on the basis of an infringement of Article 13(4) of the Constitution. Whilst the appellant's chief and only contention was on his application for a writ of habeas corpus, it was this Court which had granted leave on the question of an infringement in terms of Article 13(4) of the Constitution. The Supreme Court has the jurisdiction to look into such a question in terms of Article 126(3) of the Constitution. In terms of Article 126(3), it is obvious that the purpose of that Article was to prevent persons from filing different applications in the Supreme Court and the Court of Appeal on the same transaction. Referring to the purpose of the provisions in Article 126, Justice Mark Fernando, in Shanthi Chandrasekeram v. D. B. Wijetunga and others (Supra) stated that,

"Since those provisions do not permit the joinder of such claims, the aggrieved party would have to institute two different proceedings, in two different courts, in respect of virtually identical 'causes of action' arising from the same transaction unless there is express provision permitting joinder. The prevention in such circumstances, of a multiplicity of suits (with their known concomitant) is the object of Article 126(3)."

It would therefore not be correct for the 1st respondent to take up the position that, as the appellant has not taken up the infringement of Article 13(4) at the initial stage, that now he cannot urge such violation before the Supreme Court. In fact, it is also to be borne in mind that, the appellant could not have combined a violation of Article 13(4) with an application for a writ of habeas corpus in the Court of Appeal and in the event he had proposed for an application in terms of Article 13(4) of the Constitution, he should have made the application to the Supreme Court and not to the Court of Appeal and in any event, the sole purpose of Article 126(3) of the Constitution is to avoid such multiplicity of actions and therefore the 1st respondent cannot now take up the position that the appellant has failed to urge the infringement in terms of Article 13(4) of the Constitution. On a careful consideration of the provisions of Article 126(3), I hold that, it is the duty of the Court of Appeal to decide whether there is prima facie evidence of an infringement or an imminent infringement of the provisions of the Articles contained in the Chapter on fundamental rights of the Constitution and if so to refer such matter for determination by the Supreme Court. In such circumstances, there is no requirement or a need for the appellant to take up the question of an infringement of Article 13(4) of the Constitution in his application for a writ of habeas corpus in the Court of Appeal.

(b) The appellant has not made the complaint within the stipulated time limit of one month from the disappearance of his children.

Learned Counsel for the 1st respondent submitted that, there was no basis on which the Court of Appeal could have referred the appellant's application in terms of Article 126(3) of the Constitution as he has not complained within one month since the alleged incident as stipulated in Article 126(2) of the Constitution. His position is that the appellant's children were alleged to have been removed from their residence and were taken to Plantain Point Army Camp in June or July 1990, whereas his application praying for mandates in the nature of writs of habeas corpus were filed only in June 1994.

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Learned Counsel for the 1st respondent considered that, in a long line of cases, the Supreme Court has consistently held that the time limit of one month stipulated in Article 126(2) of the Constitution is mandatory. He took up the view that the intention of the legislature with regard to the mandatory time limit specified in Article 126(2) of the Constitution is re- emphasized in section 13(1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 which states that,

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"When a complaint is made by an aggrieved party in terms of section 14 to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."

Learned Counsel for the 1st respondent also drew our attention to the decision in Shanthi Chandrasekeram v. D. B. Wijetunga and others (Supra) where he submitted that, the detainees were arrested on or about 03.07.1991 and that the applications praying for the writs of habeas corpus were filed in August 1991.

Admittedly, the corpora were taken into custody in July 1990 and the appellant had come before the Court of Appeal only in June 1994. The appellant had stated in his petition that he had made inquiries and had searched for his sons with government and non governmental organizations (P1-P5).

Habeas corpus, unlike other prerogative orders still remains as a writ. It is not discretionary and therefore it cannot be denied because there may be some alternative remedy. As pointed out by Wade (Administrative Law, 9th Edition, 2004, pg. 594).

"The writ may be applied for by any prisoner, or by anyone acting on his behalf, without regard to nationality, since 'every person within the jurisdiction enjoys the equal protection of our laws'. It may

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be directed against the gaoler, often the appropriate prison governor, or against the authority ordering the detention, e.g. the Home Secretary. It is not discretionary, and it cannot therefore be denied because there may be some alternative remedy. There is no time limit. The defense will not always be statutory."

It is also to be borne in mind that the writ of habeas corpus potentially has a very wide scope as it is directly linked to the liberty of citizens. Blackstone referring to the writ of habeas corpus, had stated that, (Commentaries, BK III, 12th Edition, 1794, pg. 131):

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"the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."

Although the learned Counsel for the 1st respondent had referred to the provision in Article 126(2) of the Constitution, the appellant had not moved the Court in terms of that provision. It is this Court which had granted Special Leave to Appeal to consider the question of any violation in respect of Article 13(4) of the Constitution. Therefore it would not be correct to say that the appellant had to strictly adhere to the mandatory time limit stipulated in Article 126(2). The application made by the appellant was on the basis of obtaining a writ of habeas corpus and was not in terms of the fundamental rights jurisdiction of the Supreme Court. Although I am in complete agreement that a long line of cases of this Court had decided that an application on the basis of obtaining relief in terms of any infringement or imminent infringement of his fundamental rights will have to be filed within 30 days of the alleged infringement, subject to a few exceptions, it is my view that this condition does not apply to the appellant in this case as he had moved the Court of Appeal on an entirely a different premise. In such circumstances it would not be relevant to consider the application of Article 126 in relation to the time bar with regard to this appeal.

The next question that has to be gone into is whether the 1st respondent and or the State are liable for the arrest and the

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subsequent presumed death of the corpora.

The appellant's position was that in or around 06.07.1990, two of his sons were taken into custody by the Army Officers attached to the Plantain Point Army Camp. The appellant had made a complaint to the Trincomalee Police on 09.12.1992 about the said arrest. In the said complaint and in the subsequent complaints made by the appellant with regard to the arrest of his sons he had mentioned that his sons were arrested by the officers attached to Plantain Point Army Camp. However, the appellant had made no direct allegation against the 1 st respondent to the effect that he and he alone is responsible for the arrest of his sons. The appellant's contention was that the corpora were arrested by the officials of the Plantain Point Army Camp and they were last seen at the said Camp. This position was substantiated by witness Jesudasan who was also arrested at the time the corpora were arrested, but released after a few days of the arrest.

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Habeas corpus could be applied for and granted in many occasions such as when there is an excessive delay in bringing a prisoner up for trial (R v Brixton Prison Governor, ex-parte Walsh(6))or in executing an order for his deportation (R v Durham Prison Governor, ex-parte Hardial Singh(7)). However, it is to borne in mind that the writ has served and has a remarkable reputation as a bulwark of personal liberty although it has failed to measure up to the standards of the European Convention on Human Rights (Wade, Administrative Law, 9th Edition pg. 596).

In such circumstances the question arises as to the burden of proof in habeas corpus cases. Considering this question Wade (Supra) is of the view that it is the responsibility of the detaining authority to give positive evidence of the circumstances. As pointed out by Wade (Supra at pgs. 294-295):

"In cases of habeas corpus there is a principle which 'is one of the pillars of liberty, that in English Law every imprisonment is prima facie unlawful and that if is for a person directing imprisonment to justify his act.

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Accordingly the detaining authority must be able to give positive evidence that it has fulfilled every legal condition expressly required by statement, even in the absence of contrary evidence from the prisoner. This rule is indeed an example of the principle stated at the outset, since unjustified detention is trespass to the person. It is particularly important that the principle should be preserved where personal liberty is at stake".

The existence of the Plantain Point Army Camp is not disputed by the 1st and 4th respondents and the appellant as well as witness Jesudasan refers to the cordon and search operation conducted by the said Army Camp.

Although the 1st respondent denies his involvement with such an operation, he himself has stated that Plantain Point Army Camp was the Headquarters of the 22nd Brigade of the Sri Lanka Army and moreover that there were two major units at the said camp which consisted of the branches dealing with the operations and administration of the area. The Military Police Camps had come under the supervision of the latter. He has also admitted that he had no authority to arrest civilians under any circumstances and that there were other high ranking officers in charge of

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the Army Camp. All the documents filed by the appellant give a clear indication that he had been referring to the Plantain Point Army Camp as the place from which the cordon and search operation was conducted, the arrests made and was the place where the corpora as well as the appellant (for a short period) were detained. As has been pointed out earlier, it is reasonable to conclude that corpora were kept in the Army Camp with the knowledge and the connivance of the Army officers. In such circumstances, it was the duty of the Commanding Officer who had the authority to arrest and detain, to discharge the burden as to what took place on or about 03.07.1991. As pointed out by Wade, one cannot ignore the cardinal principle laid down in English Law with regard to habeas corpus applications that every imprisonment is prima facie unlawful and that it is for a person directing

imprisonment to justify his act. Since there is no evidence against the 1st respondent I cast no liability on him, but I hold that the State is responsible for the disappearance of the corpora while they were in detention at the Army Camp and the subsequent presumed death.

For the aforementioned reasons, I answer both questions raised by this Court at the time Special Leave to Appeal was granted in the affirmative. The appeal is allowed and the judgment of the Court of Appeal dated 01.07.2003 is set aside.

On a consideration of the circumstances referred to above, this Court must consider the kind of relief that should be granted to the appellant. In a similar situation, Desai J. in Sebastian M. Hongrayv Union of India (Supra) had held that exemplary costs from the respondents are permissible in such cases. As we have held that the 1st respondent is not personally responsible, there cannot be any exemplary costs payable to the appellant. However, as has been referred to earlier, the Commanding Officer has the authority to arrest and to detain and was in overall charge of such operations. In the circumstances, the State is responsible for the infringement of the fundamental rights of the corpora governed in terms of article 13(4) of the Constitution, which rights have accrued to and/or devolved upon the appellant. It is to be borne in mind that respect for the rights of individuals is the true bastion of democracy and State has to take steps to redress the infringement caused by its officers to the corpora. I therefore direct the State to pay a sum of Rs. 150,000 each for the two sons of the appellant, who had disappeared in detention as compensation and costs.

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" Thus Rs. 300,000, being the total amount to be paid to the appellant within 3 months from today.

UDALAGAMA, J. - I agree.

FERNANDO, J. - I agree.

Relief granted.

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Senadeera, Inspector of Police, Pulmuddai Police Station Vs Lt. Siyasinghe and Others - SLR - 335, Vol 1 of 2005 [2005] LKSC 4; (2005) 1 Sri LR 335 (1 April 2005)

**SENADEERA, INSPECTOR OF POLICE,
PULMUDDAI POLICE STATION
vs
LT. SIYASINGHE AND OTHERS**

SUPREME COURT
WEERASURIYA, J.
UDALAGAMA, J. AND
FERNANDO, J.
SC APPLICATION No. 263/2001 (FR)
20th JANUARY, 2005

Fundamental Rights - Articles 11, 12(1) and 12(2) of the Constitution - Weak and contradictary evidence - Weight of evidence to satisfy court - Balance of evidence.

The petitioner police officer complained that when he and his wife (President, Police Seva Vanitha Movement) were having lunch, the first and second respondents (army officers of the Kokilai Camp) together with soldiers of the Kokilai Camp arrived, kicked their plates and took the petitioner away in a truck, assaulted him and later chased him away. In his counter affidavit the petitioner said that there were other uniformed police officers accompanying him but there was no affidavit from any officer to support this, except his wife's affidavit. The 3rd to the 5th respondents were soliders and the 6th respondent was the Army Commander.

The evidence was contradictory except that there appears to have been a clash between the police and the army when the police were stopped from entering Kokilai village. The petitioner was produced before a medical officer according to whose report there were no major injuries. The petitioner decided not to enter the hospital for further treatment.

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The 1st and 5th respondents and 10 others were prosecuted before a Magistrate, but the case was withdrawn on the advice of the Attorney-General. In the course of the Supreme Court proceedings, the 3rd, 4th and 5th respondents were discharged.

The petitioner complained of infringement for his rights under Articles 11, 12(1) and 12(2) of the Constitution.

HELD:

Per Udalagama, J.

(1) " This court in order to consider granting relief to the petitioner needs to be satisfied on a balance of probabilities as to whether the petitioner had discharged his burden of establishing the allegation made out in the petitioner's petition and affidavit"

(2) The case for the petitioner is exaggerated and unsupported by independent evidence.

APPLICATION for relief for infringement of fundamental rights.

Upul Jayasuriya for petitioner.

K. S. Tilakaratne for 1st, 2nd, 4th and 5th respondents.

S. L. Gunasekera for 3rd respondent.

Hashika de Silva, State Counsel for 6th and 7th respondents.

Cur.adv.vult

April 01st, 2005

UDALAGAMA.J.

The petitioner, an Inspector of Police, who was the officer in charge of Pulmuddai Police Station alleges in his petition dated 01.05.2001 vide paragraph 4 of same that on the 16th April, 2001 which

obviously appears to have been erroneously referred to as "the day prior to the Sinhala New Year" that inter alia the 1 and 2 respondents together with soldiers in the Kokilai Army Camp subsequent to abusing the petitioner and his wife, the latter of whom was referred to as the President of the Police Seva Vanitha Association kicked their plates whilst having lunch and smashed same on the ground, pulled the petitioner by his collar using obscene language and was ordered to be dragged and put in a truck and further assaulted by at least 15 soldiers whilst in the said truck and later dropped off and ordered to run. This appears to be the second incident after a Corporal attached to the said Army Detachment is said to have abused the petitioner in obscene language and refused entry to the Kokilai village.

The latter also complains that notwithstanding his introducing himself as the officer-in-charge of Pulmuddai Police Station that the 1 st respondent assaulted him in the presence of his wife.

It is also alleged that he and his wife and two Reserve Sub-Inspectors of Police were produced before the Government Medical Officer of Padaviya but they chose not to be admitted to the hospital for further treatment. The petitioner also refers to documents P3a, P3b, P3c and P3d, the medical reports dated 16.04.2001 (Medical Legal Examination reports).

The petitioner is said to have thereafter informed the Assistant Superintendent of Police of Kebitigollewa, the Superintendent of Police (Operations) Padaviya and the Divisional Superintendent of Police, Anuradhapura, subsequent to which the 1, 2 and 5 respondents and 10 others were produced before the Magistrate of Kebitigollewa on a B report filed of record bearing No. 3134/2001 dated 23.04.2001 (P4). It is observed from the averments of paragraph 42 of the affidavit of the petitioner dated 04.11.2001 that the Magistrate discharged the accused from the proceedings on the advice of the Attorney General. The petitioner also by his averment in paragraph 48 of the same affidavit alleges inter alia mala fides on the part of the then Additional Solicitor General but significantly unsupported.

The petitioner in paragraph 35 of the petition alleges that his

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fundamental rights to liberty, the freedom to engage in a profession and equal protection of the law guaranteed under Articles 12(1), 13(1), 13(2), and 14(1)(g) had thus been infringed and in the above circumstances prays for relief against the 1 to 6 respondents.

By a second petition which is undated the petitioner had also claimed an infringement of his fundamental rights recognized by the provisions of Article 11 of the Constitution.

On 31.08.2001 this court has granted leave to proceed only for the violation of Articles 11,12(1) and 12(2) of the Constitution.

It must be also mentioned here that the petitioner having not claimed relief against the 3rd respondent had no objection to the discharge of the latter and this court had on 20.05.2004 discharged the 3rd respondent accordingly.

The affidavit of the petitioner filed with the original petition dated 01.05.2001 does not refer to any allegations of arrest, detention, torture or abuse against the 4th respondent and as no violation of the petitioner's fundamental rights by the 4th respondent appears to have been established this court has no alternative but to discharge the 4th respondent.

The 4th respondent is accordingly discharged.

The only evidence against the 5th respondent, vide paragraph 23 of the aforesaid affidavit of the petitioner appears to be the former's mere presence with the 1 st and 2nd respondents and no allegation of a violation by the 5th respondent of any of the petitioner's fundamental rights as alleged. In the circumstances the 5th respondent is also discharged from these proceedings.

The 6th respondent who is the Commander of the Sri Lanka Army had been made a party as the 1 to 5 respondents are under the latter's administrative control and general supervision and the 7th respondent, the Attorney General, is made a party to comply with the rules of court.

Considering the averments in the objections filed by the 1 st

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respondent and also as admitted to by the petitioner the latter at the time of the alleged incident was not in uniform. The 1 st respondent appears to have refused a request for a boat made by the petitioner and considering the submissions of the learned Counsel for the petitioner at the hearing and also the contents of the affidavits of the petitioner and his wife together with the averment in the affidavits of the 1 and 2 respondents it is reasonable to assume that a confrontation between the Police party and the Army personnel had occurred on the date of the incident and that in all probability a violent confrontation had also occurred. Considering also the averments as contained in the affidavit of the petitioner supported by those of his wife together with those of the 1 and 2 respondents it is apparent that the version of the incident as submitted to court by both parties are at variance except for the fact that an incident had occurred. This court, in order to consider granting of relief to the petitioner needs to be satisfied on a balance of probability as to whether the petitioner had successfully discharged his burden of establishing the allegation made out in the petitioner's petition and affidavit.

I am however, inclined to the view that the petitioner has in fact failed to do so for the following principal reasons :

1. The uncertainty as to the date of the incident in view of the averments in paragraph 4 of the petitioner's affidavit wherein the date is referred to as the 16th of April, 2001 and also referred to as the day prior to the Sinhala New Year which undoubtedly are two separate and different dates.

2. Admittedly the petitioner embarked on a journey accompanied by a number of Police officers from the Pulmuddai Police station, and none of the junior Police officers had affirmed or sworn to of such incident. The only averments in support of the purported incident as related to by the petitioner was those as contained in the affidavit of his wife.

3. The petitioner's averments vide paragraph 5 of his counter affidavit that the other Police officers accompanying him were in uniform is significantly unsupported by affidavit from any of those officers. Undoubtedly affidavits from those Police officers who

accompanied the petitioner or importantly by those who received injuries, would have certainly added value in comparison to the solitary averments in the affidavit of his wife.

4. The injuries described by the Medical Officer, vide Medico Legal reports filed marked P5A and P5(C) appear to be mild and incompatible with the alleged severity as complained of by the petitioner and his wife which included assault with weapon butts.

The petitioner also complained of being dragged along the ground to a truck and assaulted by 15 soldiers whilst inside the truck. The assault as described by the petitioner in my view appears exaggerated when considering the injuries in reference to the aforesaid Medico Legal Reports.

5. P5d, a Medico Legal Report with reference to a Sub-Inspector of Police who is said to have accompanied the petitioner and who was also stated to have been assaulted is not supported by an affidavit from that officer, which if done undoubtedly would have added credence to the petitioner's version of the incident as described by him.

6. The position of the petitioner that his wife was the President of the Seva Vanitha Association is also unsupported by independent evidence.

7. The criminal proceedings instituted in the Magistrate's Court of Kebithigollewa, vide B report bearing No. 3134/2001 and suspects including the 1 and 2 respondents who had been charged with offences under the provisions of sections 128, 129, 141, 145, 183, 186, 324, 332, 344, 345, 348, 356, 410 and 438 of the Penal Code had been concluded by the learned Magistrate by his order dated 15.10.2001 discharging all suspects on the orders of the Attorney General.

The allegation made by the petitioner against the Additional Solicitor General of mala fides as stated above is without supportive evidence and needs to be rejected.

It must be noted and understood that such discharge of the

suspects including the 1 and 2 respondents from the serious allegations made out on the complaint of the petitioner points to the fact of an obvious lack of material to proceed on the complaint of the petitioner apparently rendering the version of the petitioner supported by the averments in the affidavit of his wife to be unworthy of consideration.

Accordingly on a careful consideration of the aforesaid circumstances I am inclined to the view that the petitioner has not succeeded in establishing on a balance of probability that the petitioner was subjected to cruel, inhuman and degrading treatment thereby infringing the provisions of Article 11 of the Constitution or that the respondents infringed the petitioner's rights to equal protection as contemplated in the provisions of Article 129(1) of the Constitution or that the petitioner was subjected to any discrimination as provided for in Article 12(2) of the Constitution. This application is accordingly dismissed without costs.

WEERASURIYA, J. - I agree.

FERNANDO, J.- I agree.

Application dismissed.

Welgama v. Wijesundera And Another - SLR - 110, Vol 1 of 2006 [2005] LKSC 11; (2006) 1 Sri LR 110 (1 April 2005)

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WELGAMA

VS.

WIJESUNDERA AND ANOTHER

SUPREME COURT
S. N. SILVA, CJ,
BANDARANAYAKE,J AND
JAYASINGHE, J
SC APPEAL 2/2003
CA L. A. 24397
D. C. COLOMBO NO. 31166/T
MAY 20, JUNE 17, JULY 11, AUGUST 29 AND NOVEMBER 3, 2003
AND FEBRUARY 17, 2004

Testamentary Action - Determining the date of death for purpose of deciding. date when estate passed to heirs and for grant of letters of administration Presumption of life - Evidence Ordinance, section 107 - Presumption of death - Evidence Ordinance, section 108 - Interpretation Act, No. 10 of 1988 amending the period for presumption of death from "seven years" to "one year' - How may court decide the date of death as a fact - Does the amendment date back to the day deceased disappeared, viz. 13.02.1983 or should one year be counted from the date of the amending Act, viz. 02.04. 1988? - Intermeddling with the estate on the basis of deceased's power of attorney - Effect of intermeddling on the date of death.

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The appellant is the widow and the respondents are the two sisters of Upali Wijewardena who disappeared on his way to Colombo from Kuala Lumpur in his private lear jet on 13.02.1983. Neither the air craft nor the remains of Wijewardena were traced. At the time of his disappearance neither the appellant nor the respondents sought to institute testamentary proceedings, but on 07.10.1987 the respondents filed DC Colombo Case No. 30927/T. They complained that the appellants acting on the power of attorney issued by Wijewardena (deceased) intermeddled with the estate "while he was alive" and sought letters of administration *pendente lite* under section 539A of the Civil Procedure Code (then in force) on the basis that Wijewardena died on 13.02.1983. The court did not publish order nisi but ordered that the appellant's objections be issued to the respondents.

When the matter was taken to the Court of Appeal by the respondents, the appellant explained that the respondents were estopped from pleading death on 13.02.1983 and that as on the date of his disappearance the deceased's liabilities exceed his assets. He owed Rs. 50 million to the Revenue Department and Rs. 200 million to the People's Bank; steps were taken to settle these debts on the basis of the power of attorney and the respondents acquiesced in restructuring the companies and in fact accepted office as directors of separate companies.

In the meantime on 21.04.1988, section 108 of the Evidence Ordinance was amended by Act, No. 10 of 1988 substituting the words "seven years" with " one year" for the purpose of reducing the period of presumption of death. Consequently the Court of Appeal litigation in DC Colombo No. 30927/T was withdrawn by the respondents who also consented to letters of administration being granted to the appellant in DC Colombo No. 31166/T filed on 28.04.1988. In that action court ordered final accounts to be filed on 08.03.1993.

Notwithstanding the settlement reached regarding DC Colombo No. 309271/ T which was withdrawn of consent, respondents insisted in Case No. 31166/ T that the court should hear the matter as if Wijewardena died on 13.02.1983. The appellant contends that she filed action on the basis that the decreased died on 21.04.1988, the date of the amending Act, No.10 of 1988. The District Judge held that on the basis of the evidence and documents the date of the death was 13.02.1983. The Court of Appeal affirmed the order of the District Judge that the date of death has to be established on evidence and not in terms of section 108 of the Evidence Ordinance, as amended.

HELD:

(Bandaranayake, J. dissenting)

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The date of the death for purpose of the estate should be taken as 21.04.1988.

***Per*S. N. SILVA, CJ**

"........................ The question is from which date the period of one year should be computed? Is it one year immediately preceding 21.04.1988 as contended by the President's Counsel for the appellant or one year from the date of disappearance as contended in particular by Counsel for the 2nd respondent.? I am inclined to agree with the President's Counsel for the appellant for two reasons.

Firstly the amendment to the Evidence Ordinance is procedural in nature. It applies prospectively and a party could avail of it only after it comes into force. Therefore, the earliest date on which a party could establish the fact of death on the basis of the presumption is the date on which the law comes into operation. A fortiori the relevant period within which it should be proved that the person was not heard is

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the period of one year immediately preceding that year.

Secondly, if the presumption of death is to relate back to one year after 13.02.1983 as contended by Counsel for the 2nd respondent or to 13.02.1983 as contended by President's Counsel for the 1st respondent, it would lead to the incongruous result as noted above, in which the person will be presumed to be alive as well as dead during the same period.".

Per **BANDARANAYAKE, J.** (dissenting)

1. "Section 107 of the Evidence Ordinance could be regarded as a provision which considers the burden of proof of the death of a person known to have been alive within thirty years and section 108 refers to the burden of proof regarding a person who is alive and had not been heard of for seven years".

2. "It would be necessary according to Pulle, J (in *Davoodbhay v. Faraak*) (1959) 63 NLR 97) to prove such death in terms of section 101 of the Evidence Ordinance".

3. "The period of seven years referred to in section 108 was amended by Act, No. 10 of 1988 by reducing the period of seven years to one year."

4. "That section (108) does not create a presumption as to the time of death of a person in question".

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5 "Although the deceased was not seen after 13.02.1983, the appellant had dealt with his property as he was alive and living elsewhere."

" The respondents have continued to state that the appellant was last seen or heard on 13.02.1983. The appellant has not disputed this fact nor has taken any steps to prove anything to the contrary. Therefore there could not be any dispute between the parties that the deceased was last seen or heard on 13.02.1983.".

6. "I cannot see any basis for the date of the amended section 108, which came into force to be regarded as the date of the death of the deceased and in my view the contention that the date is to be presumed as at 21.04.1988 is not only contradictory and untenable, but also is an attempt to give an artificial and baseless interpretation to the amended section ."

Cases referred to :

1. *Silva v. Silva* 10 NLR 234 (FB)

2. *Amalgamated Investment and Property Company Ltd. v. Texas Commerce International Bank Ltd.* 1984 OB 84 at 122

3. *Doe v. Nepeani(1833)* Reports of cases of the Court of Kings Bench Vol. IIP. 219

at P226

4. Re Benham's Trusts (1867) Law Times Reports Vol. XVI P349

5. Re Phenes Trust (1870) Law Time Reports Vol. Xxi - P 107 (1870)5CH App.139

6. *Re Rhodes vs. Rhodes* (1888) Law Times Reports Vol. LVII p. 652

7. *Rex v. Taylor* (1950) Kings Bench Division P. 368

8. *Warkins v. Warkins* (1953) 2 AER P. 1113

9. *Thompson v. Thompason* (1956) 1 AER P.603

10. *Davoodbhoy v. Farook* (1959) 63 NLR 97

11. *Pattison v. Kalutara Special Criminal Investigation Bureau* (1970) 73NLR 399

12. *Assistant Government Agent v. Fernando* (1909) 12 NLR 83

13. *Doe v. Nepean* (1833) 5 B & Ad 86

14. *Nepean v. Doe* (1837) 2 M & W 894

15. *Re Rhodes* (1887) 36 Ch.D. 586

16. *Hamy Vel Muladeniya v. Siyatu* (1945) 46 NLR 95

17. *Tikiri Banda v. Ratwatte* (1894) 3 CLR 70

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18. *Prins v. Peiris* (1901)4 NLR 353

19. *Silva v. Salman* (1916) 19 NLR 305

20. *Lal Chand Matwari v. Mahant Ramrup Gir and Another* TLR Vol XUI 1925-26 P159

21. Re Green's Settlement (1865) LR 1 p. 288

22. *Dowley v. Winfield* (1844) 14 sim 277

23. *Wing v. Angrave* (1860) 8 HLC 183

24. *Hickman v. Upsali* (1876) 4 CH. D. 145

APPEAL from the judgement of the Court of Appeal.

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Nihal Jayamanne P. C. with Ronald Perera, V. Choksy, Noorani Amarasinghe, Uditha CoIlure and Dilan de Silva for appellant.

Wijeyadasa Rajapakse, PC with *Navin Marapana* for respondents.

Cur.adv. vult.

April 1st 2005
SARATH N. SILVA, C. J.

This is an appeal from the Judgment dated 11.01.1999 of the Court of Appeal. By that Judgment the Court of Appeal dismissed the application f the appellant for leave to appeal from order dated 28.11.1997 of the District Court.

The hearing of the application for Special Leave to Appeal before this Court and of this appeal were adjourned for considerable periods of time to enable the parties to arrive at a settlement of the dispute. Upon the failure to arrive at a settlement, Counsel made submissions and thereafter tendered extensive written submissions.

The dispute relates to the administration of the estate of the late Philip Upali Wijewardena, leading public figure and a businessman. He embarked from the Kuala Lumpur International Airport in his private Lear Jet on 13.02.1983 with the recorded destination being Colombo. The aircraft failed to give a position report overhead Medan to the Kuala Lumpur Air Traffic Control Centre and did not regain contact with any Ground Control Center, thereafter. Neither the remains of Wijewardena nor of any of the passengers have been found. It is reported that some fishermen in

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Indonesia have found a wheel of an aircraft and a part which could be related to that aircraft. The heirs are his widow, the present appellant and his two sisters, being the Respondents. Although, Wijewardena disappeared in the circumstances stated above on 13.02.1983, neither the Appellant nor any of the Respondents sought to institute Testamentary proceedings for Letters of Administration in terms of Section 530(1) of the Civil Procedure Code (which was then applicable) on the basis that he died on 13.02.1983 being the day on which the aircraft he was in disappeared. Wijewardena had appointed one Ramalingam Murugiah as his Attorney and his affairs were carried out on the basis of the said Power of Attorney. Subsequently, the said Murugiah gave a substituted Power of Attorney in favour of the Appellant.

On 07.10.1987, the two Respondents filed a petition in the District Court of Colombo (No. 30927/T), seeking Letters of Administration in respect of the estate of Wijewardena. It was pleaded in the petition (paragraph 7) that the Petitioners have reason to believe that the Respondent (the present appellant) has been willfully asserting that the deceased is still alive for the unlawful and illegal purpose of

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administering wrongfully, intermeddling and to do what she solely wishes with the considerable assets of the deceased, without any authority or supervision from this Court. They also pleaded that the action taken by Murugiah and the Appellant on the power of attorney referred to above is unlawful. They applied to administer the estate on the basis that Wijewardena died on 13.02.83 and sought inter alia Letters of Administration pendente lite in terms of Section 539A of the Civil Procedure Code (which was then applicable). The District Court refused to grand Letters of Administration *pendente lite.* However, the Court issued Order Nisi on 08.10.1987. On 19.10.1987 the Appellant filed papers and made an application to recall the Order Nisi that had been issued. The District Court then noted that the Order Nisi had not been signed and made order that no Order Nisi be published. It was further directed that Notice of objection be issued on the present Respondents. The Respondents filed an application for Leave to Appeal to the Court of Appeal from the order made by the District Court on 19.10.1987. They also filed an application in Revision and a Final Appeal from the same Order.

On 28.04.1988, the Appellant filed petition in the District Court (Case No. 31166/T) seeking Letters of Administration. The application was filed on the basis of the amendment to Section 108 of the Evidence Ordinance

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made by Act, NO.10 of 1988, which came into force on 21.04.1988. The District Court issued Order Nisi on the basis of this application, in terms of Section 531 of the Civil Procedure Code and directed service on the Respondents.

At this juncture, when cases were pending in the District Court and Court of Appeal as aforesaid, the parties entered into a settlement on 18.01.1989. The settlement has been signed by the appellant and the Respondents on the basis of which the Respondents withdrew the Applications for Leave to Appeal, Revision, and the Final Appeal referred to above. A schedule to the Settlement Agreement specifies the Companies in respect of which the deceased had interests and the Appellant agreed on her part to the appointment of the Respondents and their children to positions in the Boards of Directors of specified Companies and to make certain payments as fees. It is specifically provided that subsequent to the execution of the agreement and the appointment of Directors, as referred to, the Respondents will consent to Letters of Administration in respect of the estate of the deceased being issued to the Appellant in the District Court case No. 31166/T, as the widow of the deceased without her providing any security for this purpose other than a personal bond. The Respondents also agreed to withdraw the testamentary action No. 30927/T filed by them in the District Court. It was specifically agreed that the Respondents will withdraw the allegations made against the Appellant in paragraph 7 of the petition filed in that action, the contents of which paragraph have been referred to above.

On the basis of the foregoing settlement Appellant was issued with Letters of Administration.

On 26.11.1992 the Letters of Administration were signed by the Addl. District Judge who directed that the inventory and the final account be filed on 08.03.1993. In clause 3 of the settlement Agreement it is specifically stated that the Appellant, "undertakes to furnish accounts in respect of each and every year of her administration of the said Estate of the deceased to the Parties of the First Part (Respondents) before the Thirty First day of December in each and every year commencing from 31st March, 1990"

The dispute was rekindled by the failure on the part of the Appellant to file the inventory and final account as directed by Court or to render accounts as agreed to in clause 3 of the Agreement referred above. The Respondents

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filed a petition and affidavit on 02.04.1997 in case No. 31166/T (being the application filed by the Appellant in which Letters of Administration had been issued.), alleging inter alia, that the deceased died on 13.02.1983 and the Appellant intermeddled and/or dealt with the assets of the deceased for her own benefit on the basis of a Power of Attorney which was null and void, for her own benefit in fraud of the Respondents. They sought an order against the Appellant from the District Court to file a further inventory and valuation of the deceased's property at the date of his death, namely 13.02.1983 and a final account of the administration of the estate on or before a Date to be fixed by Court.

The Appellant filed objections on 29.07.1997 stating that the Respondents are estopped from asserting that the deceased died on 13.02.1983 after they withdrew case No. 30927/T filed by them and consented to Letters being granted to her in case No. 31166/T filed by her on the basis that death took place on 21.04.1988 being the date on which the amendment to the Evidence Ordinance came into force. She further stated that as at the date of disappearance the liabilities of Mr. Wijewardena exceeded his assets, with about Rs. 50 Million due to the Inland Revenue Department and nearly Rs. 200 Million due to the People's Bank on debts of his companies covered by personal guarantees. That, action was taken on the Power of Attorney to avoid a bankruptcy situation in which the Peoples Bank would have taken over the assets. The debts were settled and the assets were restructured. That, the Respondents acquiesced in such restructuring which was done on the basis that Wijewardena was alive and on the authority of the power of attorney by accepting Directorship in Companies that came into existence after 13.02.1983, in terms of Settlement Agreement referred to above.

The Additional District Judge, in the first part of his Order dated 28.11.1997, came to a finding that the Appellant has delayed in filing the final account and inventory. In the second part of his Order the Judge has noted that for the purpose of filing the final account and inventory it is necessary to decide on the date of death and on the documentary evidence adduced as to the disappearance of the aircraft he held that the date of death was 13.02.1983. The Appellant was accordingly directed to file the inventory and final account within 6 months on the basis that the death took

place on 13.02.1983. The Court of Appeal dismissed the application for Leave to Appeal on the basis that the date of death cannot be decided

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in terms of Section 108 of the Evidence Ordinance. That, the date of death should be established on evidence and on the documentary evidence the District Court correctly held that death took place on 13.02.1983.

At the stage of granting Special Leave both parties were permitted to raise questions on which the appeal will be considered. The questions raised by the Appellant are based on the premise that the direction made by the District Court to file the inventory and final account with effect from 13.02.1983 is erroneous and that the date of the inventory and commencement of the accounting should be taken as one of the following.:

(i) in view of section 553 of the Civil Procedure Code which requires a final account of the "executor ship or administration", the point of commencement should be the date on which an order was made to issue Letters of Administration to the Appellant being 24.04.1989;

(ii) in view of the Settlement Agreement which requires the Appellant' to furnish an account of her administration of the estate, commencing 31st March 1990, (clause 3), that should be taken as the date operative between the parties,

(iii) in view of the Appellants application for Letters of Administration being filed on 28.04.1988 on the basis of the amendment to Section 108 of the Evidence Ordinance which came into force on 21.04.1988, that date should be taken as the date on which the estate came into being and the operative date for the inventory and the accounting.

Submissions of President's Counsel for the Appellant relate mainly to the premise formulated in (iii) above.

The Respondents raised the question that the Appellant should account from the date she began to intermeddle with the estate of the deceased being the date of disappearance of the deceased and that the presumption operative in terms of Section 108 of the Evidence Ordinance and/or that Letters of Administration issued, should relate back to that date. Initially, only one set of submissions were filed on behalf of both Respondents. Later, a separate submission was filed on behalf of the 2nd Respondent in which it has been contended that even assuming that the Amendment to

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Section 108 of the Evidence Ordinance applies, the date of death should be taken as one year after the date of disappearance viz. 13.02.1984. In the joint submission

made on behalf of the Respondents it was contended that the Settlement Agreement was void.

The question raised by the parties relate to the principal fact in issue, being the date of death of Wijewardena, which has been addressed from different aspects of fact and the application of principles of Law. It is to be borne in mind that we have to examine the issue solely from the perspective of a testamentary action. We are here, not concerned with the circumstances relevant to the disappearance of the ill-fated aircraft but, with the estate of Wijewardena. The dispute is, to state it plainly, as to the property of Mr. Wijewardena and the manner in which it should be accounted for; if as at 13.02.1983, being the date of disappearance, Mr. Wijewardena owned no property, there would have been no dispute.

From the perspective of the Law, property is identified only with reference to rights and obligations in relation to such property. I use the words rights and obligations to include all the jural co-relatives identified in jurisprudence that may relate to property. For example, if we take an immovable property such as a block of land, from the perspective of the Law, we are not concerned whether it is fertile or infertile, flat of steep but, only with the rights of ownership, possession, use enjoyment and so on. These rights are identified in relation to property, as being vested with a person or other legal entity that can hold such rights. The same applies to all forms of movable property and legally recognized relationships, be it in contract or otherwise. Since property and legal relationships are identified with reference. to persons who are vested with rights and obligations, it is essential for the legal system that such persons be clearly identified, at any given point of time.

The death of a person, in physical or material terms means, the cessation of life, In legal terms, it means the passing of the dead persons rights and obligations that survive, to the heirs or the persons who inherit his property.

For the purpose of testamentary proceedings, at the moment of death the property of the deceased (the bundle of rights and obligations) become the estate and pass without interval to the heirs. This basic premise

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of the law has been clearly stated in a decision of the Full Bench of the Supreme Court in the case of Silva vs. Silva (1) Grenier A. J. stated as follows:

" ....On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the dominium vests in them. Once it so vests they cannot be divested of it except by the several well-known modes recognized by law."

The Law does not and cannot recognize an interval between the death and the passing of property, since rights and obligations, from which perspective only, property and legal relationships are identified in law, have to be, at any given point of time vested or reposed in a person or a legal entity.

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Moving from the general propositions stated above, to the specific facts of the case; when the aircraft in which Wijewardena was travelling disappeared on 13.02.1983, and he was not heard of thereafter; the obvious question that arose in relation to his property rights and obligations was whether they could be dealt with on the basis Wijewardena was alive or on the basis he was dead. The preceding analysis reveals that from a legal perspective as to property rights and obligations, there could be no intermediate situation.

The question whether a person is dead or alive, is one of fact and in this instance the fact in issue is the date of death since the estate for purpose of Testamentary proceedings came into existence on that date and the property rights and obligations thereupon pass to the heirs. There is no direct evidence as to the death of Mr. Wijewardena. However, this does preclude the proof of that fact with circumstantial evidence. Although, a basic premise of our Law of Evidence, it is relevant to state here the standard of proof that would apply. Section 3 of the Evidence Ordinance states as follows:

" A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

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Documentary evidence was adduced by the Respondents with their petition dated 02.04.1997 filed in the District Court seeking an accounting from 13.02.1983, alleging that on a balance of probability that Mr. Wijewardena died on that date. Upon an acceptance of the evidence the impugned orders have been made by District Court and the Court of Appeal. However, it is obvious that this evidence was available to them as far back as 1983. The significant matter is that neither the Respondents, nor the Appellant nor any of the persons who had claims against Mr. Wijewardena, sought to assert that the death took place on 12.02.1983 and to institute Testamentary proceedings, at that stage, on this material. They all chose to go along with what is generally described as the "presumption as to life and death" as contained in Section 107 and 108 of the Evidence Ordinance. These two sections that appear in the part dealing with the burden of proof, prior to the amendment to Section 108 effected by Act, No.10 of 1988 read as follows :-

107. "When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it" ..

108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Coomaraswamy in his book on the Law of Evidence (Vol. II book I at page 429) describes the operation of the presumption of life thus:

"When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. In other words, the court has to presume that the man is alive until the contrary is proved by those who affirm that he is dead. If not so proved, those who affirm that he is alive will succeed. This is known in English Law as the presumption as to continuance of life. It derives its authority from the presumption of continuance recognized in Section 114(c), but it appears to be obligatory, whereas Section 114(c) is discretionary. It is a reputable presumption."

These two sections do not lay down inflexible principles of law. They are only rules of evidence that state the burden in a proceeding before any

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Court in which the fact in issue is whether a person is dead or alive. In terms of Section 107 where it is shown that the person was alive within thirty years, it is presumed for evidentiary purposes that the person continues to be alive and the fact of death has to be proved by the person who alleges it, on a balance of probability as noted above. Section 108 is a proviso which comes into operation in the background of the presumption of life as contained in Section 107. The manner in which the proviso works, could be stated in practical terms as follows:

The presumption of life continues to apply since the person has been alive within thirty years and a party not being possessed of evidence to prove the fact of death, adduces evidence short of that by proving that the person has not been heard for seven years (prior to the amendment) by those who would naturally have heard of him if he had been alive, then the presumption shifts and it is presumed that the person is dead. In such circumstances the party who alleges that the person is alive has to prove that fact on a balance of probability. The presumption of life is no longer operative.

It is now necessary to apply these presumptions to the facts of this case.

As at 13.02.1983 being the date of disappearance of Wijewardena had been alive within thirty years. Therefore, Mr. he is presumed to be alive. The Appellant and others who dealt with his property, rights and obligations functioned on the premise that he was alive and the Appellant acted for and on his behalf. Section 107 which lays down the presumption of life does not debar any person from adducing evidence and proving the fact of death. The Respondents did not avail of this option. By Act, No. 10 of 1988, Section 108 was amended by substituting a period one year in place of the period of seven years. The amendment was certified on 21.04.1988 and within one week on 28.04.1988 the Appellant filed the present case for Letters of Administration pleading specifically that Wijewardena should be presumed to be dead in terms of Section 108 of the Evidence Ordinance as amended. The present Respondents who were cited in that application accepted

that basis and agreed to the grant of Letters of Administration.

The question to be considered is whether in this state of things, the Respondents could nearly nine years later, in April 1997 file papers alleging

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that, Mr. Wijewardena died on 13.02.1983. To my mind the following points militate against this belated change of position on the part of the Respondents, which found favour with the District Court and the Court of Appeal. They are:

(i) After the disappearance of Mr. Wijewardena on 13.02.1983 the Appellant acting on the presumption of life dealt with his affairs in terms of the power of Attorney as stated above. The Respondents who knew of this course of action, did not seek to stop it by instituting a Testamentary proceeding on the . documentary evidence as to the disappearance which according to them establish on a balance or probability that Mr. Wijewardena, died on 13.02.1983.

(ii) On 07.10.1987 the Respondents filed case No. 30927/T for Letters of Administration on the premise that Mr Wijewardena died on 13.02.1983. It is significant that they relied on the same documentary evidence adduced with the petition dated 02.04.1997 to prove the fact of death and also made the same allegation that the Appellant fraudulently and wrongfully dealt with the affairs on the basis of the Power of Attorney. The Respondents later withdrew this application and all proceeding in the court of Appeal, filed from the order of the Additional District Judge refusing to sign the Order Nisi in their favour, without any reservation of their right to reagitate the same matter;

(iii) In the Settlement Agreement, the Respondents specifically withdrew the allegation in paragraph 7 of their petition dated 07.10.1987 filed in case No. 30927/T which reads as follows:

"The Petitioners (present Respondent) have reasons to believe that the Respondent (present Appellant) has been willfully asserting that the said deceased is still alive for the unlawfully and illegal purpose of administering wrongfully intermeddling and to do what she solely wishes with the considerable assets of the deceased without any authority or supervision from this Court and also completely disregarding the rights and interests of the Petitioners who are the sisters of the late Upali Wijewardena (deceased)" Thereby, they accepted the validity of the action taken by the

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Appellant on the basis of that Wijewardena was alive by virtue of the power of attorney. Their acquiescence in the course of action taken by the Appellant is confirmed by the acceptance of Directorships in companies formed after 13.02.1983 in terms of that Power of Attorney.

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(iv) The Respondents consented to Letters of Administration being granted to the Appellant in her application in which the fact of death is asserted in terms of Section 108 of the Evidence Ordinance, as amended. The Respondents did not contest this position at that stage and seek to establish that the death took place on 13.02.1983. On the contrary, they withdrew their application for Letters filed on that basis as noted in (ii) above.

The Respondents have thus acquiesced in the course of action taken by the Appellant after 13.02.1983 in attending the affairs of Mr. Wijewardena in terms of the Power of Attorney. On the basis of their conduct itemized above including the Settlement Agreement and the two Testamentary cases, they are estopped in law from asserting in 1997 that Mr. Wijewardena's date of death, for the purpose of the administration of his estate, should be taken as 13.02.1983. The operation of the doctrine of estoppel is stated in Section 115 of the Evidence Ordinance as follows:

"When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit. or proceeding between himself and such person or his representative to deny the truth of that thing. "

In England the doctrine of estoppel has been stated as a general principle by Lord Denning M. R. in the following statement made in Amalgamated Investment and Property Co. Ltd., vs. Texas Commerce International Bank Ltd. (2)

"The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become over loaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been

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sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth, All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption-either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

Although, certain doubts have been expressed in England or to the Application of a unified doctrine of estoppel, the statement of Lord Denning could be read in harmony with the principle in Section 115 of our Evidence Ordinance.

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The Appellant applied for Letters of Administration on the basis of the presumption in Section 108 of the Evidence Ordinance, as amended. The Respondents who had previously applied for Letters on the basis of circumstantial evidence that the death took place on 13.02.1983 dropped that premise and acquiesced in the position taken by the Appellant. The Court has to decide the fact in issue as to date of death in relation to the parties and then apply it to property, obligations and so on, as noted above. There is no question of the date of death being decided as a matter of general or public importance, in which event different considerations may have to be taken into account. Between the parties, based on their conduct, as analysed above, the date of death must necessarily be decided on the basis of the application of the presumption in Section 108 of the Evidence Ordinance, as amended. This process of reasoning may not be amenable to common sense or logic but, from the perspective of the Law, the reasoning has to be applied so that at any given point of time, it produces a clear and unambiguous answer as to whether a person is considered as alive or dead. There cannot be any intermediate period of doubt or ambiguity. The preceding analysis shows that rights and obligations in relation to property and transactions are workable only on a clearly defined line of demarcation in which a person is considered to be alive upto a specified date and dead thereafter. As at the date of death thus determined, the estate comes into being and the rights and obligations in

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relation to property and transactions that survive after death, pass to the heirs or persons to whom they are devised or bequeathed.

he presumption of death in Section 108 is a proviso to the general presumption of continuity as contained in Section 107. The general presumption as to continuity of life is couched in wide terms for obvious reasons. In the absence of specific evidence as to the fact of death, the law has to presume that the person who was alive continues to be alive. In this background of a presumption of continuity of life, the presumption of death as contained in the proviso operates only where it is "proved" that the person "has not been head of for seven years (prior to the amendment) by those who would have naturally heard of him, if he had been alive." On the reasoning set out above, the question can now be narrowed down to its core. On what date does the presumption of death begin to operate? Does it relate back to the date the person was not heard of as contended by the Respondents? Or, is it at the end of the period as contended by the Appellant?

If the answer is based on the principle of relation back as contended by the Respondents, the person will now be presumed to be dead during the period he was presumed to be alive in terms of Section 107. As noted above, for rights and obligations in relation to property and transactions to be worked, there has to be a clear dividing line, A person cannot be presumed to be alive and dead during the same period. If so, all transactions entered on the basis that the person is alive would be put asunder and there would be uncertainty as to their validity. Furthermore, in terms of Section 108, the presumption arises only when it is "proved that he has not been heard of for seven years (prior to the amendment) by

those who would naturally have heard of him if he had been alive ...." The fact could be said to be 'proved' only at the end of the period.

The conclusion arrived at pursuant to the preceding analysis, flowing from the Law of Property, to succession and the application of Section 107 and 108 of the Evidence Ordinance is supported by the series of judgments in England which relate to trusts, legacies, prescription and bigamy cited by President's Counsel for the Appellant. In all these cases the evidence was that the person in question disappeared and it has been consistently held that the absence of evidence as to the date of death, the fact of death has to be presumed at the end of the period of seven years.

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In a chronological order the cases are as follows:

1. Doe vs. Nepean (3) Judgment of Denman C. J.
2. Re. Benham's Trusts (4)
3. Re. Phenes Trust (5)
4. Re. Rhodes; Rhodes vs. Rhodes (6)
5. Rex vs. Taylor (7)
6. Warkins vs. Warkins (8)
7. Thompson vs. Thompson (9)

A further complication arises in this case from the amendments to section 108 of the Evidence Ordinance effected by Act, No.10 of 1989 certified on 21.04.1988. The amendment simply substitutes three words "for one year" in place of the words "for seven years" in Section 108. I would reproduce the comment made by Coomaraswamy with regard to this amendment with which I am in entire agreement:

"Prior to the 21st April, 1988, when Amendment Act, No. 10 of 1988 was certified, the Ordinance, following the wisdom of more mature systems like the English Law very properly fixed this period at seven years. But the Amendment drastically reduced the period to one year. It is submitted that this is a retrograde step which will lead to many complicated and anomalous situations and should be rectified forthwith. To depart from a provision which has worked satisfactorily and which was based on the wisdom of the ages and to amend the law in this way, perhaps in order to benefit one individual or more, is not in the best interests of justice and can do violence to the symmetry of the law. It imposes an unnecessary heavy burden on those who seek to show that the person is alive. It will also result in the fouling of title to property. It certainly shows the wisdom of the legislature in a very poor light. "(Vol. II Book 1, P.430)

When the amendment came into force on 21.04.1988 a period of 5 years and 2 months had elapsed from the date of disappearance. Therefore, the presumption of life was operative. With the amendment the fact of death could be presumed after one year. The question is from which date should the period of one year be

computed. Is it one year immediately preceding 21.04.1988 as contended by President's Counsel for the Appellant or one year from the date of disappearance as contended in

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particular by Counsel for the 2nd Respondent. I am inclined to agree with the submission of President's Counsel for the Appellant for two reasons:

Firstly, the amendment is to the Evidence Ordinance is procedural in nature. It applies prospectively and a party could avail of its provisions and institute proceedings only after it comes into force. Therefore, the earliest date on which a party could establish the fact of death on the basis of the presumption is the date on which the law came into operation. A fortiori, the relevant period within which it should be proved that the person was not heard is the period of one year immediately preceding that date.

Secondly, if the presumption of death is to relate back to one year after 13.02.1983, as contended by Counsel for the 2nd Respondent or to 13.02.1983 itself as contended by Presidents Counsel for the 1st Respondent, it would lead to a incongruous result, as noted above, in which the person would be presumed to be alive as well as be dead during the same period.

For these reasons I uphold the submission of President's Counsel for the Appellant that the date of death for the purpose of the estate should be taken as 21.04.1988 as being the earliest date on which it could be established in terms of Section 108 of the Evidence Ordinance that the presumption of death applies.

President's Counsel for the 1st Respondent has submitted that the Appellant should be considered as an Executor de son *tort* from the date on which she started to intermeddle with the estate of the deceased being the date of disappearance. He cited the following passage from Wharton's Lexicon and from Executors and Administrators by N. E. Mustoe:

"Executor de son tort,.............. If a stranger takes upon himself to act as executor or administrator (see. 14 Halsbury's L of E, 2nd edn. Para 282), without any just authority (as by intermeddling with the goods of the deceased, and any other transactions), he is called in law an executor of his own wrong, de son tort, and is liable to the extent of the assets which have come to him and to all the trouble of an executor ship without any of the profits or advantages .... "

An executor de son tort can discharge his liability by obtaining probate if he is entitled, or by accounting to the personal representative, or to the Court, in an administration by the Court."

(Wharton's Lexicon 14th edition page 390)

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"Any person who is not an executor or an administrator, but who intermeddles with the deceased's property, may make himself liable to the obligations of an executor de son tort (by his own wrong). Very slight acts on intermeddling, will make a person an executor de son tort, e.g. advertising for claims, paying or receiving payment of debts, or carrying on the deceased's business." (Executors and Administrators by N. E. Mustoe 4th Ed. page 6)

The preceding analysis reveals that from the perspective of the Law the property of a person has to be dealt with on the basis that he is alive or dead with a clear dividing line. As at the date of disappearance, the presumption of life was operative and the affairs of Mr. Wijewardena were carried on, on the basis he was alive. The finding stated above is that, the presumption of death operates from 21.04.1988 being the earliest date on which the matter could have been established in Court. It is a sine qua non for a person to be considered an Executor de son tort, that it be established in the first instance that the person is dead and there is an estate. Therefore the liability of an *Executor de son tort* cannot be attributed to the Appellant in the manner contended for by Counsel. If at all, the Appellant could be considered an Executor de son tort from 21.04.1988. This would be unnecessary since the doctrine of relation back relied on by the Respondents would apply and the letters granted subsequently would relate to the date of death as determined. In this connection I would cite the following passage from Whartons Law Lexicon - 4th Edn. - Page 858 relied on by the Respondents -

"Relation, where two different times or things are accounted as one, and by some act done the thing subsequent is said to take effect 'by relation' from the time preceding. Thus letters of administration relate back to the intestate's death, and not to the time when they were granted."

Accordingly I allow the appeal and set aside the order dated 28.11.1997 of the District Court and the judgment dated 11.01.1999 of the Court of Appeal. The Appellant being the Administratrix of the Estate is directed to file the inventory and final account on the basis of that the Estate of the deceased came into being on 21.04.1988. Since the Administratrix has failed to file any account either in compliance of the Settlement Agreement

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or in compliance with the order made by the District Court, she is directed to file the said inventory and account finally within 3 months of the date of this Judgement.

No costs.

JAYASINGHE, J.,-I agree.,

Appeal allowed.

SHIRANI A. BANDARANAYAKE, J. (Dissenting)

I have had the benefit of reading, in draft, the judgment of His Lordship the Chief Justice. Whilst I am in agreement with the factual position considered in the said draft, I regret very much that I am unable to agree with His Lordship's answer to the question as to the exact date of the presumption of death begins to operate, in connection to the estate of the deceased coming into being to the appellant for the purpose of inventing and accounting. The reasons for my inability to agree with the draft judgment are as follows:

At the stage of granting Special Leave to Appeal, both parties were permitted to raise questions on which the appeal was to be considered and consequently three questions were so raised. However, learned President's Counsel for the appellant made submissions mainly on question No.3, which was in the following terms:

"In view of the appellant's application for letters of administration being tiled on 28.04.1988 on the basis of the amendment to section 108 of the Evidence Ordinance, which came into force on 21.04.1988, that date should be taken as the date on which the estate came into being and the operative date for the inventing and the accounting.".

Having considered the aforementioned question, it has been narrowed down in the draft judgment to read as follows:

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"On what date does the presumption of death begin to operate? Does it relate back to the date of the person was not heard of as contended by the respondents? Or is it at the end of the period as contended by the appellant?"

The appeal was chiefly considered on the basis pf Sections 107 and 108 of the Evidence Ordinance. These two sections are contained in Part III, which deals with the burden of proof. Section 107 of the Evidence Ordinance could be regarded as a provision which considers the burden of proof of the death of a person known to have been alive within thirty years and Section 108 refers to the burden of proof regarding a person who is alive and has not been heard of for seven years. Having said that, it is also necessary to be borne in mind that both these sections are also referred to as sections dealing with the presumption of death and the presumption of continuance of life. Considering this aspect, E. R. S. R. Coomaraswamy, (The Law of Evidence, Vol. II, Book I, pp. 428-429) is of the view that,

"The fact is that rules as to burden of proof and presumptions are so involved together that it is artificial to separate a given situation and to state that it is a pure rule of the burden of proof and not of a presumption. Every rebuttable presumption in favour of one party necessarily involves a rule as to burden of proof in the other and *vice versa*. It is, therefore, proposed to consider the rules in sections 107, 108, 109, 110 and 111 as giving rise to the contrary presumptions which a court shall draw.".

At the same time it would be necessary to be borne in mind that there is a school of

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thought that Sections 107 and 108 of the Evidence Ordinance do not enact a presumption of law or fact, but enact rules governing the burden of proof. In fact Basnayake, C.J. in *Davoodbhoy v. Farook* [10] observed that,

"It is essential to bear in mind that Sections 107 and 108 do not enact a presumption of law or fact, but enact rules governing the burden of proof like anyone of the other rules that precede them.".

A similar view was taken by Pulle, J., in the same decision to the effect that,

"A rule of evidence as to burden of proof does not generate a presumption of fact."

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The view that has been taken by Pulle, J., thus emphasizes the fact that one cannot always discharge the burden that the person in question is dead by leading evidence to indicate that the said person had not been heard of for seven years by those who would naturally have heard from him. It would be necessary according to Pulle, J., to prove such death in terms of Section 101 of the Evidence Ordinance. In Pulle, J.,'s words:

"In my view there is nothing in section 108, which compels a Court to hold, upon proof that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, that the fact of that person's death has been established by him on whom the burden lies under Section 101 to prove such death.".

Sections 107 and 108 of the Evidence Ordinance, No. 14 of 1895 reads as follows:

"Section 107-
When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Section 108 -
Provided that, when the question is whether a man is alive or dead, and it is proved that he is not being heard of for seven years by those who would naturally have head of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.".

The Period of seven years referred to in Section 108 was amended by Act, No.10 of 1988 by reducing the period of seven years to one year. This amendment was certified on 21.04.1988.

According to Section 108 of the Evidence Ordinance, when the question as to whether a person is alive or dead is taken into consideration, and it is proved that the person referred to has not been seen or heard of for, earlier seven years and since April 1988, for one year, by those who would have naturally have heard from

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him, in the event if he was alive, the burden of proving that the said person is alive is shifted to the person who relies on it.

A careful consideration of the contents in sections 107 and 108, indicate that both sections should be read together as the latter is a proviso to the

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earlier Section. Whilst section 107 creates a legal presumption, of continuance of life if nothing is shown to the contrary, section 108 provides for the burden of proving that a person to be alive by shifting it to the person asserting it by denying the death. Considering the operation of section 108 of the Evidence Ordinance, H. N. G. Fernando, C. J., in *Pattison v. Kalutara Special Criminal Investigation Bureau* [(11)] stated that,

"Section 108 of the Evidence Ordinance provides that when a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to them who affirm that he is alive."

However, it is to be borne in mind that section 107 does not create a presumption as to the time of death of a person in question. Therefore this section will not be applicable to a case where the question is not whether a person is alive or dead, but whether a person died on a specific date. Considering this position, E.R. S.R. Coomaraswamy is of the view that,

"A party who asserts that a person was alive at a certain date must prove such fact."

In fact in Assistant Government *Agent v. Fernando* [(12)] Wendt J., considering the provision in section 107 stated that, there is no presumption as to the continuance of life or of an admitted marriage. A party who asserts that a person was alive at a particular date must prove it. In Wendt, J.'s words:

"Section 107 of the Evidence Ordinance is not applicable, because, as pointed out by Lascelles, A. C. J. on October 11, 1906, in the case No. 4,365, C. R. Kalutara brought by Siman Perera's widow, the question here is not whether Justina is alive or dead, but whether she (known to have been dead in 1855) died before or after July, 1852."

Wharton's Law Lexicon, (4th Edition pg. 796) defines the presumption of life or death and the details are given in the following form:

"When a person is once shown to have been living, the law will in general presume that he is still alive, unless after a lapse of time considerably exceeding the ordinary duration of human life; but if there be evidence of his continued unexplained absence from home and if

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the non-receipt of intelligence concerning him for a period of seven years, the presumption of life ceases and he is presumed to be dead at the end of seven years. **But the law raises no presumption as to the time of his death**. And therefore, if anyone has to establish the precise time during those seven years at which such person died, he must do so by evidence."

In support of this position law lexicon refers to the decisions in Doe v. Nepean (13) Nepean v. Doe (14) and Re Rhodes (15).

The appellant's contention is that she conducted the affairs of the business and properties of the deceased until after the expiry of the period applicable for the presumption in terms of section 108 and thereafter filed the testamentary action. Her submission was that the estate of the deceased came into existence on the day where the period of 7 years is expired. Therefore although the deceased was not seen after 13.02.1983, the appellant had dealt with his property as if he was alive or living elsewhere. According to Coomaraswamy (Supra, Pg. 429-430) there is no presumption of law in favour of or against the continuance of life for any given period unless contained in a particular enactment.

The respondents have continued to state that the deceased was last seen or heard on 13.02.1983. The appellant has not disputed this fact nor has she taken any steps to prove anything to the contrary. Therefore there could not be any dispute between the parties that the deceased was last seen or heard on 13.02.1983 .

Considering sections 107 and 108 of the Evidence Ordinance, it is abundantly clear that in terms of section 108 if a person has not been heard of for seven years (presently one year) by those who would normally have heard of him, had he been alive, the presumption of continuance would cease and the burden of proving the person to be alive shifts to the person who asserts the said presumption by denying death. This position was taken in *Re Phene's Trusts* (Supra) where it was stated that,

"If a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption, but of evidence and the onus of proving that the death took place at any particular time within the seven

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years lies upon the person who claims a right to the establishment of which that fact is essential".

The question that arises at this juncture is whether it is necessary to ascertain the exact date of death of the deceased. The answer to this question is that the need would depend on the circumstances of each instance and therefore it would vary from case to case. For instance in a case where the court has to adjudicate a claim

of prescription by a third party, the date of death may become important. Similarly, in an instance where letters of administration or probate is granted the need to know the exact date of the death of the deceased could arise. In fact it appears that one of the most important situations that could arise along with the circumstances under consideration would be with regard to matters pertaining to the deceased person's estate.

In *Hamy Vel Muladeniyav. Siyatu*(16) the Court held that when a person is presumed to be dead in accordance with the provisions of section 108, his property has to be divided among his heirs. Further, it is to be borne in mind that there cannot be an interval between the death of a person and passing of his property to the heirs. In fact in *Silva v. Silva* (Supra) a full Bench held that on the death of a person, his estate, in the absence of a will, passes at once by operation of law to his heirs, and that the dominium vests in them. This has been an accepted principle and that in *Tikiri Banda v. Ratwatte* (17) a case decided in 1894, Lawrie, J. and Withers, J. had held that the succession of the estate of an intestate, devolved immediately upon his death. Accordingly as a safeguard and chiefly to prevent any injury occurring to the deceased person's estate, the English Courts have adopted the doctrine of relation back in testamentary proceedings.

Halsbury's Laws of England (4th Edition, Vol. 17(2), Pg. 26 Para. 35) refers to the doctrine of relation back. With regard to the relation back of administrator's title, it is stated that,

"In order to prevent injury being done to deceased person's estate without remedy, the courts have adopted the doctrine that on the grant being made the administrator's title relates back to the time of death. This doctrine has been consistently applied in aid of an administrator seeking to recover against a person who has dealt wrongfully with the deceased's chattles or chattles real. It is also applicable against a person dealing wrongfully with the deceased's real estate. ".

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Wharton's Law of Lexicon (Supra, at Pg. 858) also refers to the doctrine of relation back and defines the said doctrine in the following terms:

"Relation, where two different times or other things are accounted as one, and by some act done the thing subsequent is said to take effect 'by relation' from the time preceding. **Thus letters of administration relate back to the intestate's death, and not to the time when they were granted** (See *Re Pryse* 1904 Pg. 301. *Foster v. Bates* (1843) 12 M & W 226) (emphasis added)".

As referred to earlier there is no such presumption as to the date or time of a person's death. If the question in issue is the date and/or the time of the death that is to be taken up as a matter that has to be proved by evidence. The respondents had contended that the deceased died on 13.02.1983 and this has not been challenged by the appellant. In fact the appellant concedes that she had last heard from him on 13.02.1983.

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In such circumstances, the estate of the deceased, in the absence of a will, have to pass at once by operation of law to his heirs and no one other than the executor or an administrator could intermeddle with such property. Infact N. E. Mustoe (Executors and Administrators, 4th Edition, Pg. 6) observed that,

"Any person, who is not an executor or an administrator, but who intermeddles with the deceased's property, may make himself liable to the obligations of an executor de son tort (by his own wrong). Very slight acts of intermeddling will make a person an executor de son tort, e.g.- advertising for claim, paying or receiving payment of debts' or carrying on the deceased's business. ".

Actions based on the English Law as to an executor de *son tort*, has been recognised by our Courts, as Bonser, C. J., as far back as in 1901 had stated in Prins v. Peiris (18) that-

"Then, Mr. Walter Pereira argued, as I understand him, that the English Law as to an executor de son tort was not in force in this island. It seems to me rather late in the day to argue that: there have been numerous cases in which such actions have been recognized by this Court."

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This position is applicable to the estate of a spouse. In *Silva v. Salman* (19) Wood Renton, C. J., had clearly stated that,

"Had she applied for administration of her husband's estate, she was the natural person to have obtained it; not having and done so and having intermeddled with the estate by paying off the debts, she is in the position of an executrix *de son tort*,".

There are two other matters I wish to consider in connection with the matter in issue. Firstly, it was the contention of the learned President's Counsel for the appellant that the appellant is liable to account on the basis of an Administratrix only from the date on which the estate came into being, namely 21.04.1988. The significance of the date is that the amendment to the Evidence Ordinance, which amended section 108 of the Evidence Ordinance came into force on that day. Therefore the date suggested is not a date, which was arrived at, either according to the provisions of the Evidence Ordinance, or in terms of the provisions of the amended section. It is also important to be borne in mind that, the appellant did not wait for a period of one year from the date of the amendment, but filed her action seven days after the amendment Act came into operation. In the circumstances, I cannot see any basis for the date of the amended section 108, which came into force to be regarded as the date of the death of the deceased and in my view the contention that the death is to be presumed as at on 21.04.1988, is not only contradictory and untenable, but also is an attempt to give an artificial and baseless interpretation to the amended section.

Secondly, seeking the advantage of the presumption in terms of sections 107 and

108 could be for a variety of reasons. A sudden disappearance of a person may bring in numerous kinds of issues that would have to be looked into. The complexities could be on the basis of marriage, retirement benefits, payments on an insurance policy or as in this appeal the question of administering the estate, which includes the accounting and inventing. As has been stated earlier, there is no presumption as to the time of a person's death, which has to be proved by evidence and clearly the presumption of death does not extend to the date of death. In English Law, as Coomaraswamy points out (Supra Pg. 431) the presumption of death has been used to repel a charge of bigamy, to justify remarriage and to justify a divorce.

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Considering the totality of the aforementioned circumstances and the legality of the situation, it would appear that in a situation where as in the present case, the following aspects would have to be taken into account:

a. when there is a situation arising out of a disappearance of a person, there is no presumption as to the date or the time of the death of a person;

b. on the death of a person, who had died intestate, his estate passes at once, by operation of law, to his heirs;

c. any person who is not an executor or an administrator, but intermeddles with the deceased's property, may make himself liable to the obligations of an executor de son tort ;

d. as has been referred to in Halsbury's Laws of England (Volume 17(2), 4th Edition, Pg. 38) referring to the effects of acts of executor de son tort, the lawful acts done in the professed administration of the estate by a person purporting to act as personal representative which a rightful executor would have been bound to perform in due course of administration would bind the estate; and

e. considering the injuries that could be done to a deceased person's estate without remedy, the English Law recognizes the doctrine of relation back that would apply to testamentary proceedings. Thereby when the grant is made, the administrator's title relates back to the time of death.

In a series of cases *(Lal Chand Marwari v. Mahant Ramrup Gir and another(20) Re Green's Settlement (21) Dawley v. Winfield (22) Wing v. Angrave* (23) the courts have taken the view that if a person has not been heard of for a term of not less than seven years, there is a presumption of law that he is dead, but the onus of proving the death of a person at any particular date must rest with the person to whose title that fact is essential.

On the question of the time of the death based on the presumption an example was cited in *Hickman v. Upsall* (24) where circumstantial evidence of the time of the death was taken into consideration. The example

"Suppose a person intending to return home at ten o'clock at night does not appear, there is no presumption that he is dead. But if after a week he is found with his skull broken in a wood, you can then conclude that he was killed before ten o'clock on the night on which he disappeared.".

The respondent's position was that the aircraft in which the deceased was a passenger disappeared after it left Kuala Lumpur at 21.09 Hrs. on 13.02.1983. Later it was reported that some fishermen in Indonesia had found a wheel of an aircraft and a part of a plane, which could be related to the ill-fated aircraft. None of these had been challenged by the appellant and she had not taken any steps to discharge the burden of establishing any other date other than 13.02.1983, the date suggested by the respondents on which the death of the deceased to have occurred. In fact the appellant contended that the deceased was in Malaysia on 13.02.1983 and he boarded his aircraft to fly back to Sri Lanka; but he never arrived in the country.

It is therefore not disputed that the deceased was expected to return to Sri Lanka after 21.09 Hrs. on 13.02.1983 and considering the aforementioned circumstances on the basis of the example given in *Hickman v. Upsall* (supra) the conclusion should be that the deceased met his death in or around the said time en route from Kuala Lumpur to Sri Lanka.

For the aforementioned reasons, I am of the view that 21.04.1988 cannot be taken as the date on which the estate of the deceased came into being as on the disappearance and the death of the deceased which apparently had occurred on 13.02.1983, in the absence of a will, the deceased person's estate passed at once by operation of law to his heirs on 13.02.1983, and such date should be taken into consideration as the date for the inventory . and the accounting.

This appeal is accordingly dismissed and the order of the District Court dated 28.11.1997 and the judgment of the Court of Appeal dated 11.01.1999 are affirmed. The appellant being the administratrix of the estate is directed to file the inventory and final account on the basis of that the estate of the deceased came into being on 13.02.1983, within three months from today. There would be no costs.

Appeal dismissed.

By majority decision appeal allowed.

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Viacom International Inc v. Maharaja Organisation Ltd. And Others - SLR - 140, Vol 1 of 2006 [2005] LKSC 12; (2006) 1 Sri LR 140 (28 April 2005)

VIACOM INTERNATIONAL INC.

VS.

MAHARAJA ORGANISATION LTD. AND OTHERS

SUPREME COURT
S.N. SILVA, CJ.
UDALAGAMA, J AND,
FERNANDO, J
CASE No. SC (APPEAL) NO. 40/99
HIGH COURT (CIVIL) 21/93(3)
31ST SEPTEMBER AND 19TH OCTOBER 2004

Intellectual Property - Code of Intellectual Property Act, No. 52 of 1979 as amended - Registering of "MTV Music Television" and "Maharaja Television" Sections 90 and 100 of the Code - A voidance of confusion by viewers - Side by side comparison of the two marks.

The appellant objected to the registering of "MTV" as a trade mark by the 2nd respondent (Registrar of Patents and Trade Marks) The Maharaja mark was registered after the registration of the appellant's mark, "MTV Music Television". The appellant urged that the impugned registration would create confusion in the minds of viewers of television. A condition imposed by the 2nd respondent that neither party has the monopoly of the letters M. T. V. was of no avail. The 2nd respondent and the High Court both allowed the registration. The appellant appealed to the Supreme Court .

The respondents filed no affidavits of objection, whilst the 2nd respondent Registrar was prepared to abide by the decision of the court. The 2nd respondent also did not file an affidavit of objections.

HELD:

(I) The High Court's contention was that the way letters "MTV" are written in the two marks are different and therefore, one could clearly distinguish the two marks. The High Court came to this conclusion by a close, side by side comparison of the two marks ignoring previous decisions to the contrary.

Per Raja Fernando, J

"What is important is to consider the prominent parts of both marks and decide whether the prominent parts of the two marks taken as a whole with the design/get up, closely resemble one another as to confuse the consumer. The court should not compare the two marks meticulously"

2. A preliminary objection to the appeal that only the 2nd respondent, Registrar should have been made a party respondent was in error and ought to be rejected.

Cases referred to :

1. *Toklon v Davidson* 1915 32R pages 133-136

2. *Bacadi Company Limited v Vigal Kardi* (*Ahuja's Intellectual* Property Case) (1959) Vol 3 No.3 Page XII

3. *N STLE SA v Multitech Lanka (Pvt) Ltd* (1999) 2 SLLR 298

4. *Arumugam v Seyed Abbas Air* 1964 Mad 206

APPEAL from the judgment of the High Court

K. Kanga - Iswaran, P. C. with Dr. Harsha Cabraal for plaintiff appellant.

Romesh de Silva, P. C. with *Hiran de Alwis* for 1st respondent.

S. Barrie, State Counsel for 2nd respondent.

Cur.adv. vult

28th April, 2005
RAJA FERNANDO, J.

The Plaintiff - Appellant Viacom International (hereinafter referred to as the Appellant) filed this appeal on 10.11.1999 to set aside the Order of the High Court of the Western Province sitting in Colombo in the exercise of its civil jurisdiction (hereinafter referred to as the Commercial High Court) dated 13th September 1999 and make order in favour of the appellant as prayed for in the plaint dated 11th August 1998.

Preliminary objection :

When this matter came up for hearing the appellant took up a preliminary objection that the 1st defendant - respondent, The Maharaja Organisation Ltd., (hereinafter referred to as the 1st respondent) was not entitled to be heard in this application as it had not taken part in the proceedings in the Commercial High Court. However it was agreed by the parties on 17th May 2004 that the objection to the participation of the 1st Respondent in these proceedings be considered with the main appeal

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and that the parties would tender written submissions and further the court could make its order on the written submissions of the parties.

Accordingly the appellant filed his written submissions on 31.08.2004 and the 1st Respondent, his on 19.10.2004. The 2nd defendant - respondent The Director of Intellectual Property, (hereinafter referred to as the 2nd respondent) whose decision the Appellant is seeking to set aside did not file his written submissions.

Before proceeding to consider the main appeal of the Appellant it is necessary to initially make an order with regard to the preliminary objection raised by the Appellant regarding the participation of the 1st respondent in these proceedings.

Firstly, the 1st respondent is a party to the appeal named by the appellant and further the decision the Appellant is seeking to set aside is the decision of the Commercial High Court made affirming the Order of the 2nd Respondent made on 13th September 1998 in favour of the 1st respondent's Trade mark. Therefore it is the 1st respondent who is the party directly affected by the outcome of this appeal. Hence it is the view of the Court that apart from 1st respondent being a party to the appeal he being the party directly affected by the decision of the court he must necessarily be permitted to participate and heard in this appeal.

Accordingly I make order over-ruling the preliminary objection of the Appellant and permit the 1st respondent to participate and be heard in the proceedings of this appeal.

The Main appeal The main appeal is on the Registration by the Director- General of Intellectual Property the 2nd respondent of the trade mark "MTV" under class 38 of the international classification as the trade mark of the 1st respondent the Maharaja Organisation made on 30th June, 1998.

The Background The plaintiff - appellant, Viacom Incorporated in U. S. A. the user of the trade mark "MTV Music Television" which has been registered in the US and in several other countries made an application to register its mark "MTV Music Television" in Sri Lanka on 15th May 1991 under application Nos. TM 61297 and TM 61298 in classes 38 and 41 respectively of the international classification and has prior registration for MTV.

Pursuant to an agreement with Teleshan Network (PVT) Ltd. of Sri Lanka and TNL television station the Appellant has been telecasting MTV Music Television in Sri Lanka, before Maharajah Television Commenced its telecast.

The 1st respondent made an application on 23rd May 1991 under application No. 61332 for the registration of the alphabetical letters "MTV' in respect of communication in the same class 38 of the International classification. The said mark was accepted and published in terms of section 107 of the Code of Intellectual Property (hearing after referred to as the Code.) in the government gazette No. 830 of 29th July 1994 subject to the condition that the registration did not give the 1st respondent the right to exclusive use of the letters M. T. and V

Upon publication the Appellant filed notice of opposition in terms of section 107(2) of the Code of Intellectual Property on 18th January 1995.

The Applicant's opposition was:

(i) That the 1st Respondent's propounded mark will contravene the provisions of Section 99, 100 and 142 of the code.

(ii) That the Appellant had pending applications under the same class 38 in TM 61297 and class 41 in TM 61298 filed prior to the 1st respondent's application.

(iii) That the 1st respondent's propounded mark is not sought to be registered in good faith

(iv) That the propounded mark is likely to create the erroneous impression that the 1st respondent's services are the services of the appellant

(v) That the 1st respondent's propounded mark will give the impression that there is a connection or association between the 1st respondent's service and of the appellant.

After an inquiry the 2nd respondent made order on 30th June 1998 allowing the 1st respondent's application for registration.

The appellant being aggrieved by the said order of the 2nd respondent appealed there from to the Commercial High Court under Section 182 of the code. The appeal of the Commercial High Court by the appellant was dismissed by the High Court on 13th September 1998.

This appeal is to set aside the judgment of the Commercial High Court dated 13th September 1998 and make order in favour of the Appellant as prayed for in the plaint dated 11th August 1998.

Submissions of the parties.

The Appellant submits that the registration of the 1st Respondent's mark "MTV" by the 2nd Respondent is contrary to the provisions of the said Code and the Order of the learned Commercial High Court Judge is replete with irrelevant considerations made without due regard to the law and abundance of Judicial authority relating to Trade Marks.

Further it was submitted by the Appellant that the finding of the 2nd Respondent in registering the mark of the 1st respondent is entirely without merit and misconceived both as a matter of fact and of law.

It was the submission of the Appellant that in the Commercial High Court the 1st Respondent did not file proxy and/or answer or participate in the appeal before the

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Commercial High Court and the 2nd Respondent, the Director of Intellectual Property, informed court that he is not filing answer and that he will abide by the judgement of court.

In effect the 2nd respondent did not defend his order in the Commercial High Court or before this court.

The Commercial High Court disposed of the appeal solely on the affidavit, answer and written submissions of the appellant.

The 1st Respondent in his submissions filed in this court referring to the host of authorities cited by the Appellant attempts to dismiss them by merely stating that they are irrelevant and causes confusion rather than throw light on the matter.

It is the submission of the 1st Respondent that both Maharaja Television and Music Television made applications to register MTV as the Trade Mark of each of them and that the Appellant objected to the registration of the 1st Respondent's trade mark and the 1st Respondent objected to the registration of the appellant's trade mark. The Registrar of Trade Marks the 2nd respondent permitted the registration of both marks with a disclaimer that no party is entitled to the exclusive use of the letters MTV.

The 1st Respondent submits that the 2nd Respondent and the learned High Court Judge have both come to the same conclusion that the mark will not cause deception or confusion in the minds of the public and that the viewers will ignore the common denominator of the two marks and will know clearly that one is Music TV and the other is Maharaja TV.

Merits of this Appeal

In terms of the code of Intellectual Property a "Mark" Means a Trade Mark or service mark serving to distinguish the goods or services of one from those of another. '

The exclusive right in a mark may be acquired by registration under the Code. Unregistered marks are safeguarded under the provisions relating to unfair competition and the common law, under action for passing off.

Once an application for registration of a mark is received by the registrar, he is required to examine the mark in relation to the provisions of sections 99 and 100.

As submitted by the 1st respondent in his submissions what the 2nd Respondent, the Director of Intellectual Property, has done is to register both marks with a disclaimer that no party is entitled to the exclusive use of the letters MTV. This is contrary to the spirit and substance of the law on Trade marks.

A visible sign capable of distinguishing the goods or services of different enterprises can constitute a mark provided it is not inadmissible under section 99 and 100 of

the Code. No trader or service provider should be permitted to monopolise alphabetical letters unless the mark consisting of such letters can constitute a valid mark and not inadmissible under Section 99 and 100.

The two marks have been registered without exclusive rights to the English alphabetical letters M T and V.

This position to my mind can not be valid.

The two letters "TV" is a standard abbreviation used all over the world for the word "Television", as such no party could claim exclusive rights for the use of the letters TV. Then the only letter left in the mark is the letter M. According to the evidence on record the Plaintiff -Appellant has extensively used "MTV" as a mark and acquired a reputation/identity and therefore when the letter M is taken together with the two descriptive letters TV as a whole the three letters MTV can stand as a valid mark. It is settled law that a mark should be taken as a whole. The Plaintiff-Appellant does not receive exclusive rights to the letters TV but he should receive exclusive rights to the combination of letters MTV in this instance. Thus others are not entitled to the use of the combination of letters MTV.

The law attempts to avoid 'confusion' in the minds of the public as to the source of the service. If both Music TV and Maharaja TV are permitted the use of the mark MTV it is hard to understand how the viewers could know the correct source of the service.

The learned High Court judge's contention is that the way the letters MTV are written in the two marks are different and therefore one could clearly distinguish the two marks. Further he has come to this conclusion by a close, side by side comparison of the two marks.

The learned trial judge has completely ignored the host of authorities which stipulate that, such side by side comparison is not the way to examine Trade marks. What is important is to consider the prominent parts of both marks and decide whether the prominent parts of the two marks taken as a whole with the design/get up, closely resemble one another as to confuse the consumer. Without doubt the prominent parts of both marks included in this appeal are the letters MTV. The court should not compare the two marks meticulously. As Lord Johnson expressed in Taka/on v. Davidson (1) "we are not supposed to scan the words and do microscopic inspections. It is a matter of general and casual point of view of a consumer walking into a shop."

When one considers the two marks in that light it is clear that both marks so closely resemble one another and the consumer/viewer is likely to be confused.

The initial question then to be decided is, when a particular programme is said to be telecast on "MTV" whether a viewer will be in a position to know which of the two channels this programme comes on; Music TV or Maharaja TV. If the answer to this simple question is that one cannot decide, then both Marks cannot co-exist and the

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second registration has to be cancelled.

The learned High Court Judge in deciding that the two marks are diametrically opposed to each other has engaged in a critical side by side examination of the two marks and of their presentation and a minute examination of each letter of the alphabet in the two marks.

It is settled law both in Sri Lanka, India and elsewhere that "In order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two marks are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so whether they are of such a character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such a overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him." *Bacardi Company Limited Vs. Vigal Kardi* (Ahuja's Intellectual property case (2)

In the case of Nestle *SA Vs. MultiTech Lanka (Pvt.) Ltd* (3), Fernando J. has in a trade mark/unfair competition dispute held that such dispute "cannot be decided by simply totting up and weighing resemblances and dissimilarities upon a side by side comparison of the marks".

The issue is whether a person who sees one in the absence of the other and who has in his mind's eye only a recollection of that other would think the two were the same. The mind's impression (idea) of the mark is critically important. The impression (idea) of the mark here is "MTV".

In Arumugam vs. Seyed Abbas(4) it has been held that "Striking resemblance between distinctive words of an existing registered trade mark and the proposed trade mark disentitles the latter to be registered."

Further the learned High Court Judge has ignored the phonetic resemblance of the two marks.

It is undisputed that the Plaintiff-Appellant applied to the Registrar of Patents and Trade Marks for the registration of the Trade mark "MTV Music Television" on 15th May, 1991 in applications numbered TM 61297 and TM 61298 in classes 38 and 41 respectively.

Whilst the Appellant's application was pending the 1st respondent Maharaja Organisation also filed an application on 23rd May 1991 for the registration of the alphabetical letters "MTV" with a devise in respect of Communication in Class 38 the same class as the appellant under application No. 61332.

The plaintiff-appellant objected to the registration of the Trade mark of the 1st respondent on the ground that the plaintiff-appellant being the registered owner of the Trade mark "MTV Music Television" under the same class as the 1st Respondent his rights under the Code would be contravened.

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It is common ground that the plaintiff - appellant had the Trade mark "MTV Music Television" registered prior to the 1st Respondent in the same class. Therefore, another application to register the same trade mark or a similar trade mark which is likely to mislead or confuse the public as to the source of the service cannot be registered.

Eventhough, the original registration was subject to the condition that he will have no exclusive right to the alphabetical letters MTV, what the law attempts to prevent is confusion in the minds of the public as to the source of the service. As mentioned above the plaintiff-appellant is entitled to letter "M" with the letters T and V under the special circumstances relating to this matter.

The only way in which the same letters MTV could have been used as a trade mark by another is to either show that customers/viewers will not normally regard such letters as indicators of the Origin of the services concerned. it is the contention of the 1st Respondent that the letters combined in an artistic manner used by the 1st respondent is capable of distinguishing the services of the 1st respondent from the plaintiff- appellant.

The learned High Court Judge has come to that same conclusion by a minute and a side by side close scrutiny of the purported Trade mark of the 1st respondent.

As stated earlier in examining Trade Marks such side by side close scrutiny is not the approach to decipher trade marks. One must consider whether the public could without confusion identify the source of the goods or services offered under such trade mark.

In so deciding one invariably has to consider the services offered by the competing parties. Undoubtedly, both the plaintiff-appellant's "Music TV' and the 1st respondent's Maharaja TV are under the same Trade mark "MTV" offering the same services if not identical services. Therefore, the confusion in the minds of the public is more probable.

The learned High Court Judge has failed to properly consider the two marks under the law for the protection against unfair competition. He has not considered whether there has been an appropriation of the benefit of the good name or reputation of one for the commercial advantage of the other. Nor has he considered the use of the two marks concurrently in the same class and in respect of the same service and whether it would cause confusion, as given in Section 142 of the Code, resulting in an act of unfair competition.

It is evident on the affidavits and other documents filed by the appellant before the High Court that the appellant has been telecasting MTV music television in Sri Lanka and elsewhere even prior to the registration of the appellant's Trade mark MTV by the Director of Intellectual Property in Sri Lanka. It is the submission of the appellant that the 1st respondent was aware of the use of the mark by the appellant at the time the 1st respondent made his application for registration of a deceptively

similar mark for registration under the same services.

There is merit in the submission of the appellant that their Trade mark MTV Music Television was in use long prior to the 1st respondent filing his application for registration of a similar mark and there would be unfair competition and even passing off.

The phonetic resemblance of the two marks is such that it is almost impossible for a person to distinguish between the two services. The disclaimer recorded by the 2nd respondent in respect a of the letter M T and V is in the circumstances of this case of no relevance. As I mentioned earlier the use of MTV by both will lead to confusion among the public. Whether or not the 1st defendant-respondent intended such outcome is immaterial. Thus, his registration or use of letters MTV is contrary to the provisions relating to unfair competition and cannot be permitted. The unfair competition law safeguards not only the interest of traders and service providers but also the consumers.

Therefore I hold that the Registration by the 2nd respondent of the trade mark of the 1st respondent is contrary to the provisions of Sections 99, 100 and 142 of the code of Intellectual Property Act, No. 12 of 1979.

Accordingly, I set aside the judgment of the Commercial High Court, dated 13th September 1999 and also set aside the Order of the 2nd respondent dated 30th June 1998 allowing the 1st respondent to register Trade Mark No. 61332.

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

N. K. UDALAGAMA, J.-I agree.

Appeal allowed.

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Muthappan Chettiar v. Karunanayake And Another - SLR - 327, Vol 3 of 2005 [2005] LKSC 9; (2005) 3 Sri LR 327 (10 May 2005)

MUTHAPPAN CHETTIAR
VS
KARUNANAYAKE AND ANOTHER

SUPREME COURT.
BANDARANAYAKE.J.
FERNANDOJ.
AMARATUNGA J.
SC 69/2003.
FEBRUARY 17, 2005.
MARCH 4, 2005.
MAY 10,2005.

Supreme Court Rules 1990 -Rules 2, 6,8(6), 30, 30(1), 30(6), 30(7),34, 35(c) - Filing of written submissions within six weeks from date special leave is granted - Is It mandatory? - Could the party be heard?

HELD:

Per Shirani Bandaranayake, J.

" Objection raised on a non compliance of a mandatory Rule, in my view cannot be taken as a mere technical objection and where there has been no compliance at all of such mandatory Rules at the time the matter was taken up for hearing serious consideration should be given for such non compliance as that kind of behaviour could lead to serious erosion of well established Court procedures maintained throughout several decades".

(1) Rules 30 (1) and 30 (6) specify that it is mandatory that within 6 weeks of the grant of special leave to appeal the appellant has to file hfs written submissions, although the appeal shall not be dismissed for the non compliance of Rule 30 (c) and the effect of such non compliance would be the non entitlement to be heard, such non compliance would attract Rule 34 which states that, an appellant who fails to exercise due diligence in taking all necessary steps for the purpose for prosecuting the appeal, the Court could declare the appeal to stand dismissed for non prosecution.

(2) A party in default could move Court stating valid and acceptable reasons and seek the leave of Court of further time to furnish written submissions.

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(3) Non compliance of Rules 30(1) - 30 (6) combined with the non compliance would certainly amount to failure to show due diligence.

Cases referred to :-

1. Priyani Soysa vs. Rienzie Arasakularatne - 1999 1 Sri LR 179

2. Union Approach (Pvt.) Ltd vs. Director General of Customs - 2000 1 Sri LR 27

3. Balasingham and another vs. Puranthiran (minor) by the next friend - 2000 1 Sri LR 163

4. Coomasaru vs. Leechman Ltd - SC 217/72 - 307, 72-SCM 26.6. 1976

5. Samarawickrema vs. Attorney General - 1983 - 2 Sri LR 162

6. Mylvaganam vs. Reckit and Colman - SC 154/87 - SCM 8.7. 1987

7. All Ceylon Metal Workers Union vs. Jaufer Hassan and Another - 1990 2 Sri LR 420

8. Read vs. Samsudeen - 1895 1 NLR 292

9. Aspinall vs. Sutton - 1894 2QB 349

10. Secretary of State for Defence vs. Warn - 1968 3 NLR 609

had not complied with the mandatory requirement of filing written submissions within six weeks from the date on which special leave to appeal was granted and therefore the appellant had failed to comply with the said Rule. Learned President's Counsel for the respondents therefore contended that having regard to the fact that an essential step of the prosecution of the present appeal had not been taken by the appellants and therefore the appeal should be dismissed for non compliance. Both parties thereafter agreed to file written submissions on the preliminary objection and judgment was reserved on the said preliminary issue.

Learned President's Counsel for the appellant submitted that there are no provisions in the Supreme Court Rules of 1990, to indicate that an appeal must be dismissed for the non filing of written submissions. In support of his contention learned President's Counsel drew our attention to Rule 30(1) of the Supreme Court Rules of 1990 and the decisions of this Court in Priyani Soysa v Rienzie Arsecujaratne and Union Apparel (pvt) Ltd. vs. Director General of Customs Referring to the said decisions, learned President's Counsel contended that, it is clear law that non compliance with the Rules, particularly in regard to non filling of written submissions, will not disentitle the appellant to be heard. It was also submitted that the Court can order the appellant to furnish written submissions at any time determined by Court.

Having said that, let me now turn to examine the provisions of the relevant Rules and the ratio decidendi of the aforementioned cases and their applicability to the appeal in question.
Rule 30 of the Supreme Court Rules of 1990 deals with the written submissions that has to be filed prior to the date of the hearing. Both Rules 30(1) and 30(6) refer to the filing of the written submissions regarding an appeal. Whilst Rule 30(1) refers to the need for filing of such submissions, Rule 30(6) clearly specifies the time period given for the filing of the said written submissions. A careful reading of both Rules indicates that the provisions stated in them are mandatory. Rules 30(1) and 30 <?>) of the Supreme Court Rules, 1990 are in the following terms:

Rule 30(1)

No party to an appeal shall be entitled to be heard, unless he has previously lodged five copies of his written submissions (hereinafter referred to as 'submissions') complying with the provisions of this rule."

"Rule 30(6)

The appellant shall within six weeks of the grant of special leave to appeal, or leave to appeal, as the case may be lodge his submissions at the Registry and shall forthwith give notice thereof to each respondent by serving on him a copy of such submissions."

In terms of these two Rules, it is necessary for the appellant to file five copies of his written submissions in the Registry and this has to be carried out within six weeks of the grant of special leave to appeal or leave to appeal by this Court. Also it is necessary that the appellant must take steps to give notice to each respondent of the lodging at the Registry of such submissions by serving on them a copy of his written submissions. Therefore (he cumulative effect of Rules 30{1) and 30(6) would be that the appellant should file five copies of his written submission within six weeks of the grant of special leave to appeal or leave to appeal as the case may be, and a copy of such submissions has to be served to the respondents' notifying of the said submissions.

In the event of non-compliance of the said provisions of the Rules, Rule 30(1) specifically states that, such party shall not be entitled to be heard.

Learned President's Counsel for the appellant's first submission was that the Rules do not indicate that an appeal should be dismissed for non filing of written submissions. As referred toealier, Rules 30(1) and 30(6) clearly specify that it is mandatory that within Six weeks of the grant of special leave to appeal, the appellant has to file his written submissions. Although the appeal shall not be dismissed for the non-compliance of Rule 30(1) and the effect of such non compliance would be the non entitlement to be heard, such non-compliance would attract Rule 34 which clearly states that, an appellant who fails to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal, the Court would declare the appeal to stand dismissed for non prosecution.

The applicability of Rule 34, when the appellants had failed to file their written submisions, was considered by this Court in Balasingham and another vs. Puranthiran (A Minor) by his next friend Sivapackiam . In that case, the appellants had failed to file their written submissions in terms of Rule 30 of the Supreme Court Rules, 1990 within six weeks from the date on which special leave to appeal was granted. The written submissions were filed approximately one year from that date. The respondent in his submissions took an objection on the ground of such default and moved that the appeal be declared dismissed for non-prosecution, in terms of Rule 34. It is to be noted that the appellants in that case had also failed to give an acceptable excuse for the default on their part. Considering the material placed before this Court, it was decided that the preliminary objection raised on behalf of the respondent that the appeal be declared dismissed for non-compliance must be sustained, in Balasingham's case reference was made to Coomasaru vs. Leechman Ltd (4) whore the former Supreme Court dismissed an appeal for failure to file written submissions in terms of Rules of the Appeal Procedure Rules in the absence of any excuse for such failure.

Samarawickrama vs. Attorney- General(5) is also a decision that is worthy of note in this regard. In that case, a preliminary objection was taken by the Senior State Counsel that the appellant had not complied with the provisions of Rule 35(c) of the Supreme Court Rules of 1978. Rule 35(c) requires the appellant, within 14 days of the grant of special leave to appeal, to lodge his written submissions and forthwith give notice thereof to each respondent by serving on him a copy of the submission. Learned Counsel for the appellant had taken up the position that a copy of the written submission was handed over to the office of the Hon. Attorney General. However, the Senior State Counsel had informed Court that there was no record of such receipt and the learned Counsel for the appellant conceded that he had no proof of such service. The Court noted that apart from the aforementioned submission that no other excuse for the non-compliance with the Rule 35(c) of the Supreme Court Rules, 1978 was given by the appellant. The Supreme Court took the view that the relevant provisions have been consistently held by the Court as, being imperative' and the preliminary objections were so upheld. A similar approach was taken in Mylvagnam vs. Reckittand Colman6 and the appeal was dismissed for failure to comply with Rule 35 of the Supreme Court Rules of 1978. This Court had also considered the necessity to comply with Rule 35 of the Supreme Court Rules of 1978, in Alt Ceylon Match Workers Union vs. JauferHassan and others (7JwhereAmerasinghe, J. held that, when the appellant had not filed any written submissions there is a failure on the part of the appellant to comply with Rule 35.

In view of the aforementioned decisions of this Court, it is apparent that objections taken in terms of Rule 30 of the Supreme Court Rules of 1990 have not only been upheld, but Rule 30 also have been considered in terms of Rule 34 of such Rules.

Having considered the first submission of the learned President's Counsel for the appellant let me now turn to examine his second submission.

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Learned President's Counsel drew our attention to the decision in Priyani Soysa vs. Rienzie Arsecularatne (supra) and Union Apparel (Pvt.) Ltd. vs. Director General of Customs (supra). His contention was that in these two decisions this Court had held that the non-compliance with the said Rules is not fatal and does not necessitate a dismissal of the case. However, it is to be noted that both the aforementioned cases could be distinguished from the instant case for several reasons, which are discussed in the following paragraphs.

In Priyani Soysa's case, the question arose with regard to the non-compliance with Rules 2, 6 and 8(6) of the Supreme Court Rules of 1990. This Court in its majority view had decided that there was compliance with the aforementioned Rules for the reason that,

(a) if the respondent had failed to file the caveat within the time specified by Rule 3(6}, but submits an explanation, which the Court is prepared to accept, eg. that he was in fact not resident at the address on the date of receipt of the notice, the Court may in its discretion regard the date of 'Actual' receipt of the notice as the relevant date for the purpose of compliance with the Rule. On a liberal view of the matter, the respondent had filed the caveat within time ;

(b) the only lapse of the petitioner relied upon by the respondent was that the petitioner had failed to obtain the Court's permission in terms of the proviso to Rule 2 to tender the copies of the Court of Appeal briefs and the fact that the petitioner filed three instead of four copies. However, Rule 8(7) enables the respondent also to submit the same documents by way of objection whilst Rule 13(2) empowers the Court to direct the Registrar to call for the same, and having regard to the purpose of the Rules, non-compliances of this nature would not necessarily deprive a party of the opportunity of being heard on the merits at the threshold stage unless there is some compelling reason to do so.

The decision in Union Apparels (Pvt.) Ltd. vs. Director General of Customs and others (Supra) also could be clearly distinguished from the instant case. In that case, the question arose as to whether the petitioner had filed his written submissions in compliance with the Rule 34 of Supreme Court Rule of 1990. The petitioner company had filed its application on 03.06.1999. Hearing was fixed for 20.08.1999 and the written submissions were filed by the petitioner on 19.08.1999. The respondents' objection was that the petitioner thereby had failed to comply with Rule 45(7), which requires the written submissions to be filed at least' One weak before the date fixed for hearing'. The 2nd respondent took up the position that the application must stand dismissed in terms of the Supreme Court Rules of 1990 as the written submissions of the petitioner were not filed in terms of the Rules. This Court having regard to the purpose of Rule 45(7) in comparison with Rule 30 and considering the purpose of Rule 34 and especially the circumstances of the case decided that it cannot be said that the petitioner had failed to show due diligence in taking all necessary steps for the purpose of prosecuting the application. Accordingly the Court held that the preliminary objection must be overruled.

It is to be borne in mind that in Union Apparels (Pvt). Ltd. (Supra), although there was a delay in filing the written submissions, it was however filed one day before the date of the hearing. Therefore it is to be noted that, when that matter was taken up for hearing, the written submissions were available.

The purpose of the Rules of the Supreme Court is to ensure that the necessary submissions and authorities are available to Court when the appeal or the application is taken up for argument. It is also necessary to be borne in mind that the right to be heard by a party is one of the most elementary, but significantly important rights of any party before Court. Nevertheless, when a party is before this Court in connection with an appeal or an application, this right has to be exercised in terms of the Supreme Court Rules, as the failure to comply with the rules cannot be simply ignored. I am in complete agreement with the view expressed over a century ago by Bonser, C. J. in Read vs. Samsudin where his Lordship quoted the words of Sir George Jessei, Master of the Rolls with approval that, it is not the duty of a judge to throw technical objection, difficulties in the way of the administration of Justice, but where he sees that he is prevented from receiving material or available evidence merely by reason of a technical objection he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

However, objection raised on a non-compliance of a mandatory Rule, in my view cannot be taken as a mere technical objection and where there has been no compliance at all of such mandatory Rules at the time the matterwas taken up for hearing, serious consideration should be given for such non-compliance as that kind of behaviour by parties could lead to serious erosion of well established Court procedures, maintained throughout several decades.

In the instant case, it is quite clear that the appellant had not taken steps to comply with Rule 30 of the Supreme Court Rules of 1990. The case record reveals that this Court granted special leave to appeal in this matter on 24.09.2003. On that day, the Court had made order that written submissions be filed according to Rules. Supreme Court Rules of 1990 clearly states that the appellant should, within six weeks of the grant of special leave to appeal, lodge his submissions at the Registry and should give notice to each respondent by serving on him a copy of such submission (Rule 30(6). Rule 30(7) of the Rules of the Supreme Court, 1990 refers to the time given to the respondant in submitting his written submissions in case of an appeal and states that,

" the respondent shall within six weeks of the receipt of notice of the lodging of the appellants submissions, lodge his submissions at the Registry, and shall forthwith give notice thereof to the appellant and to every other respondent, by serving on each of them a copy of such submissions."

It further provides that,

'Where the appellant has failed to lodge his submissions as required by sub-rule (6), the respondent shall lodge his submissions within twelve weeks of the grant of

special leave to appeal, or leave to appeal as the case may be giving notice in like manner."

According to the aforementioned Rufes, the appellant should have filed his written submissions on or before 05.11.2003. Although the matter was fixed for argument on 29.01.2004, on a motion filed by the learned President's Counsel for the respondents dated 10.10.2003, this matterwas re-fixed for hearing on 03.03.2004. On 03.03.2004, on an application made on behalf of the learned President's Counsel for the appellant, the hearing was again re-fixed for 01.07.2004. On 01.07.2004, it was not possible for the appeal to be taken up for hearing as the Bench comprised of a judge who had heard this matter in the Court of Appeal and this was re-fixed for hearing on 01.11.2004. On that day it was once again re-fixed for hearing for 17.02.2005. By that time one year and four months had lapsed from the date special leave to appeal was granted. It is not disputed that even on the day this appeal was finally taken up for hearing, viz. on 17.02.2005, the appellant had neither filed his written submissions nor had he given an explanation as to why it was not possible to file such written submissions in accordance with the Rules.

Notwithstanding the aforementioned non-compliance, it appears that even thereafter, the appellant had not taken any interest to comply with the rules relating to the filing of written submissions. On 17.02.2005, when this matter was taken up for hearing and when the learned President's Counsel for the respondents took up the preliminary objection, appellant moved to file written submissions on the question of the preliminary objection. This Court granted time for both parties to tender such written submissions and reserved the judgment on the question of the preliminary objection. The Court directed the respondents to file their written submissions on or before 07.03.2005 and the appellant to file their written submissions on or before 01.04.2005.

The respondent filed their written submissions on 04.03.2005 and the appellant's written submissions were not filed on 01.04.2005, as directed by this Court. Later the appellant had filed their written submissions on 10.05.2005. The written submissions filed belatedly refer to the aforementioned submissions pertaining to Rule 30 and the decision in Priyani Soysa (Supra) and Union Apparels (Pvt.) Ltd. (Supra), but does not give any reason as to why there was no compliance with the rules after special leave to appeal was granted and also an explanation for the delay in filing written submissions after hearing the objection on the preliminary issue, as directed by this Court.

Enactments legislating the procedure in Courts are usually construed as imperative Aspinall vs. Sutton191 Secretary of State for Defence vs. Warn and this position, as pointed out earlier, has been up held on numerous occasions by the Supreme Court in this country.

The appellant could have moved this Court stating valid and acceptable reasons and sought the leave of the Court for further time to furnish written submissions, so that this Court could have exercised its discretion in permitting the appellant to file his written submissions. However, it is to be borne in mind that the appellant had

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not sought to exercise the discretion of this Court, but also had not given any valid reason even belatedly for this Court to consider using its discretion.

It is therefore absolutely clear that the appellant has not complied with Rules 30(1)and 30(6) of the Rules. The contention of the learned President's Counsel for the appellant is that non-compliance with such Rules will not disentitle the petitioner being given a hearing. I am in agreement with the learned President's Counsel that Rule 30(1) does not refer to an appeal being dismissed for non compliance with that Rule. However, it is necessary to consider the circumstances of this case, which makes it necessary for this Court to take cognizance of them.

As referred to earlier, in Balasingham's case (Supra) appellants had filed their written submissions approximately one year after special leave to appeal was granted and this Court held not only that there was non-compliance, but also that such non-compliance was the appellant's failure to show due diligence.

It is quite clear from the aforementioned that there was not only non-compliance of Rules 30(1) and 30(6) of the Supreme Court Rules of 1990, but also that such non-compliance combined with the non -availability of a valid explanation for such non-compliance would certainly amount to failure to show due diligence. In such circumstances, in terms of Rule 34, the appeal stands to be dismissed for non prosecution.

For the aforementioned reasons, I hold that the preliminary objection raised by learned President's Counsel for the respondents must be sustained. This appeal is accordingly dismissed. There will be no costs.

FERNANDO J. - I agree.

AMARATUNGA J. - I agree.

Preliminary objection upheld Appeal dismissed.

Samy And Others v. Attorney-General (Bindunuwewa Murder Case - SLR - 216, Vol 2 of 2007 [2005] LKSC 22; (2007) 2 Sri LR 216 (27 May 2005)

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SAMY AND OTHERS
v
ATTORNEY-GENERAL (BINDUNUWEWA MURDER CASE)

SUPREME COURT
WEERASURIYA, J.
JAYASINGHE, J.
UDALAGAMA, J.
DISSANAYAKE,J.
FERNANDO, J.
SC 20/2003 DB
HC COLOMBO 763/2003 (TAB)
NOVEMBER 12, 23, 29, 30, 2004
JANUARY 5, 2005
FEBRUARY 2, 2005

Penal Code sections 30, 31, 42, 138, 139, 146, 297, Murder - Unlawful assembly - Lucas Principle - Ellenborough dictum - discussed- illegal omission - Failure to take action - Police Ordinance section 56 - Police inaction - Exercising discretion bona fide and to the best of one's ability - Can the officer be faulted?

The case was tried against 41 accused before a Trial at Bar (TAB) upon an indictment containing 83 counts. 18 accused were called upon for their defence and at the conclusion of the trial 13 were acquitted; 5 were convicted and sentences imposed. The charges were sequel to the killing of 27 detainees and injuring 14 detainees at the Rehabilitation Center at Bindunuwewa.

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In appeal,

It was contended that, the evidence only established the presence of the accused-appellants at the scene, and the TAB had wrongly applied the 'Lucas principle and the Ellenborough principle'.

Held:

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(1) It is settled law that mere presence of a person at the place where the members of an unlawful assembly had gathered for carrying out their illegal common objects does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion.

(2) The finding of the TAB that the 1st accused-appellant was present at the commencement of the attack is erroneous for there was no evidence to that effect. It is not prudent to rely on the evidence of Wickremasinghe -he has given false evidence to sustain a verdict of guilt pronounced on the 2nd defendant-appellant. The visit to the camp by the 3rd defendant appellant was motivated by curiosity on the information that the detainees were attacking the villagers.

(3) The 'Lucas principle' is that falsehood uttered in Court or outside Court by a defendant could be taken as corroboration of the evidence against a defendant. It is not justifiable to hold that the 3rd accused-appellant knew that if he told the truth, he would be sealing his fate. There was no allegation that he had given false evidence and insufficient evidence although the name he gave was false.

(4) The prosecution had failed to establish a strong prima facie case against the 3rd accused-appellant which warrants the application of the 'Ellenborough dictum.'

(5) There is no an illegal omission - or intentional failure to comply with the duty imposed by law by police officers. Having regard to the department orders, if the Officer-in-Charge has exercised his discretion bona fide and to the best of his ability, he cannot be faulted for the action he has taken even though it may appear that another course of action could have proved more effective in the circumstances.

APPEAL from the judgment of the Trial at Bar.

Cases referred to:

1.Kulatunga v Mudalihamy 42 NLR 331

2.Andrayes v Queen 67 NLR 425

3. Rex v Lucas 1981 2 All ER 1008

4. Karunanayake v Karunasiri Perera 82 2 SLR 27

5.Rex v Cocharane 1814 Gurneys Report 499.

6. Inspector Arendstz v Wilfred Peiris 10 C.L.W. 121

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7.R v Seeder Silva 41 NLR 337

8.King v Wickramasinghe 42 NLR 313

9. King v Peiris Appuhamy 43 NLR 410

10.King v Endoris 46 NLR 490

11.King v Abeywickrama 44 NLR 254

Dr. Ranjith Fernando for 1st, 2nd and 3rd accused-appellants. D. S. WIjesinghe PC with Priyantha Jayawardena, Chandrika Silva and K. Molligoda for the 4th accused appellant.

C. R. de Silva PC Solictor General with Sarath Jayamanne SSC and P. Nawana SSC for the respondent.

Cur.adv. vult.

May 27,2005

WEERASURIYA, J.

This case was tried against 41 accused before a Trial-at-Bar upon an indictment containing 83 counts. For convenience 83 counts in the indictment could be classified into five groups in terms of the alleged offences based on two different principles of criminal liability, as follows:-

(1) Count 1 of the indictment alleged that on or about 25th October 2000 Bindunawewa, Bandarawela, the accused along with others unknown to the prosecution were members of an unlawful assembly, the common object of which was to cause hurt to the detainees of the Bindunuwewa Youth Rehabilitation and Training Centre and thereby committed an offence punishable under section 140 of the Penal Code.

(2) Counts 2-22 of the indictment alleged the commission of the offence of murder of 27 detainees (named in the indictment) by the members of the said unlawful assembly in the prosecution of the common object of the said unlawful assembly or was such that the members of the said unlawful assembly knew to be likely to be committed in the prosecution of the said object and thereby committed an offence punishable under section 296 read with section 146 of the Penal Code.

(3) Counts 29-42 of the said indictment alleged the commission of the offence of attempted murder of 14 detainees (named in the indictment) by the members of the said unlawful assembly in the prosecution of the common object of the said unlawful

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assembly or was such that the members of the said unlawful assembly knew to be committed in the prosecution of the said object, and thereby committed an offence punishable under section 300 read with section 146 of the Penal code.

(4) Counts 43-69 of the indictment alleged the commission of the murder of 27 detainees (named in the indictment) by the accused along with others unknown to the prosecution and thereby committed an offence punishable under section 296 read with section 32 of the Penal Code.

(5) Counts 70-83 of the indictment alleged the commission of the offence of attempted murder of 14 detainees (named in the indictment) by the accused along with others unknown to the prosecution and thereby committed an offence punishable under section 300 read with section 32 of the Penal code.

The prosecution led the evidence of 58 witnesses comprising officials of Bindunuwewa Rehabilitation Camp, senior Police officers in charge of the area, Army officers who came to assist the police to disperse the crowd, certain Police officers who were on duty at the time of the attack, most of the detainees who survived the attack, several villagers, Medical officers who conducted the post-mortem and medico-legal examinations in respect of the deceased and injured detainees, and Police officers who conducted investigations.

At the close of the prosecution case on 21/06/2003, 23 accused listed on the indictment were discharged on the application made by the State on the basis that there was no evidence against them. The remaining 18 accused were called upon for their defence and at the conclusion of the trial 5th, 7th, 12th, 15th,19th, 25th, 33rd , 34th, 35th, 36th, 38th, 39th and 40th, were acquitted of all the charges. 4th, 13th, 21st, 32nd and 41st accused were convicted on 1st, 2nd - 16th, 29th, 30th, 31st, 33rd, 35th- 37th, 38th, 39th, 41st and 42nd counts, and following sentences were imposed on them:-

Counts 2-16 death sentence

Count 1-6 months RI.

Count 29-1 year RI.

Count 30-7 years RI.

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Count 31-3 years RI

Count 33-2 years RJ

Count 35-2 year RI

Count 36-1 year RI

Count 37-1 year RI

Count 38-3 years RI

Count 39-2 years RI

Count 41-1 year RI

Count 42-1 year RI

They were also fined Rs. 1000/- each on counts 30,31,33,38, and 39 of the indictment.

General comments

It is to be noted that the foregoing charges were a sequel to the killing of 27 detainees and injuring 14 detainees at the Rehabilitation Center at Bindunuwewa on 25.10.2000.

The first three accused-appellants who were residents of Bindunuwewa village, had been convicted on account of their membership of the unlawful assembly with the common object of causing hurt to the detainees of the Rehabilitation Camp and thereby attracting vicarious liability in terms of section 146 of the Penal Code in respect of the charges in the indictment.

The 4th and 5th accused-appellants being Police Officers who were on guard duty around the camp on 25.10.2000 were found guilty on the basis of the illegal omissions and positive (illegal) acts for having aided and abetted the commission of offences set out in the indictment and thereby rendered themselves to be members of the unlawful assembly resulting in criminal liability in terms of section 146 of Penal Code. Accordingly items of evidence with regard to the villagers (1st, 2nd and 3rd accused-appellants) would differ from the evidence presented by the prosecution against the police officers (4th and 5th accused appellants). Thus the complicity of the two groups as classified above will be considered separately under two different heads in this judgment. In fact Trial-at-Bar had proceeded to examine the evidence in respect of the accused based on the same classification. At the hearing of this appeal on the application of the learned Solicitor General, 5th accused-appellant was acquitted of all charges preferred against him.

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Submission on behalf of 1st-3rd accused-appellants

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Learned counsel for the above appellants submitted that the Trial-at-Bar had failed to consider the following circumstances and thereby misdirected itself in imputingvicarious liabilityon the 1st - 3rd accusedappellant:

(a) that the evidence led against the 1st-3rd accused-appellants only established their presence at the scene on 25/10/2000.

(b) that the evidence disclosed that there was a 'news' that tigers were attacking the village and due to that reason there was a large gathering of villagers rangingfrom a minimum of 500 to 3- 4 thousand ?t various points at various times.

(c) that the Trial-at-Bar had wrongly applied the "Lucas principle" and the "Ellenborough principle" in respect of these accused appellants.

The situation at the Rehabilitation Camp on 24th night as a background to the Incident

On 24th night when Headquarters Inspector Jayantha Seneviratne came to the camp on the information he received that there was a commotion in the camp and that the detainees had tried to grab weapons from the officers,the villagers had assembled near the camp. They (the villagers) had received the informationthat Lt. Abeyratne had been attacked and injured and that the Police post inside the camp had been abandoned which were factually correct. The crowd witnessed the remnants of the Police post being removed and the detainees abusing the Police and throwing stones. The villagers had planned to stage a peaceful Satyagraha opposite the camp on the following morning, for removal of the camp. Accordingly posters were seen all over the town calling for the removal of the camp on the following morning. The police sought the assistance of the army and Lt. Balasuriyawho came with a platoon of 24 men around 8.50 p.m. dispersed the crowd and left around 1.30 a.m.

Commencement of the unlawful assembly

Evidence led at the trials reveals that the villagershad assembled on 25th morning, in large numbers. As the crowds continued to swell there were reports of traffic congestion and blocking of roads. The number of

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villagers gathered on 25th morning had been estimated varying between a minimum of 500 to three to four thousand people. The detainees were seen inside the camp by Capt. Abeyratne walking along with clubs in their hands. The detainee Asokhan had conceded that they (detainees) carried clubs, rods, iron poles, knives and axes. The incident of stone throwing which took place on 25th morning from both sides were not considered as a threat to the detainees as conceded by Ltd. Abeyratne.

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It was evident that the immediate cause for the attack by a section of the crowd was the provocative act of the detainees, in charging into the crowd with clubs, rods and stones in their hands. The crowd having retreated for a moment which reflected a moment of having got frightened, nevertheless broke into camp with all their fury from the Vidyapeeta site. It is from this point one could assert with justification the commencement of the unlawful assembly with the common object of causing hurt to the detainees.

Law relating to membership of unlawful assembly and vicarious liability

Section 138 of the Penal Code defines an unlawful assembly. For the purpose of this case it is sufficient to state that an unlawful assembly of five or more persons is designated an unlawful assembly, if the common object of the persons comprising that assembly is to commit any offence.

Section 139 of the Penal Code provides that" whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly or continues in it, is said to be a member of an unlawful assembly".

The effect of this section was considered in the early case of Kulatungav Mudalihamy (1)where it was held that the prosecution must prove that there was an unlawful assembly with a common object as stated in the charge. So far as each individual is concemed, it had to be proved that he was a member of the assembly which he intentionally joined and that he knew the common object of the assembly.

The vicarious liability imputable on the basis of being a member of

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an unlawful assembly as provided for in section 146 of the Penal Code reads as follows:-

"If an offence is committed by any member of an individual assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."

In terms of that section, for vicarious liability to be imputed on the members of an unlawful assembly the prosecution must prove either:-

(a) that the offence was committed in prosecution of the common object of the unlawful assembly, or

(b) that the members of the unlawful assembly knew that the offence was likely to be committed in prosecution of the common object.

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(Vide Andrayes v Queen [(2)])

It is well settled law that mere presence of a person in an assembly does not render him a member of an unlawful assembly, unless it is shown that he has said or done something or omitted to do something which would make him a member of such an unlawful assembly or where the case falls under section 139 of the Penal Code. Dr. Gour in Penal Law of India discusses the law in respect of unlawful assembly as follows: (VoLII page 1296-11th Edition) "All persons who convene or who take part in the proceeding of an unlawful assembly are guilty of the offence of taking part in an unlawful assembly. Persons present by accident or from curiosity alone without talking any part in the proceedings are not guilty of that offence, even though those persons possess the power of stopping the assembly and fail to exercise it.

"Mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under section 142 I. P.C If members of the family of the appellants and other residents of the village assembled, such persons could

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not be condemned ipso facto as being members of that unlawful assembly. It would be necessary therefore for the prosecution to lead evidence pointing to the conclusion that all the appellants had done or been committing some overt act in prosecution of the common object of the unlawful assembly. Where the evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons like guns, spears axes etc., this kind of omnibus evidence has to be very closely scrutinized in order to eliminate all chances of false or mistaken implication."

Dr. Gour at page 1299 states that" The first thing to remember in cases of this nature is that where a large number of persons has assembled and some of them resort to violence or otherwise misbehaved it need not necessarily mean that every one of the persons present actually shares the opinions, intentions or objects of those who misbehave or resort to violence.

"In fact the possibility of some of the persons actually resenting or condemning the activities of the misguided persons cannot be ruled out. Caution should therefore be exercised while deciding which of the persons present can be safely described as members of an unlawful assembly. Although as a matter of law, an overt act on the part of a person is not a necessary factor bearing upon his membership of an unlawful assembly, in a case of this nature it will be safer to look for some evidence of participation by him before holding that he is a member of the unlawful assembly".

It would be helpful to reproduce the following passages from RATANLAL and DHIRAJLAL's Law of Crimes dealing with the same issue. (Vo/.1) (24th Edition pages 598 and 599).

"It is settled law that mere presence of a person at the place where the members of unlawful assembly had gathered for carrying out their illegal common objects does not make him a member of such assembly. The presumption of innocence would preclude such a conclusion. Whether a person was or was not a member of unlawful assembly is a question of fact".

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"Whenever in uneventful rural society something unusual occurs, more so where the local community is faction ridden and a fight occurs amongst factions, a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an event mere presence in the unlawful assembly should not be treated as leading to the conclusion that the person concerned was present in the unlawful assembly as a member of the unlawful assembly. Vicarious liability would attach to every member of the unlawful assembly if that member of the unlawful assembly either participates in the commission of the offence by overt act or knows that the offence which is committed was likely to be committed by any member of the unlawful assembly in prosecution of the common object of the unlawful assembly and becomes or continues to remain a member of the unlawful assembly. If one becomes a member of the unlawful assembly and his association in the unlawful assembly is clearly established, his participation in commission of the offence by overt act is not required to be proved if it could be shown that he knew that such offence was likely to be committed in prosecution of the common object of the unlawful assembly. But while finding out whether a person was a curious spectator or a member of an unlawful assembly it is necessary to keep in mind the life in a village ordinarily uneventful except for small squabbles where the village community is faction ridden and when a serious crime is committed people rush just to quench their thirst to know what is happening.

"Where a large crowd collected, all of whom are not shown to be sharing the common objects of the unlawful assembly, a stray. assault by anyone accused or any particular witness could. not be said to be an assault in prosecution of the common object of the unlawful assembly so that the remaining accused could be imputed the knowledge that such an offence was likely to be committed in prosecution of the common object of the lawful assembly.

"A mere innocent presence in an assembly of persons does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused

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shared the common object of the assembly. Thus a Court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left at any stage during its activities is in law guilty of every act committed by it from the beginning to the end or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage but at all the crucial stages and that he shared the common object of the assembly at all these stages. It is not uncommon that an unruly crowd on the rampage may contain some miscreants who may go beyond the common object and commit ad hoc crimes graver than the mob had as its objective."

(1) ASSESSMENT OF CULPABILITY ACCUSED-APPELLANTS

(A) 1st accused-appellant (*Munasinghe Arachchige Sammy*)

The evidence which is seemingly incriminatory against the 1st accused-appellant emanates from two witnesses namely Ariyasena and Piyasena. These two witnesses had arrived at the scene at two different times and speak to facts and circumstances after the attack on the camp had virtually ended which was evident by the fact that when they arrived at the scene billets were on fire. As between Ariyasena and Piyasena, the first to arrive at the scene was Ariyasena.

E.A.C. Ariyasena, a postman attached to Makulella Post Office on his way to work around 7.00 a.m. on 25.10.2000 had seen a large gathering of people around the camp. After his work he came back to the camp around 8.20 or 8.30 and found two billets on fire and crowd of 3000 - 4000 people gathered at various points, namely, Vidyapeeta grounds, near the gate and around the camp. In his view the crowd inside the camp, was in the region of 700-800, who were armed with clubs. Driven by a desire to ascertain the plight of the detainees, some of whom were known to him, he entered the camp through the cemetery side and saw a young boy falling on to the fire and rescued that boy. Soon thereafter another boy came and informed him that the injured boy was his brother.

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Ariyasena looked for some water and went towards the kitchen and having failed to find some water he took the boys along the edge of the ground, when someone struck him a blow on his back. On turning round he saw a crowd of abQJ.It20-30 armed with clubs, among whom was the 1st accused-appellant.

The Trial-at-Bar had erroneously stated that after receiving a blow on his back when Ariyasena turned round he saw only the 1st accused-appellant armed with a club which could lead to a wrong inference being drawn that it was the 1st accused-appellant who struck Ariyasena when he was taking the two boys to a safer place (page 66 of the judgment)

There was another item of evidence which could give a different complexion in respect of the attitude of some people who were gathered inside the camp, towards the detainees, if viewed in proper perspective. Ariyasena disclosed that he called for help from a person whom he described as "Hitchchi" to take the injured boys to Vidyapeeta grounds and he (Hitchchi) obliged even though with some reluctance, (vide Vol. V pages 2152 and 2164). It must be noted that the people inside the camp were found armed with clubs (vide Vol. V.P2134).

The question may be justifiably posed as to why 1st accused appellant did not assist Ariyasena to take the injured boys out of the camp, if he was only an innocent villager. It has to be recalled that Ariyasena did not seek assistance from the 1st accused-appellant and someone in the crowd had shouted whether Ariyasena was a tiger. This would show that there were some elements inside the camp who had strong feelings against the detainees. Therefore the difficult question is how to distinguish between people who formed the unlawful assembly to cause hurt to the detainees, and the innocent villagers who had came there to witness the incident who could be falling into the category of "Hitchchi", due to the circumstances peculiar to this case, which would be enumerated later in the judgment.

The Trial-at-Bar had observed that if Sammy (1st accused appellant) had no intention to cause hurt to the detainees without going into the camp with a club in hand at the commencement of the attack, he could have moved out of the camp. Accordingly

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Trial-at-Bar was of the view that 1st accused-appellant's presence inside the camp at the commencement of the attack armed with a club, was sufficient to draw the inference that he was a member of the unlawful- assembly with the object of causing hurt to the detainees.

The finding of the Trial-at-Bar that the 1st accused-appellant was present at the commencement of the attack is erroneous for the reason that there was no evidence to the effect. The evidence of Piyasena does not support the proposition that the 1st accused appellant was near the camp with a club in hand at the commencement of the attack. It is to be emphasized that Piyasena had arrived at the camp between 9.00 and 9.30 a.m. and he had seen the 1st accused-appellant near Sugathan mama's boutique which was 150 meters away from the camp. It is manifest that when Piyasena came to Sugathan Mama's boutique the attack was almost over and the billets were on fire. This is evidenced by the fact that Captain Dematapitiya who arrived at the camp after 9.45 a.m. dispersed the crowd assembled near Sugathan Mama's boutique. It must be noted that within 20 minutes after the arrival of Piyasena, the army had come and dispersed the crowd. Therefore there was no evidence to suggest that the 1st accused appellant was found near the camp by Piyasena, at the commencement of the attack on the camp, having assembled near Sugathan Mama's boutique.

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It is to be noted that the Trial-at-Bar too had observed at page 27 of the Judgment that when Piyasena arrived at the scene the camp was on fire and detainees were 'finished' implying that they were not alive by that time.

On an overall examination of the evidence, the presence of a large gathering of people ranging from a minimum of 500 persons to three to four thousand persons in and around the camp could be due to several reasons. It was revealed that among the gathering, were a Buddhist Priest of the temple, women, students of Vidyapeeta and ordinary villagers (vide evidence of Piyasena). The reasons for the unusual gathering of people could be summarized as follows:-

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(1) the incident on 24th night involving detainees which culminated in the removal of the Police Post;
(2) the news that the detainees who were suspected of having connections with the L.T.T.E. taking control of the camp;
(3) the information that the Deputy Commander of the camp Lt. Abeyrathne had been injured due to an attack by a detainee.
(4) the decision of the villagers to stage a peaceful satyagraha in the morning calling upon the authorities to remove the camp from Bindunuwewa and the publication of posters in the town to that effect.
(5) The fear and anxiety of villagers about their safety and the curiosity to know as to what is happening in the camp.

In view of the circumstances peculiar to this case as enumerated above which has generated an unusual interest arTong the villagers in respect of the incident at the camp, it is justtiable to expect a group of innocent villagers who mayor not form the majority to gather without any intent of causing hurt to the detainees. In the circumstances it would be safer to look for some evidence of participation by each person alleged to be a member before holding such person as a member of the unlawful assembly, lest innocent persons be punished for no fault of theirs although as a matte of law an overt act is not a necessary factor bearing upon membership of an unlawful assembly.

In the light of the material adverted to in the preceding paragraph I am of the view that it is unsafe to arrive at a finding that the 1st accused-appellant was a member of the unlawful assembly with the object of causing hurt to the detainees named in the indictment.

(B) 2nd accused-appellant (*Sepala Dassanayake*)

The evidence to impute liability on the 2nd accused-appellant emanates fro, Wickramasinghe Banda, a technical officer of Vidyapeeta (Training College). He testified that he saw 2nd accused-appellant coming out of the main entrance of the camp with a club n hold.

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He admitted iI his evidence that his statement to the C.I.D. was based mainly on the facts disclosed to him by the Vice Chancellor

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and other villagers. He referred in particular to the fact that it was from the Vice Chancellor that he came to know that the 2nd accused-appellant was armed with a club. He admitted that he gave false evidence in Court for fear of reprisal by the villagers. Nevertheless at a subsequent stage of his evidence he stated that he actually witnessed the incident and that his evidence was not false or hearsay.

Having regard to the material on which he gave false evidence in respect of the 2nd accused-appellant, it is not prudent to rely on his evidence to sustain a verdict of guilt pronounced on the 2nd accused-appellant. (C) 3rd accused-appellant *(Rajapakse Mudiyanselage Premananda)*

The evidence against the 3rd accused-appellant emanates from the following witnesses:-

(1) Don Sugath Jayantha
(2) Rick Anderson
(3) Dr. E.A.G. Wijeratne

The 3rd accused-appellant had gone with Sugath Jayantha and Padmananda to the Camp as they had heard that the detainees were attacking the village. The 3rd accused-appellant had alighted from the vehicle near the Agricultural Training center and lad gone into the camp where there was a commotion. After (bout 15 minutes he had come running with a bleeding wrist injury stating that he had cut his hand by an aluminum sheet. He lad taken treatment for the injury from Dr. Anderson and given his name as Siripala.

The Trial-at-Bar had held that since 3rd accused-appellant had stayed inside the Camp for about 10-15 minutes, he should explain as to how he got injured; his subsequent conduct namely, giving a false name to Dr. Anderson raises suspicion and t/at he tried to cover up as to how the injury occurred.

There is no dispute that the 3rd accused-appellant had gone into the camp and stayed there for 10-15 minutes end that he had received a cut injury whilst he was inside the camp

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It is to be noted that the suggestion to go to the camp had come from Padmananda who accompanied Jayantha and the 3rd accused-appellant and the reason for that was given by Padmananda himself that the detainees were attacking the village. On their way to the camp they had refrained from discussing anything pertaining to the incident in the camp suggestive of any positive act either

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offensive or defensive in nature. It would appear that their visit to the camp was solely motivated by curiosity on the information that the detainees were attacking the village. This attitude is clearly reflected by the fact that the 3rd accused appellant had gone into the camp unarmed.

Lucas principle

The prosecution sought to apply the principle laid down in Rex v Lucas(3) and followed in the local case of Karunanayake v Karunasiri Perera(4). The principle laid down in Lucas case was that statements made out of Court which are proved or admitted to be false in certain circumstances amount to corroboration. Lies proved to have been told in Court by a defendant is equally capable of providing corroboration.

It is to be noted that a lie told out of court, or in court to be capable of amounting to corroboration must satisfy the following requirements:-

(1) It must be deliberate
(2) It must relate to a material issue
(3) The motive for the lie must be a realization of guilt and fear of the truth
(4) The statement must be clearly shown to be lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness

There is no doubt that the 3rd accused-appellant had given a false name to Dr. Anderson in seeking treatment for his injury found on the wrist area. There is no explanation either from Sugath Jayantha or from the 3rd accused-appellant for giving a false name to the doctor. What has to be ascertained is whether the motive for the falsehood by the 3rd accused-appellant was the realization of

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the guilt and a fear of the truth. In other words the court has to ascertain whether he knew, that if he told the truth, he would be sealing his fate.

Neither Dr. Anderson nor Dr. Wijeyratne who examined 3rd accused-appellant on 30th November rejected the proposition that the injury found on his wrist area could be caused by an aluminium sheet. In fact Dr. Wijeyratne had confirmed that such an injury could be caused by a sharp edged surface. Therefore there is no material to reject the assertion by the 3rd accused-appellant that the injury was caused by an aluminum sheet. It would appear that Dr. Anderson had been satisfied with the statement made by Jayantha that the injury found on the 3rd accused-appellant was caused by an aluminium sheet. There was no evidence to suggest that Dr. Anderson had inquired from the 3rd accused-appellant as to the manner the injury was caused.

There was no allegation that the 3rd accused-appellant had given a false address or insufficient address although the name he gave was false. Dr. Anderson

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had noted in his register that the patient named Siripala was brought by Sugath Jayantha, the van driver known to him.

In this situation the identity of the 3rd accused-appellant could be readily obtained from the person who brought him for treatment. Accordingly it is difficult to state that by giving his name as Siripala he could effectually prevent his identify being established. In the circumstances it is not justifiable to hold that the 3rd accused appellant knew that if he told the truth, he would be sealing his fate. Further there was no material to suggest of an attempt being made to suppress the evidence of Jayantha relating to the visit to the Binunuwewa camp on 25.10.2000.

The rule laid in Rex v Lucas (supra) is that a falsehood uttered in Court or outside court by a defendant could be taken as corroboration of the evidence against a defendant. The evidence which is sought to be corroborated by the alleged false statement is the evidence of Sudath Jayantha that the 3rd accused-appellant had gone into the camp unarmed and after 15 minutes he had come out of the camp with a cut injury on his right wrist area.

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Nevertheless the question is on these facts whether an irresistible inference could be drawn that he intentionally joined an unlawful assembly with the common object of causing hurt to the detainees.

Ellenborough dictum

It was contended by the prosecution that by applying the dictum of Lord Ellenborough, in R. v Cochrane(5), it was obligatory on the 3rd accused-appellant to offer an explanation as to the manner he received an injury on his wrist area.

It is necessary to examine the dictum of Lord Ellenborough in Rex v Cocharane (supra) which reads as follows:-

"No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but nevertheless, if he refuses to do so where a strong prima facie case has been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

This dictum has been applied in Sri Lanka both in cases of circumstantial and direct evidence. It must be noted that in the following cases this dictum was applied where a strong prima facie case had been made out against the accused.

(1) Inspector Arendstz v Wilfred Peiris (6)
(2) R. v Seeder Silva (7)
(3) King v Wickramasinghe (8)
(4) King v Peiris Appuhamy (9)
(5) King v Endoris (10)

On a careful survey of these cases it is manifest that a condition precedent to the application of this dictum is that there must exist a strong prima facie case made out against the accused.

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In the instant case the purported incriminating circumstances against the 3rd accused-appellant relied upon by the prosecution were as follows:-

(1) that he was inside the camp for about 10-15 minutes and
(2) that he came running with a bleeding injury on his wrist.

As against these purported incriminating circumstances there were other circumstances as well, enumerated below which require careful consideration before one arrives at a decision whether a strong prima facie case has been made out:

(1) that the suggestion to visit the camp originated from Padmananda, the other van driver

(2) that the information relating to the situation in the camp was provided by Padmananda

(3) that no discussion took place on their way to the camp of any action contemplated by the 3rdaccused-appellant

(4) that he went inside the camp unarmed

(5) that at the time he went into the camp there was a commotion

(6) that he came out running with a bleeding injury stating that it was caused by an aluminum sheet

(7) that there was no medical evidence to contradict the position that the injury was not consistent with having been caused by an aluminum sheet

(8) that aluminum sheets were found inside the camp.

Having examined the totality of the aforementioned circumstances I am of the view, that the prosecution had failed to establish a strong prima facie case against the 3rd accused appellant which warrants the application of the dictum of Lord Ellenborough.

Conclusions

For the aforementioned reasons the convictions entered against 1st, 2nd and 3rd accused-appellants cannot be sustained.

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Accordingly I allow their appeals and set aside the convictions and sentences in respect of 1st, 2nd and 3rd accused-appellants and acquit them of all charges preferred against them.

(II) ASSESSMENT OF CULPABILITY OF 4th ACCUSEDAPPELLANT

(4th accused-appellant - Senaka Jayampathy Karunasena)

Submissions on behalf of 4th accused-appellant

Learned President's Counsel for the 4th accused-appellant submitted that the Trial-at-Bar had seriously misdirected itself on the following matters in assessing the culpability of the 4th accused appellant in respect of the charges levelled against him.

(1) That the charges based on unlawful assembly are misconceived in respect of the 4th accused-appellant since there was no factual or legal basis to have joined him along with the unruly crowd as members of the unlawful assembly.

(2) That the prosecution must establish necessary mens rea in respect of illegal omissions and positive (illegal) acts to impute vicarious liability in terms of section 146 of the Penal Code.

(3) That the prosecution must present a consistent case against the accused-appellant whether by way of illegal omissions or positive (illegal) acts or both.

Basis of the prosecution case against 4th accused-appellant

Learned Solicitor-General submitted that the prosecution presented its case against the 4th accused-appellant on the basis of illegal omissions and positive (illegal) acts. The allegation of illegal omissions consisted of the general allegation of intentional failure to comply with the duty imposed by law and certain specific illegal omissions by Police officers. Two specific instances of illegal omissions highlighted were:

(a) failure to arrest miscreants and
(b) failure to take action when certain detainees were attacked inside the truck.

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The positive (illegal) acts enumerated by the prosecution were

(a) shooting at the detainees and
(b) removal of dead bodies with a view to destroy evidence

Law relating to illegal omissions

The relevant provisions of the law which govern illegal omissions are found in sections 30, 31 and 42 of the Penal Code.

Section 30 - "In every pan of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions. "

Section 31 (1) 'The word 'act' denotes as well a series of acts as a single act."

Section 31 (2) "The word 'omission' denotes as well a series of omissions as a single omission"

Section 42 person is said to be "legally bound to do" whatever it is illegal in him to omit"

In Criminal Law by Wayne R. Lafave and Austin W Scott (Second Edition (1986) at page 202) illegal omissions are defined as follows;

"More difficult, however are crimes which are not specifically defined in terms of omissions to act but only in terms of cause and result. Murder and manslaughter are defined so as to require the killing of another person; arson so as to require the burning of appropriate property. Nothing in the definition of murder, manslaughter or arson affirmatively suggests that the crime mayor may not be committed by omission to act. But these crimes may in appropriate circumstances be thus committed. So, a parent who fails to call a doctor to attend his sick child may be guilty of criminal homicide if the child should die for want of medical care, though the parent does nothing of an affirmative nature to cause the child's death"

At page 210, it is stated that "one's failure to act to save someone toward whom he owes a duty to act is murder if he knows that failure to act will be certain or substantially certain to result in death or serious bodily injury. If he does not know that

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death or serious injury is substantially certain to result, but the circumstances are such as to involve a high degree of risk of such death or injury if he does not act (in some jurisdictions he must, in addition, be conscious of this risk), his failure to act will afford a basis for liability for involuntary manslaughter. A failure to act which, under the circumstances, amounts to no more than ordinary negligence would not, by the general rules of criminal homicide make him liable for either murder or

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manslaughter. Thus it cannot accurately be said that an omission to act (assuming a duty to act) plus death equals murder or equals manslaughter without considering the mens rea requirements of those crimes."

The above proposition of the law would make it clear that the mere fact that there was a duty to act in the given circumstances and death has resulted due to the said failure to act will not be sufficient to establish the offence unless the prosecution proves that the omission was intentional.

Section 139 of the Penal Code lays down that "Whoever being aware of facts which render any assembly an unlawful assembly, intentionally joins the assembly or continues in it, is said to be a member of an unlawful assembly".

Therefore the vital ingredient of the offence of being a member of an unlawful assembly is the intention to join the assembly with a particular common object. The onus of proving the ingredient lies on the prosecution. In this case the prosecution has sought to rely both on positive (illegal) acts and illegal omissions to establish the necessary mens rea on the part of the 4th accused-appellant. It is the duty of the prosecution to present its case consistent with this position. In order to establish an intention to join the unlawful assembly the purported (illegal) positive acts and the illegal omissions must necessarily point in the same direction.

The prosecution must necessarily rely on circumstantial evidence to establish that the 4th accused-appellant intentionally joined the unlawful assembly with the object of causing hurt to the detainees. Therefore the inescapable inference from both the positive acts and the omissions taken together must be that the 4th accused-appellant had only the intention to join the unlawful

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assembly with the common object of causing hurt to the detainees. If the proved facts do not exclude other reasonable inferences then a doubt arises whether the inference sought to be drawn is correct. (Vide Rex v. Seedar de Silva at 344 (supra) King v Abeywickrema[11]

Insufficiency of action: Does it amount to inaction?

The prosecution contended that the Police did some acts to prevent the commission of offences but the action taken viewed in the light of final outcome, namely, death of 27 detainees and injuring 14 was insufficient and therefore the 4th accused-appellant entertained the common object of other members of the unlawful assembly.

There is no dispute that the Police Officers are bound to prevent the commission of offences. Chapter VIII of the Code of Criminal Procedure deals with the powers of the Police Officers to command any unlawful assembly which is likely to cause a disturbance of the public peace to disperse and their right to disperse such

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assembly and if the said assembly shows a determination not to disperse, the Police are empowered to fire at them with a view to disperse such assembly.

Section 56 of the Police Ordinance lays down the duties of Police Officers as including the duty to preserve the peace and detect and bring offenders to justice and to use their best endeavour and ability to prevent all crimes, offences and public nuisances.

It is necessary to highlight that a decision with regard to the course of action that should be taken in situations of this nature is essentially a matter within the discretion of the officer in charge of the Police party. Departmental Order No. A 19 Rule 29 states "It will be appreciated that no rules or regulations can be drawn up for every conceivable contingency that may arise. The man on the spot that is the Senior Police Officer at the scene must decide what best he should do and use his judgment and discretion as the situation may seem to dictate".

Part III B (2) of the said Departmental Order states as follows:-

"In dealing with disorderly crowds the officer in charge of the Police must consider carefully the number of men at his disposal. Due regard must be paid to the particular circumstances of each case and as to whether the party of Police is strong enough to

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avoid any danger of being rushed and overpowered if the crowd is engaged in hand-to-hand combat"

Having regard to the departmental orders referred to above if the officer in charge has exercised his discretion bonafide and to the best of his ability, he cannot be faulted for the action he has taken even though it may appear that another course of action could have proved more effective in the circumstances.

<u>Purported illegal omissions and positive (illegal) acts of the Police establishing their complicity</u>

The general allegation that the Police did nothing to save the detainees came mainly from the two detainees namely Ganeshamoorthy Ashokan and Kandasamy Chandrasekaran. Ashokan stated that the Police did not do anything when they saw crowds outside the camp carrying clubs. However in re-examination he stated that Police shot at the fence to save them (vide Vol. III page 1038).

Chandrasekaran stated that the Police did not come and save them when they were attacked but later admitted that he did not see any Police at that time but he saw Police Officers at the initial stage when they were asked to stay inside the billets.

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The evidence relating to alleged illegal omissions of the Police must be assessed against the other evidence of detainees who stated that the Police took steps to save them. (Vide evidence of Uttaranathan - Vol 3 page 953) (Sinnatamby Rajendran) (Vol. III page 1179) (Ganeshamoorthy Ashokan - Vol. IIIpage1031and 1038)

It was submitted by the prosecution that the 4th accused-appellant had admitted in his dock statement that he was stationed near the main entrance to the camp at the time of the attack implying that he could see the detainees being attacked and merely stood by and watched the attack. On a reading of the said dock statement it would appear that there was no such admission. He had stated that he came up to the entrance when the attack commenced and immediately ordered his men to shoot in the air and proceeded towards the camp. He had explained that the reason for not shooting at the attackers directly was the inability to distinguish between the detainees and the villagers in the commotion. It was revealed that he was not possessed of even tear gas equipment at the time, as seen from the evidence of A.S.P.

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Dayaratne who stated that he brought tear gas equipment when he came to the camp that morning.

Two purported specific acts of illegal omissions

(1) Failure to arrest miscreants at the time of the incident.

It was submitted that the alleged omission would indicate that the Police did entertain an intention to share the common object of the members of the unlawful assembly.

In dealing with this allegation one has to be mindful of the fact that only 65 officers were available to the 4th accused-appellant at the time of the break-in by the unruly mob. The 4th accused-appellant was not in a position to muster the full strength of the Police unit at the entrance to the camp for the reason that some of his men were deployed around the perimeter of the camp running into approximately 1.5 kilometers. In the circumstances it would be clear that the Police were greatly outnumbered. Considering the public feeling against the detainees and the fact that the Police were getting outnumbered, any attempt to arrest the offenders could have led to a backlash against the Police. It is to be recalled that when Police did in fact arrest 367 persons on the following day, the villagers stormed the Police demanding their release on bail.

It was submitted by the prosecution that the Trial-at-Bar had held that if the 4thaccused-appellant really wanted to guard the camp and to protect the detainees he could have positioned all his men around the billets without positioning his men around the perimeter of the camp. This proposition is clearly unreasonable for the

reason that the 4th accused-appellant was under orders not to enter the camp premises.

In the light of the aforesaid material it is not justifiable to draw the inference that the failure to arrest the offenders on that day was an indication that the 4thaccused-appellant shared the common object of the unlawful assembly. In this regard what matters is the intention of the officers as would be seen from their actions and not on the extent of the damage.

(2) Failure to take action when detainees were attacked inside a truck.

Two detainees namely Nicholas Edwin and Thambirajah Navarajah had given evidence that they were attacked by the crowd in the presence of the Police inside the truck parked at the

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entrance to the camp. However, Gamini Rajapakse a villager who gave evidence at the trial claimed that when a detainee who came running towards the Police truck near the turn off to the camp was attacked, there were no Police Officers at the point.

Purported positive (illegal) acts of the Police

The prosecution claimed that certain items of evidence led at the trial had taken the prosecution into a new dimension which shows that in addition to illegal omissions the Police had done overt and positive acts. The purported positive acts were:

(1) shooting by the Police resulting in the death of 4 detainees;
(2) removal of dead bodies with a view to destroying evidence.

(1) Shooting by the Police

The evidence with regard to Police shooting emanates from the following witnesses:-

(1) Ganeshamurthy Ashokan
(2) Perumal Easwaran
(3) Sinnathamby Sudaharan
(4) Kandasamy Chandrasekaran

The medical evidence has revealed that only one detainee had sustained and succumbed to gun shot injuries and injuries found on him were slanted upwards.

Ganeshamurthy Ashokan stated that he was shot by the Police when he with other detainees ran for protection. But in reexamination he conceded that the Police

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shot in the air and shot at the fence to save them and at the point he lay on the ground. (Vol. III page 1038)

Perumal Easwaran claimed that he was shot in the right hand and his finger was severed. However evidence of Dr. Kahandage clearly showed that he had cut injuries on both hands and a laceration in the right hand which had been caused by sharp edged weapons and blunt weapons. (Vol. IV pages 1621 - 1623)

Though Sinnethamby Sudaharan claimed that he sustained gun shot injuries while he was running towards the playground. Dr. Chandana, who examined him testified that he had minor

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injuries on the face and right shoulder caused by a blunt weapon. (Vol. IV pages 1561-1566)

Despite the assertion by Kandasamy Chandrasekaran that a detainee named Karunakaran was shot in the leg near the tube well, it was revealed at the post mortem examination held by Dr, Wijeratne on the body of Karunakaran that he had stab and cut injuries which could be caused by a sharp weapon and injuries caused by blunt weapons. It is to be noted that he had no gun shot injuries. (Vol. IV pages 1561 - 1566).

On the available evidence it is apparent that the Police fired shots in the air from a lower elevation, from the road outside the camp. Most of the empty cartridges were found on the road near the entrance to the camp.

On a careful analysis of the evidence of 4 witnesses who testified on the act of shooting, it would appear that only one detainee had sustained gun shot injuries. The allegation that the Police shot at the detainees is not borne out by medical evidence. In the circumstances it is highly probable that the detainee who succumbed to gun shot injuries was accidentally shot when the Police were firing in the air.

The Trial-at-Bar had failed to evaluate the evidence with regard to the alleged shooting and had accepted the evidence of the detainees at its face value.

(2) Removal of dead bodies

It was submitted that the Trial-at-Bar had held that the Police had removed the dead bodies, without having recourse to normal procedure with a view to destroy evidence. A.S.P. Dayaratne conceded that he was instructed by the D.I.G. to remove the bodies to preserve the peace in the area as there was a large concentration of Tamil estate workers in the surrounding area.

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In view of the above evidence it was a total misdirection by the Trial-at-Bar to hold that dead bodies of the detainees were removed from the scene with a view to destroy evidence.

<u>Positive acts by the Police which would negate the proposition that there was an intentional failure on their part to prevent the commission of offences</u>

The following items of evidence would reveal that Police officers on duty around the camp did their best to prevent or minimize the harm which was being caused by the unruly mob. They would negate the position that there was an intentional failure on the part of the Police and the 4th accused-appellant in particular to prevent the commission of offences and share the common object of causing hurt to the detainees. Even if the matter is left in a state of doubt, it is to be highlighted that the prosecution had failed to establish the necessary mens rea.

(1) Police shot in the air with a view to disperse the crowd immediately when the crowd broke into the camp [(Vide evidence of Capt. Dayaratne [Vol. II page 147] and evidence of Ashokan. [Vol. III page 1038)].

14 empty cartridges were found at the bend near the turn off to the camp and 6 empty cartridges were found near the turpentine tree inside the camp. The leaf of the turpentine tree had been damaged at a height of 10.7 meters indicating that firing was in the air.

(2) The Police drove away groups of people preventing them from entering the camp at various points [Vide evidence of Capt. Abeyratne (Vol. II page 207) Lt. Abeyratne (Vol. II page 275) Jeganathan Uttamanathan (Vol. III page 955) P. C. Premadasa (Vol. III pages 834-837) Gunapala - Grama Arakshaka. (Vol. III pages 912 & 913)].

(3) Police officers intervened and saved detainees when they were being attacked [Vide evidence of Uttamanathan (Vol. III pages 952 & 954) Sinnathamby Rajendran. (Vol. III page 1179)].

(4) Police took steps to despatch injured detainees to the hospital [Vide evidence of Ashokan. (Vol. III page 1031)]

(5) The 4th accused-appellant deployed Police Officers who reported for duty under him having regard to the most vulnerable areas. It is to be noted that the available Police Officers had to be deployed around 8 1/2 acres of land which is approximately 1.5 kilometers.

(6) When the situation got out of hand the 33rd accused who was under the 4th appellant, called for help twice that morning.

(7) 4th accused-appellant gave clear instructions to the officers who were under him (a) not to allow anyone to enter the camp and (b) not to shoot unnecessarily except upon superior orders.

Conclusions

After a careful examination of all the material enumerated in the foregoing paragraphs, I am of the view that there is no merit in the contention that 4th accused-appellant along with the villagers, was a member of the unlawful assembly with the common object of causing hurt to the detainees.

In the circumstances, I allow the appeal and set aside the conviction and sentences entered against 4th accused-appellant and acquit him of all the charges preferred against him.

JAYASINGHE, J. - I agree.

UDALAGAMA, J. - I agree.

DISSANAYAKE, J. - I agree.

FERNANDO, J. - I agree.

Appeals allowed.

Ameer Ali And Others v. Srilanka Muslim Congress And Others - SLR - 189, Vol 1 of 2006 [2005] LKSC 14; (2006) 1 Sri LR 189 (1 July 2005)

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AMEER ALI AND OTHERS

VS

SRILANKA MUSLIM CONGRESS AND OTHERS

SUPREME COURT,
S. N. SILVA, CJ,
JAYASINGHE, J,
UDALAGAMA, J,
DISSANAYAKE, J AND
FERNANDO, J,
SC (EXPULSIONS) NO. 2/2005 WITH SC (EXPULSIONS) NOS 3 AND 4/2005
31ST MAY AND 3RD AND 7TH JUNE, 2005.

Constitutional Law- Article 99(13) (a) of the Constitution - Explusion from political party - Mala fides, bias and failure of natural justice - Invalidity of expulsions Policy of SLMC- Alleged failure to sign a pledge of loyalty to SLMC and its leader - Burden of proof to adduce evidence to support allegations against petitioners.

The petitioners in Applications Nos. 2 and 3/05 contested the Parliamentary elections as SLMC candidates and were elected to the Batticaloa and Trincomalee Districts respectively. The petitioner in Application No. 4/05, a SLMC member contested the Wanni District as a UNP candidate and was elected as Member of Parliament for that District, in terms of an electoral pact between the SLMC and the UNP.

The petitioners supported the then President's National Advisory Council for Peace and Reconciliation and were appointed Project Ministers for Batticaloa, Trincomalee and the Wanni Districts respectively. This resulted in a letter by the 3rd respondent, Secretary, SLMC addressed to the petitioners calling upon them to sign a. pledge of loyalty to the SLMC and its leader (the 2nd respondent) and the High Command, and to follow their policies and directions. The petitioners severely criticized the leader and the party for not
joining the peace process to the detriment of Muslims.

Consequently, the 3rd respondent informed the petitioner that disciplinary action will be taken against the petitioners. The 2nd respondent denied the allegations against

the SLMC and threatened disciplinary action against the petitioners. The allegations by the petitioners against the SLMC included criticism for signing an amended electoral pact with the UNP and allowing three SLMC members to join the UNP.

In the absence of clarification as to who was the disciplinary authority, whether it was the High Command of the politbureau as asserted by the 3rd respondent and criticism against the SLMC and its leader, the petitioners refused to attend an inquiry at a hotel and were summarily expelled from the SLMC by the High Command by letter dated 04.04.2005, and without hearing them.

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Held:

Notwithstanding a purported withdrawal of the letters of expulsions by the 3rd respondent on 28.05.2005 whilst the petitions were pending -

(a) The Supreme Court had jurisdiction to determine the validity of expulsions ;

(b) The expulsions were contrary to natural justice, mala fide and ultra vires the SLMC constitution;

(c) Minutes of the meetings of the High Command and polibureau were not produced in evidence. The burden of producing such evidence was on the respondents;

(d) The expulsion of the petitioner in Application No. 4/05 based on his purported expulsion from the UNP was invalid;

(e) expulsions of the petitioners from their political party were invalid;

(f) a Member of Parliament cannot be expelled from his party save on cogent grounds which are beyond doubt, in the public interest. The benefit of the doubt will be resolved in favour of the Member.

Cases referred to :

1. *Tilak Karunaratne v. Sirimavo Bandaranaike* (1993) Sri LR 91

2. *Gamini Dissanayake v. M. C. M. Kaleel and Others* (1993) 2 SriLR 135, 234

APPLICATIONS challenging expulsions from party.

D. S. Wijesinghe, P. C. with Sanjeewa Jayawardena, Priyanthi Goonaratne, Kaushalya Mo/ligoda and M. I.M. Azver for petitioners in Application Nos. 2/ 2005 and 3/2005

Wijayadasa Rajapase, P. C. with Kapila Liyanagamage and Rasika Dissanayake for

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petitioner in Application No. 4/.2005

Romesh de Silva, P. C. with Harsha Amarasekera for 1st and 2nd respondents in Application Nos. 2, 3 and 4/2005.

Ikram Mohamed, P. C., with A. A. M. Illias, Nizam Kariapper and Padma Bandara for 3rd respondent in Application Nos. 2, 3 and 4/2005

K. N. Choksy, P. C. with L. C. Seneviratne, P.C. Daya Pelpola, S. J. Mohideen, Ronald Perera and Shamila Amarawickrema for 4th, 5th and 6th respondents in SC Application No. 4/2005.

I. Demuni de Silva, Senior State Counsel for 4th and 5th respondents is SC Application Nos 1 and 3 of 2005 and for 7th and 8th respondents in SC Application No. 4/2005

Cur.adv. vult.

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1st July 2005

JUDGMENT OF THE COURT

The Petitioner in application No. 2/2005 has been a member of the 1st Respondent Party (SLMC). He contested the general election held in April 2004, as a candidate nominated by the SLMC and was the only nominee of the Party to be returned as a Member of Parliament for the Batticaloa District.

The Petitioner in application No. 3/2005, has been a member of the SLMC and contested the general election held in April 2004, as a candidate nominated by the party and was returned as a Member of Parliament for the Tricomalee District.

The Petitioner in application No. 4/2005 has been a member of the SLMC and was a nominee of the United National Party at the general election in April 2004, for the Wanni District. His name was included in the nomination paper of the United National Party on the basis of an electoral agreement with the SLMC and was returned as a Member of Parliament.

The three Petitioners have been expelled from the SLMC by letters dated 4th April 2005, sent by the 3rd Respondent, being the Secretary General of the Party. Since the expulsions were effected by letters bearing the same date and in view of the similarity in the relevant facts and circumstances, it was decided to hear these matters together.

These Petitioners have filed applications in terms of the proviso to Article 99 (13) (a) of the Constitution seeking declarations from this Court that their respective

expulsions from SLMC and in the case of the Petitioner in application No. 4/2005, the consequential expulsion from the United National Party, are invalid and that the seats held by them in Parliament have not become vacant consequent to such expulsions.

The circumstances leading to the impugned expulsions are similar in respect of all three applications. The Petitioners contend that they had serious differences of views in regard to the manner in which the Members elected from the SLMC Should conduct themselves in Parliament, with the 2nd Respondent, being the Leader of the Party. The charges on which the expulsions were made have a direct bearing on these differences .

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According to the sequence of events the first incident relevant to the expulsions is a letter dated 5.10.2004, sent by the General Secretary of the Party requesting the Petitioners to sign a pledge in the specimen form that was annexed, declaring loyalty and total allegiance to the Party, to its Leader and the High Command. The pledge also required the person to follow *inter alia* the polices and directions of the Leader and the High Command.

The Petitioners refused to sign the pledge and when they were called for explanations wrote letters dated 13.11.2004, stating, inter alia, that the requirement to sign the pledge is ultra vires the Constitution of the Party and they also raised questions as to whether three members of the Party were permitted to take membership of the United National Party, prior to their being nominated as Members of Parliament.

In the interim period the Petitioners wrote a joint letter dated 25.10.2004, to the Leader of the Party (P7) setting out serious criticisms of the conduct of the Leader in relation to the interests of the Party and of the Muslim community who have reposed confidence in the Party. In particular they criticized the decision of the Leader in not attending the meeting of the National Advisory Council for Peace and Reconciliation (NACPR) convened by Her Excellency the President to bring about a national consensus to achieve a just and durable solution to the ethnic problem that has devastated the country for more than two decades. They alleged that the failure of the Leader to cooperate in the national endeavour will have a serious impact on the interests of the Muslims of the North and East, who have been languishing in abject poverty and destitution in refugee camps for several decades. Further, that the mandate they received at the election was to make use of every opportunity to work towards a viable solution that would encompass the just and reasonable aspirations of the Muslims of the North and East. Accordingly, they informed the Leader that they would extend their fullest support to the Government in its endeavour to find a lasting solution to the problems identified by them which will benefit the Muslims in particular and the country at large, in general.

Shortly thereafter the 3 Petitioners were appointed as Project Ministers for Rehabilitation and Development for the Batticaloa, Trincomalee and Wanni

Districts, being the three Districts from which they have been elected.

The reply of the Leader to the Party is contained in a single letter dated 05.11.2004, addressed to all three Petitioners, the contents of which would be referred to later.

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The Petitioners thereafter received letters dated 19.11.2004 that were similary worded, requiring them to show cause as to why disciplinary action should not be taken against them, inter alia for anyone or more of the following, summarized as follows:

(a) failure to sign the pledge of allagiance to the Party and to the Leader;

(b) the acceptance of the post of Project Minister;

(c) The active support extended to the Government;

(d) joining the ranks of the Government Members in Parliament

The letters have been signed by the General Secretary and state that the action is taken on a decision of the High Command.

The Petitioners were requested to show cause on or before 30.11.2004, and be present at a meeting of the High Command to be held at the headquarters of the Party on 09.12.2004.

The Petitioners responded by letter dated 29.11.2004, requesting time to answer and were granted an additional 10 days time and were required to be present at the meeting of the High Command scheduled for 09.12.2004.

The Petitioners replied to the charges by letter dated 07.12.2004, denying the allegations and setting out most of the facts and circumstances included in the letter previously addressed to the Leader referred to above. They further stated that there is no validly constituted High Command in force and accused the General Secretary who wrote the letter that he would be liable to be dismissed from the Party in view of his signing the amended electoral agreement with the United National Party which had been disputed by the Petitioners in their previous correspondence.

By letter dated 20.12.2004, the Secretary General, disputed the contents of the reply and informed the Petitioners that they could present their case to the High Command and requested that a date be nominated in the month of January, on which date the matter would be heard at one of the Hotels that were specified.

It appears that no further action was taken in the matter until March 2005, when letters dated 01.03.2005, was received by the Petitioners, signed by the Secretary General who informed them that the Politbureau

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will go in to the show cause notice at a meeting on 12.03.2005 to be held at the Earls Court, Trans Asia Hotel at 5.00 p.m. The Petitioners were requested to be present. Another letter was received by the Petitioner bearing the same date sent by the Secretary General requesting the Petitioner to be present on Sunday 13th March at 5.00 p. m. at the same venue for a meeting of the High Command and at which meeting the High Command will go into the show cause notice that had been issued.

The Petitioners replied by letters dated 11.03.2005, referring to the two sets of Inquiries to be held by two bodies of the 1st Respondent party and stated that they were puzzled as to how they have been summoned to face two disciplinary inquiries on two successive dates in respect of allegations set out in one show cause notice The Petitioners sought specific clarification as to which particular body would seek to exercise disciplinary control. Thereupon letter dated 14.03.2005 was sent by the General Secretary to the Petitioners requiring them to be present at a meeting of the High Command to be held on 23.03.2005 at the Hotel specified above at 7.00 p.m.

The Petitioner responded by letter dated 21.03.2005, stating that the General Secretary has failed to clarify the several fundamental issues raised in letter dated 14.03.2005, and as such would not attend the meeting of the High Command on 23.03.2005. Thereupon the 2nd Respondent notified the expulsion of the Petitioners by letter dated 04.04.2005, referred to above. It is claimed that the decision for expulsion has been taken at the meeting of the High Command said to have held on 23.03.2005.

The Petitioners have challenged the expulsions on the following grounds:

(a) that the decisions for expulsion have been made in violation of the principles of natural justice, without affording a proper hearing to the Petitioners at a time when they had raised serious issues as to the particular body of the party that could exercise disciplinary control;

(b) that there are no grounds for the expulsion of the Petitioners, since they have acted at all times in the best interests of the SLMC, its collective membership and in keeping in mind the interests of the Nation;

(c) that the expulsions were mala fide and intended to victimize the Petitioners;

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(d) that the expulsions lack bona fides, since 3 members of the Party have been permitted to take membership of the United National Party, in violation of the Constitution of the 1st Respondent party.

(e) that the decisions have been activated through bias arising from differences

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within the Party by a group hostile to the Petitioners.

After this Court issued notice on the Respondents and when pleadings were completed, by letter dated 28.05.2005, addressed to the respective Petitioners, General Secretary of the Party stated that the High Command has taken into consideration the statements in the affidavits filed in Court and since the Petitioners have taken up the position that they were not afforded a hearing prior to adopting the extreme measure of expulsion, the High Command has decided to withdraw the expulsions communicated by letter dated 04.04.2005 in order to give a further opportunity to present their position before the Party. The withdrawal of the expulsions has also been communicated by letter bearing the same date to the Secretary General of Parliament.

Counsel for the 1, 2nd and 3rd Respondents, being the Party, its Leader and Secretary General, submitted that since the expulsions have been withdrawn it is unnecessary for this Court to make any decision as to the validity of the expulsions and that the proceedings should be accordingly terminated. On the other hand, the Petitioners contended that the withdrawal of the expulsions is conditional and restricted only to one of the grounds on which the expulsions have been challenged before this Court, namely the failure to comply with the principles of natural justice. The Petitioners contended that this Court should hear and determine the matter in its entirety.

In terms of Article 99(13) (a) of the Constitution, where a Member of Parliament ceases by expulsion to be a member of a recognized party on whose nomination paper, his name appeared at the time of becoming such Member of Parliament, his seat becomes vacant upon the expiration of a period of one month from the date of his ceasing to be such member. The proviso to the Sub-article states that the seat will not become vacant if prior to the expiration of one month the member applies to the Supreme Court and this Court detemines in such application that the expulsion was invalid. It is to be noted that the withdrawal of the expulsion by the 3rd Respondent on behalf of the 1st Respondent party was done on 28.05.2005, after a period of one month had elapsed from the date of the impugned expulsions. Thus the withdrawal was done at a time when this Court was

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seized with the matter and in terms of the proviso the seat will not become vacant only if this Court makes a determination that the expulsion is invalid. Accordingly the withdrawal by the 3rd Respondent does not per se result in a position where the expulsions become invalid and the Petitioners are correct in requesting a determination to be made by Court as to the invalidity of their expulsions.

The Petitioners submitted the letter seeking to withdraw the expulsions on the alleged non-compliance with principles of natural justice in arriving at a decision to expel the Petitioners, and this should be taken as a concession on the part of the 1st, 2nd and 3rd Respondents of this ground of invalidity.

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The sequence of events outlined above reveals that serious differences of views had arisen between the Petitioners, who were elected from 3 different Districts, presumably on the basis of the support extended by the voters of the respective Districts to the cause of the 1st Respondent party and their personal preference of the respective Petitioners as candidates most suited to serve their needs on the one hand and, the Leader of the Party on the other.

The long letter dated 25.10.2004 addressed by the Petitioners collectively to the Leader, the contents of which have been referred to above clearly state the concerns of the Petitioners from a perspective of what should be the policy of the party in relation to the ethnic issue and the serious adverse impact it has on the Muslims in the North and East. They have expressed serious concern as to the stand taken by the Leader on these issues and indicated that they would support the Government to serve the cause of the Muslims and their electorates best. This Court cannot in any way decide on the correctness of the matters stated by the Petitioners in their letter. Suffice it to state for the purpose of these applications, that the matters raised by the Petitioners relate to questions of policy to be decided by the Party in the interests of the Party and its voters. We have to note that there is no element of personal acrimony disclosed in the letter sent collectively by the Petitioners to the Leader.

The reply of the Leader dated 05.11.2004, on the other hand, commences on a note of hostility with the opening paragraph which reads as follows:

"I wish to deny all the assertions, comments and allegations contained in the said letter under reference, since they are false and made with an

A. E. M. G. Fernando v. People's Bank And Others - SLR - 215, Vol 1 of 2006 [2005] LKSC 15; (2006) 1 Sri LR 215 (8 July 2005)

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A. E. M. G. FERNANDO

VS

PEOPLE'S BANK AND OTHERS

SUPREME COURT,
BANDARANAYAKE, J
UDALAGAMA, J AND
DISSANAYAKE, J
SC APPLICATION (FR) 283/2004
28TH JANUARY AND 1ST AND 2 ND
MARCH, 2005

Fundamental Rights-Failure to grant extension of services-Abrupt termination of services-failure to give reason for premature termination of services beyond 28.06.2004-Legitimate expectation of extensions-Article 12(1) of the Constitution.

The petitioner was the Chief Manager of the Internal Audit Department of the People's Bank. On reaching 55 years age, he was given three extensions in terms of Circular No. 323/2001. His last extension was from 28.06.2003 to 28.06.2004. On 16.06.2004, twelve days before his 58th birthday, the letter P 18 was received (from the Bank) informing that his services will not be extended beyond 28.06.2004. No reasons were given for that decision.

The justification for the termination of services is contained in R4 filed with the objections of the Deputy General Manager. This appears to be a report by an officer albeit unsigned.

HELD:

(1) The sudden termination of services by P 18 at short notice and without reasons was violative of Article 12(1) of the Constitution.

(2) The petitioner had a legitimate expectation of receiving extensions up to the 60th year, in normal circumstance which expectation had been denied without adducing any reasons.

Case referred to :
1. *Surangani Marapona vs Bank of Ceylon and Others* (1997) 3 Sri L. R. 156

APPLICATION for relief for infringement of fundamental rights.

Saliya Peiris with C. Madanayake for petitioner.

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Wijedasa Rajapaksa, P. C., with Sasika Dissanayake for respondents

Cur.adv. vult

8th July, 2005

UDALAGAMA, J.

Admittedly the petitioner as at the date of this petition was the Chief Manager of the Internal Audit Department of the People's Bank and on his reaching the age of 55 years was granted extensions of service for the past 3 years. The last extension of service for one year was granted from 28.06.2003 to 28.06.2004.

It is the contention of the petitioner that he had satisfied all the requirements regulating the granting of extensions as set out in circular No. 323/2001 and complains that on 16.06.2004, 12 days before his 58th birthday that he received the impugned letter marked and filed of record as P18 informing him that his services will not be extended beyond 28.06.2004.

Learned Counsel for the petitioner submitted that vide regulations as found in the aforesaid circular No. 323/2001 referred to above, which also admittedly regulates the granting of extensions, declares that the age of retirement of Bank employees shall be 55 years, but however that extensions of service of a Staff grade employee would be granted at the discretion of the management for a specific period beyond 55 years of age and up to 60 years. Vide the contents of the same circular the General Manager or the Chief Executive Officer of the Bank is tasked with. the discretion to grant such extention taking into consideration factors enumerated in the said circular.

Paragraph 10 of the circular inter-alia deems it necessary in the event the applicant's application for an extension is unsuccessful, to be notified of such refusal of extension of service, affording him an opportunity to reapply for a service extension for a further period in terms of the said circular. The failure of the unsuccessful candidate to have done so would be deemed to have shown that such applicant was not interested to further serve the aforesaid Bank.

Paragraph 12 of the circular specifies the requirement that in the event of an applicant's extension of service not been recommended that a

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separate report stating the reasons of such non recommendation be sent directly to the Deputy General Manager of the respondent Bank.

Apparently there appears to be no evidence that such steps had in fact been taken.

The learned President's Counsel for the 1st to 9th respondents in his written submissions to this court has referred this court to items Nos. 1-4, and 6 and 7 of the aforesaid circular No. 323/2001 and has further submitted that the 1st respondent institution being a business entity engaged in a highly competitive field of banking activities is vested with full powers and discretion in recruitment, transfers, promotions and the granting of extensions of services to its employees.

However, the respondent Bank is an institution of the State. Hence I am of the view that this court in the circumstances need to examine the complaint of the petitioner that the petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution have been violated consequent to the acts of the respondent Bank. Besides discretion in my view need to be exercised properly and reasonably.

That no adequate and specific reasons for the non recommendation of the petitioner's application for an extension of service are forthcoming in respect of the petitioner's application, is patent.

R4 filed with the objections of the Deputy General Manager appears to be a report made out by an officer, albeit unsigned, to be the basis of the non recommendation and contains no reasons for such non recommendation.

P8 the impugned order refusing the petitioner's application for extension of service is bereft of any reasons for such refusal. Besides P8 is dated 14.06.2004 and same being an adverse recommendation and undoubtedly delayed, I am of the view that the said impugned notification clearly contradicts the provisions of the said circular No. 323/2001.

The absence of a separate report giving reasons for the refusal of an extension which had to be submitted to the Deputy General Manager without delay, is also contrary to the provisions of the aforesaid circular

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As submitted by the learned Counsel for the petitioner the decision of this Court in *Surangani Marapona V5. Bank of Ceylon and others.*([1])held that 4 months delay to decide an application for an extension of service "had been an inordinate delay".

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In the instant case the delay to refuse the petitioner's application, vide the impugned P8, left the petitioner barely 14 days to retire from the Bank. Importantly no reasons for such delay were also forthcoming. The necessity to give reasons for its decision to refuse an application for an extension was also emphasized in *Surangani Marapona Vs. Bank of Ceylon* (supra) when this court held that, "there should be sufficient reasons to support such decision beyond doubt".

I would also agree with the submissions of the learned Counsel for the petitioner that the latter had a legitimate expectation to serve the respondent Bank on annual extensions of service up to the age of 60 years and that the petitioner is entitled to be apprised of the reasons to justify the denial of the aforesaid legitimate expectation of the petitioner to serve the Bank until the petitioner reached the age of 60 years.

In the aforesaid circumstances and subsequent to careful scrutiny, I am of the view that inter alia the inordinate delay in determining and notifying the refusal of the petitioner's application and having failed to give reasons for the refusal of an extension the management of the respondent Bank has violated the fundamental rights guaranteed to the petitioner under Article 12(1) of the Constitution and this court would make order quashing P8 and further that the management of the respondent Bank grant to the petitioner an extension of service from 28.06.2004 to 28.06.2005. No costs.

BANDARANAYAKE,J. - I agree.

DISSANAYAKAJ:- I agree.

Relief granted.

Jabir v. Karunawathie - SLR - 412, Vol 3 of 2005 [2005] LKSC 10; (2005) 3 Sri LR 412 (7 September 2005)

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JABIR
VS.
KARUNAWATHIE

SUPREME COURT.
S m SILVACJ
TILAKAWARDANE.J.
AMARATUNGAJ.
SC 18/2004.
FEBRUARY 18, 2005.

Civil Procedure Code - Section 396, Section 760 - Rent Act, No. 7 of 1972 - Pending appeal defendant tenant dies - Abatement - Three years iater the wife makes application for substitution and set aside order of abatement - Legality - Court of Appeal abating in the absence of an application for substitution, Article-126-Constitution - Court of Appeal Rules - Rule 38.
The 1 st defendant tenant lodged an appeal against the judgment of the District court which held in favour of the plaintiff landlord. Whilst the appeal was pending the defendant tenant died on 30.01.2000. On 29.01.2002 the plaintiff fifed a motion bringing this matter to the notice of Court and sought an abatement. The Court issued notice on the registered Attorney on record. On being satisfied that the notices were served - the Court of Appeal allowed the motion of the plaintiff-respondent. The appeal was abated, and Writ was executed.

On 13.05.2003, more than 3 years after the death of the defendant -appellant tenant, his spouse made an application to get the abatement order set aside and for substitution of herself in the room of the deceased defendant-appellant. The Court of Appeal set aside the order of abatement and substitution was allowed and the case relisted.

On special leave being granted,

HELD:

(1) The consequence of abatement of a case is because the case record has become defective on account of the death of a party

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and those parties who are materially interested in the case not taking necessary steps. No cogent or explicit reasons are given for the cause of delay.

Per Shirani Thiiakawardane. J.

"The Petitioner could not after more than 3 years and 3 months of the death of the 1st defendant-appellant, and one year after the order of abatement seek to remedy this situation".

(2) The proxy of the Registered Attorney had been revoked. It was incumbent upon the 1st defendant-appellant even prior to his death to have taken steps to have his registered Attorney-at-Law enter proxy and file the required papers. In failing to give such instructions, the appellant had even prior to his death failed to exercise due diligence in the prosecution of his appeal.

Held further:

(3) The Court of Appeal must in such applications made on the death a party require such applicant or the petitioner or appellant or as the case may be to place before Court sufficient material to establish who is the proper person to be substituted - Court of appeal Rule 38, Section 760 Civil Procedure Code.

Per Shirani Tilakawardana, J.

"With the death of the 1st defendant-appellant tenant the contract of tenancy came to an end and in the circumstances his surviving spouse admittedly not in occupation of this premises would not be a fit and proper person to be substituted in the room of the 1 st defendant-appellant tenant. The only manner in which the surviving spouse of the 1st defendant-appellant could continue would be as a statutory tenant under Section 36(2) but clearly as she is not resident in the premises, she could not plead same".

APPEAL from the judgment of the Court of Appeal reported in 2004 3 Sri LR 123.

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Cases referred to :

1. Simon Silva vs. Sivasupramaniam - 55 NLR 562

2. Suppramaniam et al vs. Symons et al - 18 NLR 229.

LC Seneviratne PC with Riza Muzni for plaintiff-appellant-respondent-petitioner

Sanjeewa Jayawardane with Priyanthi Gunaratne for petitioner-

September7, 2005

SHfRANEE TILAKAWARDANE, J.

The Plaintiff instituted action in the District Court of Mt. Lavinia for the ejectment of his tenant (now Deceased) the 1st Defendant-Appellant for the wrongful subletting of the premises in suit, namely 393, Gaile Road, Colombo 4, to the 2nd, 3rd, 4th and 5th Defendant-Respondents, without the prior sanction of the Landlord. It was common ground that the Rent Act No. 7 of 1972 governed the said premises. The District Judge of Mt. Lavinia by Judgment dated 28/08/1997 held in favour of the Plaintiff (A5).

Only the 1st Defendant lodged an appeal, but while it was pending the 1st Defendant-Appellant died on the 30/01/2000, a fact proved by the death certificate marked A7.

On 29.01.2002, almost two years later, the Plaintiff-Respondent filed a motion bringing this matter to the notice of court. The Court issued notice on the registered Attomey-at-Law on record. On 7.5 2003 after ascertaining the fact that notice was not returned and thereby being satisfied that the notices had been served, the Court of Appeal allowing the application of the said Plaintiff-Respondent made an Order for abatement of the Appeal.

On the 13.05.2003, more than three years after the death of the 1 st DefendantAppellant, his spouse, the Petitioner Respondent, filed an application by way of a petition in the Court of Appeal. The District Court referred to in the caption is the District Court of Moratuwa, though this case was a case instituted in the District Court of Mt. Lavinia. Be

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that as it may, it is important to note that the Petitioner-respondent filed the application only after the writ of execution was issued in the District Court of Mt. Lavinia, after the Appeal was abated. This emanates from the facts adverted to in the prayer of the petition filed by the Petitioner respondent in the Court of Appeal.

The Petitioner-respondent by this Petition made an application to set aside the said Order of Abatement made by the Court of Appeal dated 07.05.2003, for substitution of herself in the room of the deceased 1 st Defendant-Appellant, and for a re-listing of the Appeal. She claimed therein that she had a daughter who was a co-heir to the estate of the deceased 1st Defendant-Appellant. Her daughter has filed no affidavit consenting to the substitution nor was she noticed of the application for substitution.

This application was allowed by the Court of Appeal by its order of 12.12.2003 in which the objections of the Plaintiff-Respondent-Respondent were overruled, the Order of Abatement was set aside the substitution was allowed and the case was re-listed.

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On 24/02/2004 this Court granted special leave to appeal on the following question of law.

(1) Can the Petitioner-respondent make this application for substitution after more than 3 years of the death of the 1st defendant-Appellant?

(2) Was the Court of Appeal justified in the circumstances of this case, in particular in the absence of any application for substitution to have abated the said appeal?

(3) Without prejudice to the aforesaid questions of law is the Petitioner-respondent eligible to seek substitution in place of her deceased husband the 1 st Defendant-Appellant in view of the provisions of Section 36 of the Rent Act No. 7 of 1972 as amended.

In the aforesaid Order of 12.12.2003, the Court of Appeal reference was made that the Petitioner-respondent's spouse, who was the 1 st Defendant-Appellant in the Appeal, had died on 30/01/2001. This

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appears to be a factual error, as according to the death certificate, which has been produced marked A7 and pleaded by the Plaintiff-Respondent-Respondent-Petitioner his death had occurred a year earlier, on 30.01.2000.

Indeed, according to the Court of Appeal it is dear that the only application that was made before the Court was by the Plaintiff-respondent in the Court of Appeal who had informed the Court that the 1 st Defendant-Appellant was dead and produced A7. The Court had according to law thereupon noticed the registered Attorney-at-Law. The notice was issued on 08/02/2002 and according to the journal entry dated 05/03/2002 the said notice has not been returned undelivered. Thereupon, on application made on 07/05/2002 appeal was abated.

The consequence of abatement of a case is because the case record has become defective on account of the death of a party and those parties materially interested in the case not taking the necessary steps.

The Petitioners could not after more than almost 3 years and 3 months after the death of the 1 st Defendant-Appellant and one year after the order of abatement by the Court of Appeal, seek to remedy the situation.

In the case of Simeon Silva vs. Sivasupramaniam1'1 where after the death of the plaintiff, his legal representative delayed for nearly 18 months to have themselves substituted, it was held that the order of abatement of the action should be entered under Section 396 of the Civil Procedure Code,

In considering all the facts relating to the case therefore the order of abatement of the action had legitimately been made because the Petitioner who seeks to

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substitute herself in place of the 1 st Defendant-Appellant had failed to take steps rendered necessary by law.

This Court has also considered that in any event the Petitioner had not come within a reasonable time to have the order of abatement set aside. Furthermore no cogent or explicit reasons were given for the cause of the delay except to say that it was "for reasons beyond her

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control". In other words she has not proffered any rational explanation, which could legitimately be considered as a valid reason for the delay.

In this respect it is also important to consider whether there has been a defect or error made by the Court of Appeal, in the delivery of notice on the Petitioner. This arises in the circumstances that at the time of the service of this notice, according to the pleadings of the Petitioner, the Registered Attorney's proxy had been revoked and a new registered Attorney-at-Law had been appointed.

The proxy of the registered Attorney-at-Law had been revoked. The Petitioner-Respondent admitted that she knew this fact as far back as 22.09.1998. According to the affidavit of the Petitioner dated 21/05/2003 paragraph 2(b), "the Petitioner was aware that prior to the death of the 1 st Respondent", and he had taken steps to revoke the proxy of the registered Attorney-at-Law on 22/09/1998". It is noteworthy that at this time the Appeal was pending, having been lodged in the Court of Appeal on 17/10/1997. So it was incumbent upon the 1st Defendant-Appellant, even prior to his death, to have taken steps to have his new registered Attorney-at-Law enter proxy and file the required papers in the Court of Appeal. In failing to give such instructions the 1 st Defendant-Appellant had even prior to his death failed to exercise due diligence in the prosecution of his Appeal.

It was such failure and lack of diligence on the part of the 1st Defendant-Appellant, which facilitated and/or caused the notice sent by the Court of Appeal on 07/05/2002, to be sent to a registered Attorney-at-Law on record whose proxy by then had been revoked. It is required by law that the Court before making an order of abatement should notice the parties only as far as it conveniently can, to give them an opportunity of showing cause against the order. But even though the Court had followed such procedure it was solely due to the inept failure of the 1st Defendant-Appellant, even prior to his death, to exercise due diligence in his case and failure to give adequate but necessary instructions for the filing of fresh proxy in the Court of Appeal that no papers had been filed by the 1 st Defendant-Appellant's spouse. The consequences of such failure must be borne by the party.

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It is important when cases are pending before courts to prevent any of the aggrieved parties from being unduly barred from achieving the legitimate result of their litigation by intervening factors. In (his context, Wood Renton C.J. and Ennis J.

in Suppramaniam et al Vs. Symons et all2) said (hat "People may do what they like with their disputes so long as they do not invoke the assistance of the courts of law. But whenever that step has been taken they are bound to proceed with all possible and reasonable expedition, and it is the duty of their legal advisers and of the Courts themselves lo see that this is done. The work of the Courts must be conducted on ordinary business principles, and no Judge is obliged, or is entitled, to allow the accumulation upon his Court list of a mass of inanimate or semi-animate actions".

The only ground urged by the Petitioner in (he Petition for the order of abatement to be set aside, was that no proper notice had been issued on the Petitioner and the bald statement that the said order of abatement had been made "due to reasons beyond the control of the Petitioner". No details or material has been placed before the Court as to what "reasons were beyond the control of the Petitioner". In other words she has failed to explain the delay in taking steps according to law on the death of a party. Furthermore on the facts referred to above it is clear that the Applicant-Petitioner-Respondent had not acted diligently and with the required level of due vigilance to remedy the defect in the record on the death of (fie 1 st Defendant-Respondent. The order of abatement is the reasonable and expected outcome of such failure.

After the 1 st Defendant had lodged an appeal in the Court of Appeal, the record of the Court of Appeal became defective by the reason of the death of the 1 st Defendant on 30/01/2000. The procedure according to law to rectify the defect and seek substitution has been explicitly described in the Code of Civil Procedure.

In terms of Section 760A of the Civil Procedure Code," in the manner provided in the rules made by the Supreme Court for that purpose, the Court could determine, who, in the opinion of the Court is a proper person to be substituted or entered on the record in place of or in addition to the party who had died or undergone a change of status

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and upon such order of the Court the person shall thereupon be deemed to have been substituted or entered of record".

The relevant Rule 38 of the Court of Appeal Rule reads as follows :

"Where at any time after the lodging of an application for special leave to appeal, or an application under Article 126, or a notice of appeal, or the grant of special leave to Appeal, or the grant of leave to appeal by the Court of Appeal, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may, on an application in that behalf made by any person interested, or ex mero motu, require such applicant or the petitioner or appellant, as the case may be, to place before the court sufficient material to establish who is the proper person lo be substituted or entered on the record in

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place of, or addition to, the party who has died or undergone change of status.........."

The Court of Appeal must therefore in such applications made on the death of a party, "require such applicant or the petitioner or appellant, as the case may be, to place before the Court sufficient material to establish who is the proper person to be substituted."

It is neither an automatic Order but a considered Order that is envisaged. All the more so if there is more than one heir. In this case the Petitioner has explicitly pleaded that both she and her daughter were lawful heirs in paragraph 15 of her petition dated 13.05.2003.

In this context, it is relevant to note that admittedly on her own affidavit dated 13/05/2003 filed in the District Court of Mt. Lavinia she had not stated as to how the rights of the 1 st Defendant-Appellant, even if such were available, would devolve upon her. Especially in view of the fact that this was a rent and ejectment matter and it appears that admittedly she was not residing in the premises, which was the subject matter of the action. Furthermore, even though she has claimed to be the legal wife no material has been placed before the Court to determine whether she is the lawful wife of the 1 st Defendant-Appellant nor that she is a fit and proper person to be substituted in the room of the 1st Defendant-Appellant.

In any event, with the death of the 1st Defendant-Appellant the contract of tenancy came to an end and in the circumstances that the surviving spouse of the 1st Defendant-Appellant was not, admittedly, in possession of the premises and was not a registered member of the partnership she would not be the fit and proper person to be substituted in the room of the 1 st Defendant-Appellant.

The only manner in which the surviving spouse of the 1 st Defendant-Appellant could continue would be as a statutory tenant under section 36{2) but clearly as she is not resident on the premises, she could not plead the same.

Accordingly, the order of the Court of Appeal dated 12/12/2003 setting aside the order of abatement and allowing substitution is set aside and the appeal is abated and the order dated 07/05/2003 made by the Court of Appeal abating the appeal is upheld and the application for substitution in the room of the 1st Defendant-Appellant is refused.

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

AMARATUNGA, J. - I agree

Judgment of the Court of Appeal set aside. Order of abatement to stand.

Jinasena v. University Of Colombo And Others - SLR - 9, Vol 3 of 2005 [2005] LKSC 8; (2005) 3 Sri LR 9 (15 September 2005)

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JINASENA
VS
UNIVERSITY OF COLOMBO AND OTHERS

SUPREME COURT
S. N. SILVA, CJ.
DISSANAYAKE.JAND
AMARATUNGA, J.
SC APPEAL 37A./2005.
CA NO. 1329/2000.
15TH SEPTEMBER, 2005.

Writ of Certhrari - Termination of services of a university officer - Lack of sufficient material - Participation of University Council Members at the preliminary inquiry -Validity of termination.

The petitioner was acting Registrar of the University of Colombo, appointed by the University Grants Commission. The Council of the University held a

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domestic inquiry against the petitioner and on the basis that the available material established a prima facie case, interdicted the petitoner by document P8, served a charge sheet P9, and terminated his services by document P10.

HELD:

1. There was no consideration of the material on which the charge sheet was made. The Attorney-General who was consulted advised that due to insufficiency of material, he was unable to advise on specific charges.

2. The 6th, 7th and 11th respondents, members of the Council were witnesses at the domestic inquiry; hence the termination of sen/ices following the charge sheet P9 was ultra vires and void for contravention of the rules of natural justice.

3, The Court of Appeal erred in holding that there was no requirement that the charge sheet should be approved by the Council.

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4. The petitioner was entitled to a writ of certiorari quashing the documents P8, P9 and P 10, as the Court of Appeal had failed to consider the serious consequences to the petitioner by refusing the writ.

APPEAL from the judgment of the Court of Appeal.

R. Chula Bandara with Kushani Harasgama for appellant.

Anil Gunaratne, Deputy Solicitior General for 1 st and 3rd to 15th respondents.

Cur.adv.vult.

15th September, 2005.

S. N. SILVA CJ.

This is an appeal from the judgment of the Court of Appeal dated 13.05.2003. The matter was considered at the time special leave to appeal application was supported and the Court granted special leave to appeal on the following three questions :

(a) In view of the contention in the 2nd paragraph found in the charge sheet (P9) issued by the 2nd Respondent and in the absence of any minute to support such decision of the Governing Council of the 1 st Respondent, did the Court of Appeal err in coming to the

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conclusion that there was no requirement for the charge sheet (P9) to be approved by the Governing Council and accordingly the issuance of the charge sheet (P9) by the 2nd Respondent was within the lawful authority and the powers and functions of the 2nd Respondent?

(b) Did the Court of Appeal misdirect itself in coming to the conclusion that there was no breach of the rules of natural justice although the 6th, 7th and 11 th Respondents who were witnesses were also members of the Council that made the decision set out in P 10?

(c) Did the Court of Appeal misdirect itself by considering extraneous matters disregarding serious conquences to the Petitioner?

The Petitioner joined the University of Peradeniya as a Temporary Assistant Lecturer on 28.12.1970 and continued in that capacity till 31.10.1972. On 16.11.1972 he was appointed as Administrative Assistant in the University Registry. On 15.12.1986 he was appointed as Deputy Registrar. Thereafter he has acted on numerous occasions as the Registrar. He was appointed as Deputy Registrar by the University Grants Commission. Whilst serving as Acting Registrar attached to

the University of Colombo, the Petitioner was interdicted from service by document P8 dated 09.08.1999. A charge sheet was issued on him on 24.09.1999 (document marked P9) After inquiry his services were terminated on 19.09.2000 (by document P10). The Petitioner has filed the application in the Court of Appeal to quash the said three decisions as contained in documents P8 to P10.

The Petitioner has challenged the validity of documents P8 and P 9 on the basis that although these documents issued by the Vice Chancellor refer to decisions made by the Council of the University, in fact there were no such decisions. The Petitioner has urged this ground belatedly since he was unaware of the absence of any decision until the matter came up at the disciplinary inquiry. It is conceded by the Deputy Solicitor General that the only minute of the Council is document P11. The genuineness of P 11 has been challenged by the Petitioner on the basis that it is not pasted in the Minutes Book of the minutes of the Council and that it was found in the form of two loose sheets. A formal minute of the Council appears in the manner as seen in the document P19 which gives inter alia the persons who were present at the meeting including their designations.

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P 11 does not contain any such particulars. In any event, the relevant portion of P11 which comes under the heading "Sub Commitlee Report" records that a report had been sent to the Attorney General who has indicated that there was a prima facie case for interdiction. The advice of the Attorney General is contained in the letter dated 05.07.1999 (P12) which only states that the Attorney General is of the view that the evidence discloses irregularities which concern the Petitioner but that he is unable to advise on the specific charges for the reason that the disciplinary rules applicable to the University and the entirety of the evidence has not been made available. It appears that thereafter the advice of the Attorney General has not been sought on the matter. In the circumstances, to say the least, the statement in P 11 that the Attorney General indicated that there is a prima facie case which warranted interdiction is not correct.

Furthermore, the document P9 being the charge sheet commences with a paragraph which reads as follows,: The Council having considered all relevant material and the findings consequent upon investigations, has now decided to issue you with the statement of charges to direct you to show cause why disciplinary action should not be taken against you...", is basically without foundation since even in the disputed minute the Council has not made a decision to frame charges against the Petitioner. It merely records that the Petitioner be placed under interdiction and "that the legal procedure required in this connection should be followed". The Council could not have approved any charges that were not submitted to it.

In the circumstances, we are of the view that the statements in P 9 and P10 as to approval by the Council are not supported by the available material. The Council is the proper disciplinary authority in terms of the second proviso to section 75 of the Universities Act No. 16 of 1970 (A). The Petitioner has adduced evidence to

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establish that a previous delegation of such disciplinary authority to the Vice Chancellor had been withdrawn by the Council. This evidence is not disputed. In the circumstances, we are of the view that the Petitioner has established that the decisions in P8 and P9 have not flowed from proper authority namely, the Council of the University and as such are ultra vires and liable to be quashed by a Writ of Certiorari.

We have next to consider the validity of the termination as contained in document P 10. The termination has in fact been done on a decision of the Council. The Petitioner challenges the validity of the termination on the ground that three members of the Council who were present at the time the decision was made and in fact took part in that decision were also witnesses at the preliminary and/or the domestic inquiry against the Petitioner. The 6th and 7th Respondents being members of the Council in fact gave evidence at the domestic inquiry. The 4th, 9th and 11 th Respondents who were also members of the Council and took part in the relevant decision had made statements at the preliminary inquiry. The Petitioner has therefore challenged the decision P 10 on the basis that it is ultra vires and in contravention of the principles of natural justice since the witnesses themselves have in fact finally been party to the decision lo terminate the Petitioner's services. The Court of Appeal has sought to justify such a course of action on the basis that the decision of the Council has been unanimous and that there is no evidence that the 6th, 7th and 11th Respondents in anyway influenced that decision to be made against the Petitioner. However, we are of the view that it is unnecessary for the Petitioner to adduce such evidence which would not be within his control, having not been present at the meeting. The decision perse is tainted by the fact that persons who were witnesses at the inquiry were finally party Jo the decision to terminate the services. Accordingly the decision P 10 is liable to be quashed by a Writ of Certiorari on the ground that it is contrary to the principles of natural justice.

For the reasons stated above, we allow the appeal and set aside the judgment of the Court of Appeal dated 13.05.2003, the findings are based on questions (a) and (b) stated above on which leave has been granted. We direct the issue of a Writ of Certiorari as prayed for in paragraph (b), (c), and {d) of the prayer to the petition dated 15.11.2000 filed in the Court of Appeal. There will be no order for costs in the Court of Appeal and in this Court.

N. E. DISSANAYAKE, J. -I agree.

N. G. AMARATUNGA, J. -I agree.

Appeal Allowed..

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Eassuwaran And Others v. Bank Of Ceylon - SLR - 365, Vol 1 of 2006 [2005] LKSC 18; (2006) 1 Sri LR 365 (6 October 2005)

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EASSUWARAN AND OTHERS

VS

BANK OF CEYLON

SUPREME COURT
S. N. SILVA, CJ
TILAKAWARDENA, J AND
RAJA FERNANDO, J
SC APPEAL NO. 25/2004
CA (LA) NO. 146/2003
D.C. COLOMBO CASE NO. 917/DR
17TH JANUARY, 2005

Debt Recovery - Debt Recovery (Special Provisions) Act, No.2 of 1990Jurisdicion of the District Court and jurisdiction of the Commercial High Court High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 Transaction in respect of which the District Court has jurisdiction - Whether a loan facility may be sued in the District Court or whether only a fixed loan can be sued in the District Court.

Plaintiff respondent (Bank) gave Eassuwaran Brothers Food (pvt) Ltd. a loan facility of 100 million rupees, on the guarantee provided by the defendant appellant (petitioners) and sued the defendants thereon for Rs. 114.1 million and interest in the District Court under the Debt Recovery (Special Provisions) Act, No.2 of 1990 ..

The defendants applied under section 6(2)C of the Debt Recovery Act for unconditional leave to defend. The District Judge ordered them to deposit Rs. 38 million as a pre-condition for filing answer. The defendants then applied to the Court of Appeal with leave against that order on the basis that the District Court had no jurisdiction over the claim as it was not in relation to a fixed term loan but related to a credit or overdraft facility. The defendants argued that the jurisdiction over that claim was in the Commercial High Court under the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996. The Court of Appeal dismissed the appeal.

HELD:

(1) The claim was a debt within the meaning of section 21(2) of the Debt Recovery (Special Provisions) Act, No.2 of 1992 and such debt was excluded from the

jurisdiction of the High Court of the Provinces (Commercial High Court) by the First Schedule to the High Court of the Provisions (Special Provisions) Act, No.1 0 of 1996.

(2) In the circumstances, the District Court had jurisdiction over the claim of the plaintiff respondent.

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APPEAL from a judgment of the Court of Appeal.

M. A. Sumanthiran with Prasansani Bandaranayake for defendants petitioner (appellants).

M. K. Muthukumar with Kumara Seneviratne for the plaintiff respondent.

Cur.adv. vult.

October 06, 2005
RAJA FERNANDO, J.

The Plaintiff-Respondent-Respondent Bank (hereinafter referred to as the Plaintiff Bank) filed action in the District Court of Colombo under the Debt Recovery (Special Provision) Act No.2 of 1990 to recover a sum of Rs. 114.1 million from the Defendant-Petitioners-Petitioners (hereinafter referred to as the Defendant-Petitioner).

The Plaintiff-Bank's case was that Eswaran Brothers Food (Pvt.) Ltd. a limited liability company obtained a loan facility of Rs. 100,000,000 (Hundred million) from the Plaintiff-Bank on the guarantees provided by the Defendant-Petitioners and that Eswaran Bros. Food (Pvt.) Ltd., defaulted in the repayment of the loan facilities granted to them and the sum of Rs. 114,111,103.46 as at 02.09.2001 and a further interest at 21.5% on Rs. 97,172,734 from 03.09.2001 plus B.T.T. and defence levy thereon is due to the Plaintiff-Bank.

Upon action being instituted together with an affidavit from an authorized officer of the Plaintiff Bank and the other documents supporting this claim the Court entered decree nisi which was served on the Defendant Petitioners.

The defendant-petitioners filed papers seeking unconditional leave to appear and defend the action under Section 6(2)C of the Debt Recovery (Special Provisions) Act.

The learned Addl. District Judge by his order dated 24.4.2003 ordered the defendant-petitioners to deposit Rs. 38 million (1/3rd of Rs. 114.1 million the

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amount claimed in the plaint) by way of security within 90 days of the Order to be permitted to file answer.

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Being aggrieved by the said order the defendants-petitioners sought leave to appeal from the Court of Appeal on the ground that the learned Add District Judge erred in not addressing his mind to the fact that the subject matter of the purported action is a series of commercial transactions coming under the exclusive jurisdiction of the High Court of the Western Province exercising civil jurisdiction (Commercial High Court) under Act NO.10 of 1996 and that action in respect of such commercial transactions cannot be instituted under the Debt Recovery (Special Provision) Act No. 2 of 1990 in the District Court.

The Court of Appeal refused the application for special leave and the defendant petitioners filed special leave to appeal application No. SC Special Leave to Appeal No. 62/2004 in this court and obtained special leave from the court on 25.03.2004 on the following questions.

(1) Was the Court of Appeal wrong in holding that the District Court had jurisdiction in respect of this matter?

(2) Does the definition of "debf" in terms of the Debt Recovery (Special Provisions) Act include the transaction which is the subject matter of this action? -

It is the submission on the Defendant-Petitioners that Debt Recovery (Special Provision) Act is not applicable to claims based on recovery on credit facilities or on overdraft facilities and that Debt Recovery (Special Provision) Act is applicable only to fixed/term loans where the amount due is clearly ascertainable.

The position of the Plaintiff-Bank is that the claim falls well within provisions of the Debt Recovery (Special Provision) Act and therefore the District Court has jurisdiction.

The High Court of the Provisions (Special Provision) Act No.1 0 of 1996 in Section 2 states:

"Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the Gazette appoint, in respect of such High Court have **exclusive jurisdiction** and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, **all actions, applications and proceedings specified in the First Schedule** to this Act, if the party or parties defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceedings under the Companies Act, No. 17 of 1982 the registered office of the Company is situated, within the Province for which such High Court is established".

According to the above provision High Court shall have **exclusive jurisdiction** in respect of all matters specified in the **First Schedule.**

The First Schedule to this Act reads:

"(1) All actions where the cause of action has arisen out of commercial transactions (including causes of action relating to banking, the export or import of merchandise, services affreightment, insurance, mercantile agency, mercantile usage, and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding three million rupees or such other amount as may be fixed by the Minister from time to time, by Notification published in the Gazette, **other than actions instituted under the Debt Recovery (Special Provisions) Act No.2 of 1990."**

Thus it is clear from the wording of the First Schedule that if the claim in the plaint is one that comes within a "debt" under the Debt Recovery (Special Provision) Act NO.2 of 1990 as amended by Act No.9 of 1994 the District Court will have jurisdiction.

In Section 21 (2) of Act No.9 of 1994, "debt" is defined as **a sum of money** which is ascertained or capable or being ascertained at the time of the institution of the action, and **which is in default,** whether the same be secured or not, or owed by any person or persons, jointly or severally or a**s principal borrower or guarantor or in any other capacity, and alleged by a lending institution to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution,** but does not include a sum of money owed under a promise or agreement which is not in writing ;'

The matter to be ascertained in this appeal is : Does the sum claimed in the plaint come within the definition of a debt as stated in the Debt Recovery' (Special Provision) Act?

The Plaintiff Bank is a Lending Institution in terms of Section 30(a) of the Debt Recovery (Special Provision) Act (vide P1 attached to the Plaint).

The Defendant-Petitioners are guarantors for the loan facility granted to Eassuwaran Brothers (Pvt.) Ltd. by the Plaintiff-Bank (vide P4 attached to the plaint).

In paragraphs 79 and 81 of the plaint of the Plaintiff-Bank the sum claimed has been set out and the details of the computation is also specified.

This sum is alleged by the Plaintiff-Bank as having arisen from a transaction in the course of Banking, lending, financial or other allied business activity.

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The original loan application, the Guarantee Bond together with the specific requests by the Principal borrower for sub loans under the above loan agreement have been produced together with the Plaint marked P4 to P 72(a).

On the material before Court there was sufficient evidence to show that the transactions which were referred to in the Plaint of the Plaintiff-Bank fell well within the definition of "debt" in terms of the Debt Recovery (Special Provisions) Act NO.2 of 1990 as amended by Act No.9 of 1994 and that the Defendant-Petitioners are the guarantors of the loan.

In the circumstances it is clear that the District Court had the jurisdiction to hear and determine this matter under the Debt Recovery (Special Provision) Act No.2 of 1990 as amended by Act No.9 of 1994.

The appeal of the Defendant-Petitioner-Petitioner is accordingly dismissed with costs.

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

TILAKAWARDANE, J. -I agree.

Appeal dismissed.

Officer In Charge, Cid v. Soris - SLR - 375, Vol 3 of 2006 [2005] LKSC 20; (2006) 3 Sri LR 375 (12 October 2005)

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OFFICER IN CHARGE, CID
VS.
SORIS

SUPREME COURT,
JAYASINGHE.J.
TILAKAWARDANE. J.
UDALAGAMA.J.
SC 52/05.
SC SPL LA 90/05.
CALA (PHC) APN 185/04.
HC BADULLA REV 57/04.
MC BANDARAWELA236415.

Debt Recovery (Special Provisions) Act, No.2 of 1990 amended by Act, No.9 of 1994- Sections 24, 25, 26 -Applicability- Cheques drawn in favour of person other than a lending institution -Can the construction of a statute be limited by its title- Public Property Act - Lending institut1on?-Debt?-Any person?-Language not ambiguous? - Unreasonable interpretation- Intention of the legislature

The respondent-petitioner filed reports in the Magistrate's Court alleging that the accused had committed an offence under the Public Property Act, in that he issued Cheques without sufficient funds to the Cooperative Society. He was charged in terms of Section 25 of the Debt Recovery Act (DR Act). An objection was raised that the facts disclosed do not warrant presenting a charge in terms of Section 25-DR Act. The objection was overruled, and the High Court affirmed the said order of the Magistrate's Court. The High Court in appeal refused to issue notice, holding that it is an offence to draw a cheque without funds or with insufficient funds and that the nature of the person in whose favour the cheque is drawn is immaterial for a presentation under Section 25 of DR Act. The Court of Appeal acting in revision delivered its order holding that the 'Society' does not fall within the interpretation of a 'lending institution' and held further that the provisions of the Act can be invoked only in relation to transactions involving lending institutions and those that are conducted in the Course of recovery of debts.

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In appeal it was contended that the provisions of Part 1 of the Act is not applicable for a prosecution under Section 25 (I), and where a cheque is drawn in

favour of any person or an institution Section 25 (I) is applicable

HELD:

Per Nihal Jayasinghe.J and Udalagama. J

(1) Section 25 (1) is self contained and exists devoid of any ambiguity and given effect to , without resorting to any other provision, and institution of an action in Part 1 of the DR Act has no relevance whatsoever to a prosecution under Section 25. When a cheque is drawn in favour of any person or institution in terms of Section 25 (1) DR Law is applicable.

(2) The construction of any statute cannot be limited by its title, the true nature of the law is to be determined not by the name given to t or by its form but by its substance. Where the language of the enactment is clear, its construction cannot be affected in any way by the consideration of the title of the Act. .

(3) The long title of an Act is looked at only to help resolve an ambiguity and may not be looked at to modify the interpretation of plain language.

Per Shiranee Tilakawardane. J (dissenting) :

"I am reticent to accept that "any person" adverted to in Section 25, of the Act expands the offence to all persons who would dishonour a cheque, even between private parties".

(I) It is an unreasonable interpretation to accept that the legislature intended to confine civil liability to those transactions with lending institutions but to give a wider and expansive criminal liability to include 'all persons'; in the application of the criminal liability envisaged under the said Act as amended.

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(2) The provisions of the DR Act were specially enacted to regulate and recover debts that were over due to lending institutions and was a special procedure for regulating the recovery of debts by lending institutions.

(3) A simple reading of the Act as well as the Bill show that the word "debt" had.a specific meaning in terms of the DR Act. It was amended to give a limited meaning to the word "debt" which was confined to lending Institutions and not to all monetary transactions.

(4) Even if one need not refer to the long title of the Act in its interpretation, in interpreting the provisions of a statute the intention of the legislature has to b,e gathered not only from the preamble to the Act but also through the other related provisions of the Act itself and more particularly, when the subject matter dealt with is under different chapters or part of the same statute".

Per Shiranee Tilakawardane. J :

"I am reticent to give Section 25 such a wide or unrestricted meaning on the purposive interpretation of the Act which was for the purpose of affirmatively supporting the lending institutions to recover bad debts. It is my opinion that to give such a wide meaning to those provisions goes beyond the spirit, scope and ambit of the Act. It is also my opinion that the intention of the legislature was clearly to assist the lending institutions to have a more effective recovery procedure and to deal with such defaulters who committed offences under the Act and was specially enacted to assist lending institutions dealing with defaulters".

Case referred to :

1. Re Wykes R vs. Wilkes (1769) 4 Burr. 2527

2. Mahijibahai Mohanbahai Barot v Patel Manibahai AIR 1965 SC 1477.

APPEAL from a judgment of the Court of Appeal. Buwaneka Afuvihare DSG for appellant H.G Hussain for accused-petitioner-respondent

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October 12, 2005

NIHALJAYASINGHE.J

The Respondent-Petitioners filed reports in the Magistrate's Court of Bandarawela alleging that the accused had committed an offence under the Public. Property Act, in that the Petitioner-Respondent issued cheques to the value of Rs.4.6 Million without sufficient funds to Udapalatha Multipurpose Co-operative Society. The said cheques had been issued by the accused as payment for the purchase of seed potatoes and the said cheques had been dishonoured. The Respondent- Petitioners having obtained advice from the Attorney -General filed charges in terms of section 25 of the Debt Recovery Act No.2 of 1990 as amended. When the matter came up for trial before the Magistrate, a preliminary objection was raised on behalf of the accused that the action filed by the Respondent-Petitioners cannot be maintained and moved for the discharge of the accused from further proceedings. It was urged on behalf of the accused that the facts disclosed, does not warrant presenting a charge in terms of Section 25 of the Debt Recovery Act.

After hearing submissions, the learned Magistrate overruled the objection and accordingly fixed the trial for 11.6.2004. Aggrieved by the said order of the learned Magistrate, the accused invoked the revisionary jurisdiction of the Provincial High Court of Uva Province to have the said order of the learned Magistrate set aside. The learned High Court Judge after hearing submissions refused notice. The Respondent-Petitioners submit that whilst refusing to issue notice, the learned High Court Judge held that in terms of Section 25 (1) (a) of the Debt Recovery Act, it is

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an offence to draw a cheque without funds or with insufficient funds and that the "nature" of the person in whose favour the cheque was drawn is immaterial for a prosecution under that Section. Aggrieved by the said order of the learned High Court Judge, the accused invoked the revisionary jurisdiction of the Court of Appeal. On 01.4 .2005, the Court of Appeal delivered order holding that Udapalatha MPCS does not fall within the interpretation of a "lending institution" and held further that the provisions of the Act can be invoked only in relation to transactions involving lending institutions and those

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that are conducted in the course of recovery of debts. The Court of Appeal also specifically held that Udapalatha MPCS does not fall within the interpretation of the meaning of "institution of action" and therefore has no relevance to prosecutions instituted in terms of the provisions of the Act

Aggrieved by this order, the Respondent-Petitioners filed Special Leave to Appeal and the Court after hearing submissions granted leave on the following questions of law:

(1) Where an offence has been committed in terms of Section 25 of the Debt Recovery Act, are the provisions of Part I of the said Act applicable?

(2) Where, a cheque is drawn in favour of any person or an institution, is Section 25 (I) of the Debt Recovery Act applicable?}

Mr. Buvaneka Aluwihare, D. S. G., submitted that the Debt Recovery Act contained five parts and that the 1st to 4th parts referred to the recovery procedure in respect of -moneys lent and advanced by lending institutions and that Part 5 constitutes criminal responsibility in respect of "any person" who knowingly draws up a cheque which is dishonoured by a bank for want of funds. Learned Deputy Solicitor General further submitted that the long title ought not to be looked into if the section is unambiguous and clear and submitted that there is no ambiguity as set out in Part 5, section 25(1) (a) where criminal responsibility is cast on any person who transacts business with any institution or person and that if it was within the contemplation of the legislature that "person" should include only those transactions or financial business with a lending institution, Section 25(1)(a) would have made it clear and in unambiguous terms that the person contemplated in section 25(1)(a) is only a person who has transactions with a lending institution. Learned Deputy Solicitor General went on to submit that there is no link between Parts I to 4 and Part 5 and that Part 5 stands alone, and that the sole purpose of Part 5 is to visit criminal liability on a person who knowingly draws a cheque which is dishonoured by a bank for want of funds.

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Learned Deputy Solicitor General also referred to Interpretation of Statutes by Bindra (9th Edition, page 38), where it is stated that "The construction of the statute

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cannot be limited by its title. The true nature of the law is to be determined not by the name given to it or by its form, but by its substance, where the language of the enactment is clear, its construction cannot be affected in any way by the consideration of the title of the Act." Thus Section 25 of the Act is clearly not ambiguous. It is further stated in the same book "if the language of the Act is plain, Courts cannot refuse to give effect to it generally because it happens to go beyond the matters mentioned in the title". When there is no doubt as to the construction to be put upon the words of a section, Court cannot limit it's construction because of the Title of the Act, though the said construction clearly exceeds the scope of both the title and the preamble.

Buckley J in the case of Re-Wykes [(1)] declared, "The long title of an Act is looked at only to help resolve an ambiguity and may not be looked at to modify the interpretation of plain language.

It is significant to note that section 25 is placed under the heading "Miscellaneous". In the case of Mahijibahai Mohanbahai V. Patel Manibahaj[(2)] the Indian Supreme Court held "The placing of a particular section in a part of the Code dealing with a specific subject matter may support the contention that, that section deals with a part of the subject dealt with by that part, but that cannot be said when a particular section appears under a part dealing with Miscellaneous matters. The part under the heading "Miscellaneous" indicates that the section in that part cannot be allocated wholly to a part dealing with a specific subject, for the reason that the section entirely falls outside the other part or for the reason that they cannot entirely fall within a particular part."

Mr. Hussain for the accused submitted that section 25 applies only in situations where transactions are between lending institutions and a "person" and section 25 has no application in respect of transactions entered into between two private persons or "a person" which is not a lending institution. Mr. Hussain submitted that if one looks at the definition of "debt", it clearly envisages an instance where

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money had been obtained from a lending institution and not from any other source. Mr. Hussain sought to give a very restricted interpretation to the application of section 25(1} and confines the said provisions to an ambit where the transactions were purely between a borrower and a lending institution. He submitted that Act No.2 of 1990 was brought in to speedily recover money by lending institutions and to punish those who defrauded lending institutions and not to deal with transactions between persons or institutions outside the scope of the Act. He submits further that "any person" should be understood and interpreted (in helping) with the spirit of the Act and not independently as used in common parlance; that section 25 framed under Miscellaneous deals with officers and officer referred to therein normally related to transactions referred to in the statute and not to transactions outside the

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scope of the statute and that the person should be understood in that spirit.

We have considered the submissions of the learned Deputy Solicitor General and Mr. Hussain. We are of the view that section 25 (1}(a) is self-contained and exists devoid of any ambiguity and given effect to, without resorting to any other provision. We are also of the view that "institution of an action" in Part I of the Debt Recovery Act has no relevance whatsoever o a prosecution instituted under section 25 (1) of the Act. We, accordingly, .are mindful of the fact that the Debt Recovery Act as amended, was necessitated by the expansion of commercial transactions and that a prosecution under the normal law was highly time consuming and protracted.

We accordingly answer, question (1) as follows: that the provisions of Part I of the Act is not applicable for a prosecution under section 25 (I) of the Act. We also hold that in respect of the 2nd question of law, the cheque drawn in favour of any person or institution in section 25 (I) of the Debt Recovery Act is applicable in respect of the respondents. We accordingly allow the appeal and set aside the order of the Court of Appeal dated 30.3.2005. No costs.

UDALAGAMA J - I agree.

Appeal allowed.

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Shiranee Tilakawardane, J (Dissenting)

I have had the privilege of listening to the Judgment dictated by my brother Judges but respectfully have to dictate a differing opinion. I will not deal with the facts, which have been succinctly set out by my brother Judges. Also since this is a dictated judgment I wish to deal with the matter only in a summary and concise manner. Parties conceded that the essence of the case dealt with the recovery of moneys between two parties namely the Udapalatha Multipurpose Corporative Society on the one hand and the accused-petitioner on the other in a sum of Rs.5,467,100 Million (approximately Rs.5.4 Million) which had arisen as a result of the dishonoring of several cheques.

At the outset of his argument, learned Deputy Solicitor General unequivocally and specifically stated that he conceded that the charges pertained to a transaction between two persons, and did not involve a recovery by a lending institution. The charge which had been preferred against the accused-petitioner-petitioner-respondent, on specific advice given by the Attorney- General was under Section 25 (1) (a) of the Debt Recovery (Special Provisions) Act NO.2of 1990 as amended by Act NO.9 of 1994.

Special leave was granted on 19.7.2005 on the following questions of law:-

The matter to be determined is whether the charge under section 25 (1) (a)

which had been preferred against the accused-respondent could be extended to include a situation where the drawee of the cheque is not a lending institution.

The provisions of the Debt Recovery Act NO.2 of 1990 were specially enacted to regulate and recover debts that were overdue to lending institutions and was a special procedure for regulating the recovery of debts by rending institutions. Even though the learned Deputy Solicitor General argued that one need not refer to a long title bf an Act in its interpretation, in interpreting the provisions of a statute the intention of the legislature has to be gathered not only from the

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preamble to the Act but also through the other related provisions in the Act itself and more particularly, when the subject matter dealt with is under different chapters or parts of the same statute.

In considering the nature of the recovery of the debt that is envisaged under the Act, it is set out with clarity and defined under section 21 of the amending Act No.9 of 1994 in the following manner:-

" debt" means a sum of money which is ascertained or capable of being ascertained at the time of the institution of the action, and which is in default, whether the same be secured or not, or owed by any person or persons, jointly or severally or as principal borrower or guarantor or in any other capacity, ,and alleged by a lending institution to have arisen, from a transaction in the course of banking, lending, financial or other alleged business activity of that institution, but does not include a sum of money owed under a promise or agreement which is not in writing;"

Whilst it is clear that according to the provisions of the aforesaid Act, recovery procedures for the recovery of a debt, are only available to lending institutions, the question that arises for determination, in my view is whether the penal consequences and the creation of an offence in terms of section 25(1) extends beyond a cheque that has been dishonored to a lending institution.

It appears that all parties to this case are in agreement that the provisions relating to recovery of a debt are confined to debts that are owed only to lending institutions. This procedure therefore replaced the existing recovery procedure under the Civil Procedure Code.

Clearly therefore the provisions relating to Debt Recovery in the said Act are confined to recovery of loans by lending institutions

A simple reading of the Act as well as the Bill which has been provided by the learned Deputy Solicitor General shows that the word "debt" had a specific meaning in terms of this Act. Indeed the' Bill was specifically amended to give a limited meaning to the word "debt" which

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was confined to lending institutions and not to all monetary transactions.

The draft Bill. which was proposed on 23.01.1990 has restricted the meaning of the word debt as it existed, a fact that was conceded by the learned Deputy Solicitor General. Admittedly therefore a much more restrictive definition was given, even by the amendment Act 9 of 1994 of the aforesaid Act by section 21, where recovery was restricted to the banking activity of a lending institution. Such amendment to the original Bill would not have been needed if the Act was proposed to have a wider application as argued by the learned Deputy Solicitor General.

The argument was also preferred by the learned Deputy Solicitor General that Part 5 relates to "a stand alone section" and does not have any connection with the recovery of debts by a lending institution and therefore the words "any person" that has been used mean any person within the jurisdiction of Sri Lanka who has entered into any financial transaction with any other person and who draws a cheque under the following circumstances:-

(a) knowingly draws a cheque which is dishonored by a bank, for want of funds.

(b) gives an order to a banker to pay a sum of money, which payment is not made or there being no obligation on such banker to make payment or the order given being subsequently countermanded, with a dishonest intention, or ... "

Whilst this liability clearly circumscribes "any person" to include any drawer of a cheque the Act as amended is seemingly silent as to who the drawee of the cheque should be. So that where the Act clearly broadly defines the liability of the offender or perpetrator as any person, the drawee has not been set out with equal clarity. I am reticent to give this section such a wide and unrestricted meaning on the purposive interpretation of the Act which was for the purpose of affirmatively supporting the lending institutions to recover their bad debts. It is my

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opinion that to give such a wide meaning to those provisions goes against the spirit, scope and ambit of this Act.

In this context, Part I of the Act deals with the institution of a Civil action, a fact conceded even by the learned Deputy Solicitor General, for the recovery of a debt which must necessarily be to a lending institution. His argument is that the criminal matters instituted under these provisions of section 25 are not precluded to, and goes beyond the lending institutions and would include all persons who enter into transactions by way of cheques. To give such a meaning, it would in my opinion mean that the intention of the legislature was to give a confined meaning under the civil law, confining debt recovery to lendi!1g institutions, but to give an expansive and liberal application under criminal law, to include all persons who entered into

such a transaction and defaulted on a cheque.

Furthermore, even Part 5 itself specifically in sections 24 and 26 refer to "institutions". It is my opinion, that this section must be cautiously interpreted under the whole spirit of the Act to mean that the procedure was optional to the lending institution, and whether the procedure was civil or criminal it was one that was restricted to transactions involving the lending institutions. That is a lending institution was entitled to proceed to recover by way of the new expeditious recovery procedure set out under the Act or to proceed against the defaulter by way of criminal prosecution, but in all such actions the drawee was restricted to lending institutions.

I am reticent to accept that "any person" adverted to in terms of section 25 of the said Act, expands the offence to all persons who would dishonor a cheque, even between private parties. The normal procedure and practice in commercial transactions involve post dated cheques, and this procedure would be precluded if the interpretation was to be given in the wide sense that was argued by the State Counsel. To give this meaning would attract a wider jurisdiction, beyond the jurisdiction that has been envisaged both in terms of the preamble to the Act and to other sections in the Act. An amendment to the Penal Code could have served the purpose better, had such been the real intention of the legislature.

It would also be in my opinion an unreasonable interpretation to accept that the legislature intended to confine civil liability to those transactions with lending institutions but to give a wider and expansive criminal liability to include "all persons" in the application of the criminal liability envisaged under the said Act as amended.

The interpretation that the learned Deputy Solicitor General requires from this Court is to take the simple words "any person" in isolation from both the preamble of the Act and the other sections referred to in other parts and even in this part of the Act, which he referred to as "a stand alone section" .

It is my opinion that the intention of the legislature was clearly to assist the lending institution to have a more effective recovery procedure and to deal with such defaulters who committed offences under the Act and was specifically enacted to assist lending institutions dealing with defaulters.

Accordingly, I see no merit in the argument of the learned Deputy Solicitor General. The appeal is dismissed. No costs.

Appeal dismissed.

By majority decision appeal allowed.

Nandasena v. Chandradasa, O. I. C., Police Station, Hiniduma And Others - SLR - 207, Vol 1 of 2006 [2005] LKSC 13; (2006) 1 Sri LR 207 (14 October 2005)

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NANDASENA

VS

CHANDRADASA, O. I. C., POLICE STATION, HINIDUMA AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.
WEERASURIYA, J. AND
UDALAGAMA, J
SC (SPL) APPLICATION No. 12/2004
17TH JUNE AND 15TH SEPTEMBER, 2005

Fundamental Rights-Articles 11, *and* 13(1) *of the Constitution-Alleged unlawful arrest and torture-Insufficiency of evidence on torture-Arrest for* a *breach of the peace.*

The petitioner complained that the 1st respondent OIC came near his boutique in a jeep; and after summoning him assaulted him on his face. He was then taken to the police station by other police officers. He complained of infringement of Articles 11 and 13(1) of the Constitution. He alleged that a part of his boutique had been demolished.

It was proved that on information received by the 1st respondent over the telephone, from a Pradeshiya Sabha Member that the petitioner was making an unauthorized construction encroaching on the public road and that a crowd

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had gathered creating unrest and a possible breach of the peace, the 1st respondent visited the scene. He found an atmosphere of unrest there. The evidence of the 1st respondent was supported by the Pradeshiya Sabha Member and another witness by their affidavits.

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The petitioner's version which was supplement by his petition and a belated statement made to a Grama Niladhari was contradictory. He had no injuries to establish the alleged assault.

The 1st respondent's version was that he reached the scene on information received over the telephone and saw the unlawful construction which the petitioner refused to remove. There was unrest in the crowd that had gathered there. In the context, the 1st respondent arrested the petitioner to prevent a breach of the peace .

There was no medical evidence showing any injury to the petitioner.

Article 13(1) requires arrest according to procedure established by law; and the person arrested should be informed of the reason for the arrest.

Article 11 provides that no person should be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

HELD:

1. The petitioner must discharge his burden regarding alleged infringement of Article 11 with a high degree of certainty. In the instant case, the evidence falls short of the required standard.

2. Under section 32 of the Code of Criminal Procedure Act, No. 15 of 1979, an arrest without a warrant is competent where, *inter- alia,* a person commits a breach of the peace, in the presence of the arresting officer. In the instant case, the evidence established the commission of a breach of the peace.

3. In the circumstances, there was no infringement of Articles 13(1) or 11 of the Constitution.

Cases referred to :

1. *Me. Nabb* vs. U. S. (1943) 318 US 332

2*. Channa Peiris* vs. *Attorney-General and Others* (1994) 1 Sri LR 1

APPLICATION for relief for infringement of fundamental rights. *Kapila Gamini Jayasinghe* for petitioner.

D. *Akurugoda* for 1st respondent.

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K. A. P. Ranasinghe, State Counsel for 2nd and 3rd respondents

Cur.adv. vult

14th October, 2005

SHIRANI BANDARANAYAKE, J.

The petitioner, who was 54 years of age at the time of the incident, is a small scale trader, carrying on his business at Thawalama, a village situated in the Galle District. He alleged that on 02.09.2003 around 10.00 o'clock in the morning, the 1st respondent, who was the Officer-in Charge of the Police Station at Hiniduma, arrived near his boutique in his jeep and after summoning the petitioner near the jeep assaulted him on his face.Thereafter the 1st respondent, along with some other police officers had taken the petitioner to the Police Station. Prior to that, part of his boutique had been demolished by the aforementioned group of police officers. The petitioner further submitted that he was produced before the Magistrate's Court of Baddegama on 03.09.2003 and was released on bail.

The petitioner therefore complained that the 1st respondent had violated his fundamental rights guaranteed in terms of Articles 11, 12(1), 12(2), 13(1) and 14(1) (g) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Articles 11 and 13(1) of the Constitution.

The petitioner's allegations were against the 1st respondent that he was arrested on 02.09.2003 without any basis and that he was assaulted at the time he was so arrested on 02.09.2003. In support of his complaint against the 1st respondent, the petitioner had produced an affidavit from one Jinadasa Vithanage from Thawalama, Galle and a copy of the complaint made by the petitioner to the Grama Niladhari of Thawalama.

Of the allegations made against the 1st respondent, let me first consider the alleged violation of Article 13(1) of the Constitution. Article 13(1) of the Constitution, which relates to freedom from arbitrary arrest, reads as follows :-

"No person shall be arrested except according to procedure established by law. Ariy person arrested, shall be informed of the reason for his arrest."

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According to 1st respondent, around 9.00 a.m. on 02.09.2003, he had received a telephone message (1R7) informing him that a person was erecting a structure encroaching the road and thereby causing an obstruction to the public at Halvitigala-Aswalandeniya junction. On the on received he had decided to visit the place in question and on his arrival at the said junction he had seen that a person was erecting a shed encroaching several feet of the Aswalandeniya road: The 1st respondent had also observed that at that time a crowd had gathered and the two parties were about to clash. At that instance the 1st respondent had dispersed the said crowd and had warned the petitioner to remove the unauthorised construction, which was being erected by him encroaching the road. The petitioner, according to

the 1st respondent, had refused to remove the said unauthorised construction and continued with his work irrespective of the warning given by the 1st respondent. Accordingly after explaining to the petitioner that he was causing a public nuisance which may lead to an imminent breach of the peace, the 1st respondent had taken the petitioner into custody. In support of his contention the 1st respondent had produced an affidavit from a Member of the Pradeshiya Sabha of Thawalama, namely, one Waidyaratne Attanayake Herath Mudiyanselage Sumathipala, who had been an eye witness to the aforesaid incident. According to him around 8.00 a.m. on 02.09.2003 a group of villagers had informed him that the petitioner had started to construct a temporary shed obstructing the junction near Aswalandeniya Road. According to his version if this construction was allowed to remain that would have obstructed the roadway and would have prevented any vehicle using the. road. At the time the said Sumathipala had approached the Aswalandeniya junction (1 R2), villagers had assembled near the junction and were becoming restless.

The 1st respondent had also filed a further affidavit from one Gardi Hewavasam Dodangodage Sujeewa Lakmal who was carrying on a business of collecting and transporting tea leaves from Dammala, in Hiniduma area. According to him around 7.00 a.m., when he was passing Aswalandeniya in his truck, he had seen the petitioner constructing a temporary shed obstructing the main road. Sometime later, a Member of the Pradeshiya Sabha, had arrived at the scene and had warned the petitioner not to carry out the construction, but to no avail. Later the 1st respondent had arrived and had warned the petitioner, but as the petitioner continued with his construction, the 1st respondent arrested him after dispersing the crowd that had gathered near the junction (1 R6).

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On a consideration of the afore mentioned affidavits it is apparent that the 1st respondent had arrived at the scene in question on the information he had received by way of a telephone message, that had been given as had been found out later, by the Member of the Pradeshiya Sabha. It is also clear that the 1st respondent had arrested the petitioner as it had clearly appeared to him that the petitioner was causing a public nuisance.

Section 32 of the Code of Criminal Procedure Act, No. 15 of 1979 describes the instances where peace officers could arrest persons without a warrant. According to Section 32 (1) (b)

"Any peace officer may without an order from a Magistrate and without a warrant arrest any person

(a) who in his presence commits any breach of the peace;

(b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned".

It is common ground that the petitioner was arrested by the 1st respondent. The contention of the 1st respondent is that the petitioner was arrested as he was causing a public nuisance. In such circumstances could such an arrest be a violation of the petitioner's fundamental rights guaranteed in terms of Article 13(1) of the Constitution? In terms of Article 13(1), as stated earlier, the arrest should be 'according to procedure established by law'. The importance of observing the 'correct and proper procedure' was correctly evaluated by Justice Frankfurter in Me. Nabb Vs US.(1) where he had stated that 'the history of liberty has largely beer; the history of observance of procedural safeguards'. The purpose of following the correct procedure is therefore to safeguard the liberty as well as maintain law and order and thereby to mete out justice and fairplay.

Considering the circumstances of this matter, it is clear that the 1st respondent had arrested the petitioner as he was instrumental in causing a public nuisance leading to a breach of the peace. The police had taken necessary steps against the petitioner and criminal proceedings were

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instituted against him. On an examination of the totality of the evidence, I am inclined to accept the version given by the 1st respondent.

In such a situation the arrest of the petitioner cannot be regarded as an illegal arrest and therefore the petitioner's claim with regard to Article 13(1) of the Constitution should fail.

The petitioner has complained that the 1st respondent had assaulted him on 02.09.2003 and thereby he has alleged that the 1st respondent had violated his fundamental rights guaranteed in terms of Article 11 of the Constitution. Article 11 of the Constitution refers to freedom from torture and states as follows :-

"No person shall be subjected to torture or to cruel inhuman or degrading treatment or punishment"

According to the complaint made by the petitioner, the 1st respondent had assaulted him on his face at the time the latter had arrived near his boutique. Except for his petition and affidavit where he refers to the said assault, it is to be borne in mind that the petitioner has not produced any medical evidence to substantiate his allegations against the 1st respondent.

Learned Counsel for the petitioner submitted that the petitioner had not received any medical treatment with regard to the aforementioned assault and that it was the reason for the non-production of any medical certificates. Accordingly it is' clear that there were no injuries due to the alleged assault. Learned Counsel for the petitioner drew our attention to the affidavit given by Jinadasa Vithanage (P3) and the complaint made by the petitioner to Grama Niladhari on 23.09.2003 (P3A) as supporting documents to substantiate his allegations against the 1st respondent. In the' affidavit given by the said Jinadasa Vithanage (P3) it is averred that the 1st

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respondent had summoned the petitioner near the jeep and thereafter had assaulted the petitioner on his face. Paragraph 3 of the said affidavit refers to the said incident in the following terms:

(emphasis added)".

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However, in the complaint made to the Grama Niladhari at Thawalama (P3A) what is stated is as follows :-

(emphasis added)".

On an examination of these two documents it appears that the petitioner's version given in his petition and affidavit is different to the version stated in the two documents filed by him to substantiate his position.

When there is an allegation based on violation of fundamental rights guaranteed in terms of Article 11of the Constitution, it would be necessary for the petitioner to prove his position by way of medical evidence and/or by way of affidavits and for such purpose it would be essential for the petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden. Discussing this position, Amerasinghe, J. in Channa Peiris and other vs Attorney General and others (2) had clearly stated that,

"Having regard to the nature and gravity of the issue a high degree of certainty is required before the balance of probability might be said to tilt in favour of the petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment".

Considering the non-availability of any medical evidence with regard to the alleged assault, it would be necessary to examine carefully the supporting documents produced by the petitioner to substantiate his allegations against the 1st respondent.

The petitioner attempted to substantiate his allegations against the 1st respondent on the basis of the complaint made by him to the Grama Niladhari of Thawalama and relying on an affidavit he had filed along with his petition of one Jinadasa Vithanage. The first document, being the complaint made. to the Grama Niladhari of Thawalama (P3A), indicates that the petitioner had made the said complaint on 23.09.2003. Accordingly the petitioner had decided to make a statement to the Grama Niladhari only after 3 weeks from the date of the said incident. The affidavit of Jinadasa Vithanage (P3) on the other hand is dated 22.03.2004, which is over 6 months from the date of the incident.

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Learned Counsel for the 1st respondent contended that the said Jinadasa Vithanage, who is the author of the affidavit dated 22.03.2004, is a close relative of the petitioner and is the owner of the boutique adjoining the petitioners grocery store at Thawalama. Therefore it is not possible to place any reliance on the. aforesaid affidavit not only that being the single affidavit filed by the petitioner to substantiate his position, but also, as referred to earlier, the contents of this affidavit differ from what was stated by the petitioner in his petition and affidavit.

In the event where there has been no evidence of physical harm and the only document produced by the petitioner being a statement by him that the 1st respondent had assaulted him on his face which statement had not been supported by any independent evidence by way of affidavits or by medical evidence, I am of the view that the petitioner has not been able to satisfy this Court that his fundamental rights guaranteed in terms of Article 11 were infringed by the 1st respondent.

Considering all the circumstances referred to above it is apparent that the 1st respondent has not violated the fundamental rights of the petitioner guaranteed in terms of Articles 11 and 13(1) of the Constitution.

I accordingly hold that the petitioner has not been successful in establishing that his fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution have been violated by the actions of the 1st respondent. This application is accordingly dismissed, but in all the circumstances of this case without costs.

WEERASURIYA, J.-I, agree.

UDALAGAMA, J.-I agree.

Application dismissed

Piyasena De Silva And Others v. Ven. Wimalawansa Thero And Another - SLR - 219, Vol 1 of 2006 [2005] LKSC 16; (2006) 1 Sri LR 219 (14 October 2005)

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PIYASENA DE SILVA AND OTHERS

VS

VEN. WIMALAWANSA THERO AND ANOTHER

SUPREME COURT
BANDARANAYAKE, J.
FERNANDO, J AND
AMARATUNGA, J.
SC APPEAL No. 58/2005
SC SPLA.188/2005
CA No. 78/2004
9TH AND 19TH SEPTEMBER, 2005

Writ of mandamus - Application to intervene - Refusal in chambers without hearing appellants - Contravention of Article 106(1) of the Constitution directing public sittings - Legitimate expectation of hearing - Fair procedure.

Four appellants applied to the Court of Appeal to intervene and object to an application by the first respondent against the second respondent for a writ of mandamus to compel the issue of a driving licence to the first respondent monk.

When the application was submitted to a judge in chambers, the judge without hearing the applicant - appellants or counsel and without giving reasons summarily refused the application.

HELD:

(1) The failure of a single judge to hear parties infringed Article 106 (1) of the Constitution which requires "public sittings" save in exceptional cases. Further the President, Court of Appeal had fixed the matter to be heard by two judges as required by Article 146(2)(iii) of the Constitution. The order made by a single judge was invalid in the circumstances.

(2) The respondent's counsel conceded that it was appropriate to have heard parties before the impugned order was made, subject to the

respondent's right to object to the appellants' standing to intervene. For this reason and for the reason that the failure to hear the parties was contrary to natural justice constituted a failure of a fair hearing for which the appellant had a legitimate expectation, the order made in chambers was invalid.

(3) Although natural justice does not require the giving of reasons for an administrative decision, there is a strong case for giving reasons particularly to assist the aggrieved party to pursue the remedy of an appeal.

(4) It is unnecessary to decide on the question of standing of the appellants as that question would be a matter for the Court of Appeal to decide.

Cases referred to :

1. *Madan Mohan vs Carson Cumberbatch and Co.* (1988)2 Sri LR 75

2. *R vs University of Cambridge* (1723)1 STR 557

3. *Schmidt vs Secretary of State for Home Affairs* (1969)2 Ch 149

4. *Pure Spring Co. Ltd. vs Minister of National Resources* (1947)1 DLR 501

APPEAL against the order of the Court of Appeal.

U. Egalahewa for appellants.

Saliya Peiris with Asthika Devendra for petitioner - respondents.

Cur.adv. vult

14th October 2005

SHIRANI BANDARANAYAKE, J.

This is an appeal from the order of the Court of Appeal dated 04.08.2005.By that order the Court of Appeal refused an application made by the 1st to 4th intervenient-petitioners-petitioners-appellants (hereinafter referred to as the appellants) for listing for intervention in the Court of Appeal (Writ)

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Application No. 1978/2004 without being heard and allowing the appellants to support their application. The appellants came before this Court where Special Leave to Appeal was granted on the following questions:

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"1. Did the Court of Appeal err in law when the said Court decided to dismiss the application without hearing the petitioners?

2. Did the Court of Appeal err in law for not listing an application for intervention for support?"

The facts of this appeal are as follows:

The appellants are Members of the Dayaka Sabha of the Sri Sakyamuni Viharaya where the petitioner - respondent-respondent (hereinafter referred to as the 1st respondent) is the chief incumbent Thero. The appellants submitted that they had become aware through various means that the 1st respondent had filed an application against the respondent - respondent - respondent (hereinafter referred to as the 2nd respondent), being the Commissioner of Motor Traffic for not issuing a driving license to him in the Court of Appeal (C. A. (Writ) No. 1978/2004) and that a mandamus had been sought for the issuance of a valid driving license (A 1). The aforementioned application was supported by the learned Counsel for the 1st respondent on 22.10.2004 and notice was issued on the 2nd respondent. The 2nd respondent had filed papers objecting to the grant of the writ of mandamus stating *inter-alia* that the Members of the Dayaka Sabha as well as the Commissioner General of Buddhist Affairs had objected to the granting of the said driving license (A2). The case was thereafter fixed for hearing for 14.09.2005.

Learned Counsel for the appellants submitted that the appellants, being devoted Buddhists as well as Members of the Dayaka Sabha of the Sri Sakyamuni Viharaya, who have been actively involved in affairs of the temple where the 1st respondent is the chief incumbent thera, have a sufficient interest in the matter where the 1st respondent has sought a mandamus directing the 2nd respondent to issue a valid driving license. It was also contended that the grant of a valid license to a Buddhist monk is against the Dhamma and Vinaya as claimed, not only by the Members of the Dayaka Sabha and the villagers, but also by the public in general. Accordingly the appellants had moved to intervene in the case pending before the Court of Appeal and to allow them to file objections (A3). The

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appellants had claimed that, being Members of the Dayaka Sabha that maintains the said temple of the village they have sufficient interest to intervene. The relevant documents had been filed in the Court of Appeal on 26.07.2005.

On 04.08.2005, without being heard and without allowing the appellants to support their application, the Court of Appeal had refused the appellants' application for intervention (A4). The said refusal had been made not in open Court, but in chambers by a single Judge.

Learned Counsel for the appellants contended that the said order of the Court of Appeal is contrary to law and is arbitrary and is in violation of the rules of natural

justice as the appellants were not given a hearing before the decision to reject the application for intervention in the Court of Appeal (Writ) No. 1978/2004.

Learned Counsel for the 1st respondent conceded that it would have been more appropriate in the interests of natural justice for the Court of Appeal to have heard the appellants' Counsel in support of their application. He further submitted that the 1st respondent has no objection to the appellants being heard in open Court on their application. While conceding the appellants' right to support their application in open Court for intervention, learned Counsel for the 1st respondent submitted that the appellants do not possess any legitimate interest or legal ground whatsoever to intervene in the writ application in the Court of Appeal. He further submitted that whilst reiterating the fact that he is not objecting to the appellants being heard in support of their application to intervene, the 1st respondent has a right to object to that application, which right he wished to reserve for the proceedings in the Court of Appeal.

Having stated the factual position of this appeal, let me now turn to consider the submissions on the questions of law.

The appellants had filed their application for intervention on 26.07.2005 in the Registry of the Court of Appeal. The Journal Entry dated 04.08.2005 indicates that the Registrar of the Court of Appeal had submitted it to a

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Judge in chambers for directions. The said Journal Entry dated 04.08.2005 was in the following terms:

"04.08.2005

Hon................J.,

AAL for the Intervenient petitioner files motion petition, affidavit and documents and moves that Court be pleased to call this case on 23rd, 26th, 29th August, 2005. Submitted for Your Lordship's direction please.

Sgd.

R/CA

04.08.2005"

On the same day this application was refused without hearing the appellants and without giving any reasons. The said action by the Court of Appeal, according to the learned counsel for the appellants, raises several fundamental issues, which could be broadly categorized into two segments.

They are as follows:

(a) the impugned order given by the Court of Appeal on 04.08.2005 is in contravention of the provisions of the Constitution of the Republic;

(b) The manner in which the said impugned order was given is in breach of the rules of natural justice.

It is pertinent to note that the refusal to call the case in open Court for the appellants to support their motion, was decided in the Chambers by a single judge without giving the parties an opportunity for a hearing. Article 106 of the Constitution refers to the sittings of all Courts and the manner in which it should be carried out. The said Article is in the following terms:

"106(1) The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.

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Article 106(2) refers to the exception to the rule referred to in Article 106(1), which included:

(a) proceedings relating to family relations,

(b) proceedings relating to sexual matters,

(c) in the interests of national security or public safety, or

(d) in the interests of order and security within the precincts of such court, tribunal or other institution.

Article 106(1) of the Constitution deals with 'Public sittings' and the meaning of the limb 'shall be held in public' means that the sittings of the Court should be open Court sittings. In fact, in *Madan Mohan vs Carsons Cumberbatch and Co.*([1]) Seneviratne, J. in his dissenting judgment, considering the effect and applicability of article 106(2) of the Constitution had stated that.

"Article 106 of the Constitution deals with 'public sittings' . All authorities, both local and foreign show that the meaning of the limb 'shall be held in public' means that the sittings of the court should be open court sittings, so that any member of the public can attend a court sitting. The next limb 'and all persons shall be entitled freely to attend such sittings', further emphasizes the requirements that the sitting of a court 'shall be held in public'. 'Shall be held in Public' further means that any person constituting the public whether he has a particular or special interest in the case or not, or not directly interested in the case, can attend court when the court is sitting. 'shall be entitled to freely attend such sittings' further means that there can be no restriction or impediments to any person attending a court sitting except

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factors such as the accommodation available in the court, or when due to factors set out in Article 106(2) of the Constitution the court excludes people not directly interested in the proceedings."

The exceptions to this position specified in Article 106 of the Constitution are the instances referred to in Article 106 of the Constitution.

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In the present instance, on a consideration of the facts of the case, it is apparent that the appellants' application does not fall within the scope described in Article 106(2) of the Constitution. If a case does not come within the aforesaid exceptions referred to in Article 106(2), the sittings of such matter will have to be held in public in terms of Article 106 (1) of the Constitution. It is not in dispute that in the instant case, the motion filed by the appellants was to intervene in the writ application instituted by the 151 respondent, and that the order refusing the said motion was decided not in open Court, but in chambers. In the circumstances, the impugned order of the judge of the Court of Appeal is contrary to the provision contained in Article 106(1) of the Constitution and accordingly the said order becomes illegal.

Learned Counsel for the appellants submitted that the application of the 1st respondent in the main matter in case No. CA 1978/2004, was made in terms of Article 140 of the Constitution. His contention was that, in terms of Article 146(2)(iii) of the Constitution, the jurisdiction of the Court of Appeal in respect of its powers as contained in Articles 140, 141, 142 and 143 should be exercised by not less than 2 judges of the Court, unless the President of the Court of Appeal by general or special order otherwise directs. On a consideration of Article 146(2)(iii) it is apparent that unless there was a general or a special order made by the President of the Court of Appeal, directing otherwise, the case in question should have been heard by 2 judges of the Court of Appeal. As borne out by the Journal Entry of 04.08.2005 (A4), the impugned order refusing the application for intervention was made by a single judge in chambers. No material was produced before this Court to indicate that the President of the Court of Appeal had given a general or a special order that the case in question should be heard by a single judge and according to the submissions of the learned Counsel for the appellants, the President of the Court of Appeal has appointed 2 judges to hear matters in the nature of writs. In such circumstances, the decision given by a single judge is contrary to the provisions of the Constitution of the Republic and therefore becomes illegal.

The next matter that has to be examined, relates to the breach of the rules of natural justice in the process in which the impugned order in question was given. It is not in dispute that the decision to refuse the application of the appellants to intervene in the main matter was taken in chambers and such decision was taken without hearing the parties. A

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question thus arises at to whether such a procedure would be in breach of the rules of natural justice which requires consideration and let me now examine whether there had been any such breach of the rules of natural justice.

A fair administrative procedure, which would be comparable to 'due process of law' embedded in the Constitution of the United States, is based on the principles of granting a fair hearing to both sides. The Courts therefore are bound to exercise the rules of natural justice, as the decisions would not be valid if ordered without first hearing the party who was going to suffer owing to the decision of the Court. Although the applicability and thereby the interest in the development of the well known rule "*audi alteram partem*" to a wider category succeeded recently, giving a hearing to an aggrieved party had begun arguably at the beginning of the human kind. As pointed out by Fortescue, J. In *R v University of Cambridge* ([2]), the first hearing in human history was given in the Garden of Eden. In his words:

"I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he.was called upon to make his defence. 'Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

Citing the aforementioned, referring to the principle in question as a 'picturesque judicial dictum', Professor Wade, describes it is a 'nice example of the old conception of natural justice as divine and eternallaw'.

Since the decision in *R v University of Cambridge* (Supra) several developments have taken place in the sphere of the rules of natural justice and in the present day context, the said rules apply not only to those who are carrying out judicial functions, but also to officers in certain instances, exercising administrative power. Lord Denning M. R.*, in Schmidt v Secretary of State for Home Affairs*([3]) stated that,

"..... an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say."

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Thus it is abundantly clear that the legal concepts pertaining to rules of natural justice with specific reference to the need to grant a hearing to parties have developed to such great lengths extending the applicability of such rules even to inquires carried out by administrative bodies.

In such circumstances, when there is constitutional provision to the effect that 'the sittings of every Court, tribunal and other institutions shall be held in public, that would necessarily encapsulate the need for the parties before Court to present their

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case. As pointed out by S. A. de Smith, (Judicial Review of Administrative Action, 4th Edition 1980, pg. 200) what the *audi alteram partem* rule guarantees is an adequate opportunity to appear and to be heard.

Justice Amerasinghe, in his Treatise on Judicial Conduct, Ethics and Responsibilities (Vishva Lekha, 2002, pg. 782) refers to the right to be heard and is of the view that a judge cannot decide a matter without hearing the parties. In Justice Amerasinghe's words:

"In general, however a judge cannot decide a matter without hearing the parties; nor may a judge decide a matter before hearing both parties to a dispute, for, it is 'an indispensable' requirement of justice that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him."

If the position is so clear and unambiguous could it be said that a hearing should be restricted to the two sides which are opposing to each other, and in a situation where a third party is attempting to intervene that such a party should not be" given an opportunity to present his case? I am of the firm view that the rules of natural justice and especially the rule relating to a fair hearing, necessitates that all parties should be given an opportunity to present their case and thereby a fair hearing. According to Justice Amerasinghe, a Judge is expected, not only to arrive at an accurate decision, but also to ensure that it has been fairly reached (Supra). For that purpose it would be essential to hear all parties, which would clearly include an intervenient.

Although the law is quite clear on the general rule pertaining to the duty to state reasons for judicial or administrative decisions, I am of the view that mention should be made of the usefulness in giving reasons as it could create a 'Sound system of judicial review'.

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The order dated 04.08.2005 made by the judge of the Court of Appeal refusing the intervention does not give any reasons for the refusal and the order merely states refused'. When such an application is refused, the applicants may endeavour to file an appeal in the Supreme Court and for such purpose it would be necessary for them to know the reasons for the refusal of their motion. Without knowing the reasons for the decision of the Court, it would be difficult for the petitioners to know whether the decision is even reviewable. Thus without knowing the reasons a litigant may be deprived of obtaining judicial redress and thereby protection of the law. As S. A. de Smith (Supra, at pg. 149) has correctly pointed out, there is an implied duty to state the reasons or grounds for a decision. This theory is generally applicable in situations where there is provision to appeal to a higher Court against the impugned decision. It is an accepted principle that in the field of natural justice, a right to a hearing would include the right to have a reasoned decision (Administrative Justice, Diane Longley and Rhoda James, Cavendish Publishing Ltd., 1999. pp. 208-209).

Notwithstanding the aforementioned, it is to be borne in mind that the principles of natural justice do not at present recognize a general duty to give reasons for judicial or administrative decisions (*Pure Spring Co. Ltd. v. Minister of National Resources*(4)).Considering this position, Prof. Wade is of the view that there is a strong case to be made for the giving of reasons as an essential element of administrative justice (Prof. William Wade, Administrative Law, 9th Edition, Pg. 522). Prof. Wade (Supra) further states that,

"The need for it has been sharply exposed by the expanding law of judicial review, not that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. **A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice**. It is also a healthy discipline for all who exercise power over others. No single factor has inhibited the development of English Administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions (emphasis added)':

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It is common ground that the order of the Court of Appeal dated 04.08.2005 was given without indicating any reasons. It is also not disputed that there was provision for the appellants to appeal to the Supreme Court against the impugned decision. Considering the duty to give reasons for decisions, S. A. de Smith (Supra, at Pg. 156) is of the view that, whilst concern for the quality of administrative justice does not require that all tribunals in all circumstances comply with some universally applicable standard, it is, nevertheless, essential that the Courts do not allow the duty to give reasons to atrophy'.

Be that as it may, what the rules of natural justice require relates to a fair hearing which in the instant case had not been extended to the appellants. In such circumstances it is abundantly clear that there had been a breach of the rules of natural justice.

There is one other matter I wish to deal with, based on a submission made by the learned Counsel for the appellants. Learned Counsel for the appellants submitted that the appellants had sufficient standing in law to be entitled for intervention and it was illegal and wrong on the part of the Hon. Judge of the Court of Appeal to refuse such intervention.

The appellants filed the Special Leave to Appeal Application against the order of the Court of Appeal dated 04.08.2005(A4) and prayed that the said order be set aside. This Court granted Special Leave to Appeal on that basis and had heard both parties on that limited issue. In fact learned. Counsel for the 1st respondent had no objection to granting Special Leave to Appeal in order to consider the grant of relief

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to the appellants by setting aside the order of the Court of Appeal of 04.08.2005 for the appellants to support their application to intervene in the Court of Appeal in the interest of natural justice.

In the circumstances, the submissions pertaining to the question as to whether there was sufficient standing in law for the appellants to intervene in the application is not taken into consideration in these proceedings since this question has to be examined by the Court of Appeal.

For the reasons aforementioned, I answer questions No. 1and 2, referred to earlier, in the affirmative. This appeal is allowed and the order of the Court of Appeal dated 04.08.2005(A4) is therefore set aside.

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In all the circumstances of this case there will be no costs.

RAJA FERNANDO, J. -I agree.

AMARATUNGA, J. -I agree.

Appeal allowed.

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Wickramasinghe v. Robert Banda And Others - SLR - 246, Vol 1 of 2006 [2005] LKSC 17; (2006) 1 Sri LR 246 (14 October 2005)

WICKRAMASINGHE

VS.

ROBERT BANDA AND OTHERS

SUPREME COURT
BANDARANAYAKE, J.
AMARATUNGA, J AND
MARSOOF, J
SC (APPEAL) NO. 14/2004
12TH MAY 2005 AND 14TH AND 20TH JUNE, 2005

Kandyan Law - Daughter married in deega. - Forfeiture of rights to paternal (mulgedera) inheritance - Re-acquisition of binna rights in mulgedera - Rights of daughter's son to succeed to maternal grandfather's property.

The District Court gave judgement in a partition case in favour of the 1st respondent Robert Banda on the ground that the property of his paternal grandfather Mohotty Appuhamy who died intestate devolved on Punchi Banda (son) and Podimahathmayo (daugther), Robert Banda's mother, who married in deega and lived at Kegalle. That marriage was dissolved in two years on 30.01.1908. In 1915, Robert Banda was born to Podimahthmayo by an illicit connection with one Mudiyanse ; and Podimahathmayo returned to the mulgedera as was customarj, where she gave birth to Robert Banda (the plaintiff).

The district Judge gave judgement for the plaintiff on the basis that by reverting to mulgedera, at Halpandeniya. Podimahaththayo had by such "close connection" with the mulgedera re-acquired her rights to mulgedera property.

The Court of Appeal affirmed the District Judge's order notwithstanding that Podimahathmayo had predeceased Mohotti Appuhamy, the plaintiff's maternal grandfather on the strength of *Appuhamy v Lapaya* (8 NLR 328) on the basis that the plaintiff was entitled to inherit the acquired property of his maternal grandfather.

HELD:

1. In Kandyan Law, a daugther who marries in deega forfeits her rights to mulgedera property, except that she would reacquire binna rights by proof of several instances :-

(a) having a close link with mulgedera even after the marriage;

(b) by a subsequent marriage in binna ;

(c) by leaving a child with the grand parents at the mulgedara ;

(d) by possessing shares of property in spite of the marriage in binna ;

(e) any evidence to indicate the waiver of the forfeiture of her rights by other members of the family.

2. When it was found that Podimahathmayo had predeceased her father, plaintiff's maternal grandfather, the Court of Appeal held wrongly that the plaintiff is entitled to succeed to the property of his maternal grandfather, Mohotti Appuhamy. On the strength of *Appuhamy v Lapaya* which decision has been criticized by Hayley and *Kiri Puncha v Kiri . Ukku* (1981)[1] Sri LR 341 as having been wrongly decided .

3. In the circumstances and on the evidence, the plaintiff was not entitled to judgment on any basis. Both the District Court and Court of Appeal had erred in giving judgment for the plaintiff.

CASES REFERRED TO :

(1) *Gunasena v Ukku Menika* (1976) 78 NLR 524

(2) *Dingiri Amma v Ukku Banda* (1905) 1 BAL 193

(3) *Tikiri Kumarihamy v Loku Menika* (1875) RAM 1972-76 p. 106

(4) *Babanisa v Kaluhamy* (1909) 12 NLR 105

(5) *Dingiri Amma v Ratnayake* (1961) 64 NLR 163

(6) *Madawalatenna* (1834) Marshal's Judgements 329

(7) *Ukku v Pingo* (1907) 1 Leader 53

(8) *Appuhamyv Kiri Menika et at* (1912) 16 NLR 238

(9) *Banda v Angurala* 50 NLR 276

(10) *Appu Naidev Heen Menika* (1948) 51 NLR 63

(11) *Emi Nona v Sumanapala* (1948) 49 NLR 440

(12) *Appuhamyv Lapaya* (1905) 8 NLR 328

(13) *Kiri Puncha v Kiri Ukku and Others* (1981) 1 Sri LR 341

(14) *Rankiriv Ukku* (1907) 10 NLR 129

APPEAL from the judgment of the Court of Appeal.

J. Joseph with Ms. H. P. Ekanayake and Chamindika Perera for appellant.

Peter Jayasekera with Gamini Peiris and Kosala Senedeera for respondent.

Cur.adv.vult

09th September, 2005,
SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgement of the Court of Appeal dated 27.08.2003. By that judgment the Court of Appeal affirmed the judgment of the District Court dated 30.07.1993 and dismissed the appeal. The 1st defendant-appellant-appellant (hereinafter referred to as the 1st defendant) appealed against the said judgment of the Court of Appeal on which this Court granted special leave to appeal.

The main issue in this appeal is whether the plaintiff-respondent-respondent (hereinafter referred to as the plaintiff), the son of Podimahathmayo, could succeed to his maternal grandfather, Mohottihamy.

The facts of this appeal, *albeit* brief, are as follows:

The plaintiff instituted action in the District Court of Kurunegala to partition the land described in the schedule to the plaint (P1). The plaintiff had stated that one Mohottihamy alias Mohotti Appuhamy, (hereinafter referred to as Mohotti Appuhamy) who was the original owner of the property, died intestate and his property devolved on his son and daughter namely Punchi Banda (son) and Podimahathmayo (daughter) and the said Podimahathmayo owned and possessed her 1/2 share of the property, which devolved upon her death to her only child Robert Banda, who was the plaintiff in the District Court case.

According to the plaintiff, his mother (Podimahathmayo) was married in diga to S. M. Dingiri Banda on 30.05.1906 and the said marriage was dissolved on 30.01.1908 (P2). Podimahathmayo returned to her Mulgedera and while living with her father at Halpandeniya there had been an illicit relationship with one Menawa Ralalage Mudiyanse and the plaintiff was born to Podimahathmayo in 1915. Thereafter Podimahathmayo had died in 1918, when the plaintiff was 3 years of age. Mohotti Appuhamy (the maternal Grandfather) had brought him up at the mulgedera in Halpandeniya until his death in 1929 and thereafter the plaintiff's maternal uncle (Punchi Banda) had looked after him.

The contention of the 1st defendant, however, is different and his position is that at the time the plaintiff was born in 1915, his parents were residing' not at

Halpandeniya as stated by the plaintiff, but at Menawa in Kegalle. Further it was contended that the union between Podimahathmayo and Menawa Ralalage Mudiyanse, though not registered, is a *diga* marriage since Podimahathmayo had left the mulgedera with the said Menawa Ralalage Mudiyanse. The 1st defendant took up the position that as there is no *binna* marriage contracted between the parents of the plaintiff, that the plaintiff is not entitled to the 1/2 share of the property.

Learned Counsel for the 1st respondent further contended that the plaintiff had not averred that his mother married in *binna* and that his Certificate of Birth (P3) indicates clearly that his parents were residing at Menawa in Kegalle and not at Halpandeniya, the village of the plaintiff's mother and the grandfather. The learned Counsel for the 1st respondent submitted that the union between the plaintiff's mother Podimahathmayo and Menawa Ralalage Mudiyanse, although not registered, is a diga marriage since the plaintff's mother, Podirnahathmayo had left the mulgedera with the said Menawa Ralalage Mudiyanse. Further he contended that, there was no binna marriage between Podimahathmayo and Menawa Ralalage Mudiyanse as there is no evidence of binna settlement. Therefore his submission is that since Podimahathmayo married Menawa Ralalage Mudiyanse in diga, the plaintiff had forfeited his rights to his maternal grandfather's property.

It is well recognized in Kandyan Law that a daughter who marries in diga, forfeits her right to the paternal inheritance (Gunasena v Ukku Menika (1)). Hayley referring to the Kandyan Law that is applicable to a daughter who had married in diga, clearly states that,

"the general rule is that neither a diga-married daughter, nor her children, can compete with other children by the same mother, or their descendants, in the distribution of a deceased intestate's estate. This rule has been accepted without hesitation ever since the Kandyan Law was first administered by British............ Courts (The Laws and Customs of the Sinhalese or Kandyan Law, Reprint 1993, pg. 379)."

In terms of the general rule, a diga-married daughter, or her children would therefore not be entitled to any paternal or maternal inheritance. However, the general rule is not to be applied thus simply as the modern case law has clearly accepted certain exceptions, which favours the digamarried daughter enabling her to re-acquire the rights of a binna-married daughter in the event she fulfils certain requirements. In fact Hayley points out that 'certain modern judgments have tended towards engrafting an exception in favour of the diga-married daughter who has 1 kept up a close connection with her father's home' (Supra, pg. 379).

The exception to the general rule thus appears to be a development through the case law and therefore it would be useful to examine the important judgments to assess the circumstances in which the exception had been applied .

Dingiri Amma v Ukku Banda (2) is one of the early decisions, which had considered a daughter married in diga re-acquiring the rights of a daughter who had married in

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binna. In Dingiri Amma's case the plaintiff first lived with her husband in her father's house prior to the marriage being registered. Subsequently the marriage was registered and both husband and wife lived in the father's mulgedera as well as in the husband's house, until the mulgedera was demolished. Thereafter the plaintiff's husband built a new house in the same garden where the mulgederawas situated and both the husband and the wife were living together in that house. Pereira, J., held that even if the plaintiff was married in diga, she had acquired binna rights.

In *Tikiri Kumarihamyv Loku Menika* (3) the Court was of the view that a daughter originally married in binna, subsequently leaving her parents' house and going to live with her husband in diga and still keeping up a close connection with the mulgedera or a daughter originally married in diga and subsequently returning to her parents house and being re-married in binna, may preserve her rights to any share in her parents estate.

The entitlement of a Kandyan woman to her parental inheritance, who had contracted a diga marriage, but who had subsequently returned to the parental roof and contracted a binna marriage during the lifetime of her father, was further strengthened in *Babanisa v Kaluhami* (4) as well as in *Dingiri Amma v Ratnayake* (5)

It is therefore clear that a daughter who had married in diga, but under varying circumstances had kept a close connection with the mulgedera, would re-acquire the rights to inherit from her father as that of a daughter who had married in binna. This position has been endorsed in an early case, namely in *Madawalatenne* (6) decided in 1834 where the Supreme Court was of the view that,

" ....it appears that, though she was married in diga, she always kept up a close connection with her father's house, in which indeed three of her children were born; ....again it appears that the father, on his death-bed, gave one talpot to the defendant and two others to his wife, what had become of those two latter olas does not appear, but it is not improbable that one of them may have been intended for the plaintiff, **more especially considering the frequency of her visits to the paternal residence** (emphasis added)."

However, it is to be borne in mind that, as correctly pointed out by Hayley *(Supra)*, that the daughter in Madawalatenne was awarded only one-sixth of what her mother possessed and not the half share to which she would have been entitled if not for her marriage.

Be that as it may, there are several other decisions that had taken the view that depending on the circumstances, a Kandyan woman married in diga could later re-acquire the rights of a binna marriage. I would refer to some of the judgments to indicate the circumstances in which such reacquiring the rights of a binna marriage had taken place.

In *Ukkuv Pingo* (7) it was held that a daughter, who married in diga, after her father's death, retained her share by leaving behind in the mulgedera a child previously born to her there as mistress of her brother-in-law. A similar view was adopted in

the decision in *Appuhamyv Kiri Menika et al* (8) where a Kandyan woman, who was married in diga went to live with her husband about two miles away from the mulgedera. One of their children was left in the mulgedera and brought up by her grandmother. It was also revealed that the woman, although maried in diga, kept up a constant and close connection with the mulgedera. Lascelle, C. J., held that in the circumstances, the woman did not by reason of her marriage in diga, forfeit her right to the paternal inheritance.

The decision in *Banda v Angurala* (9) on the other hand, clearly. indicates that the Court had looked at the question from another perspective and held that the regaining of binna rights may be evidenced by material other than in connection with the mulgedera. Emphasising on this aspect, Bertram, C. J., stated that,

"In all previous cases the question for the recovery of binna rights has always appeared to turn upon something done in connection with the mulgedera, such as a resumption of residence there; the cultivation of the paternal lands held in connection with it; the leaving of a child in the mulgedera; or the maintenance of a close connection with the mulgedera. But in this case nothing of the sort is suggested. The claim to binna rights, however, in the case is based upon circumstances of a very significant and uneqivocal character………." in spite of their marriages in diga to possess their share of the land for a long period of time, he has acquiesced in their right and cannot be permitted to deny it.

On an examination of the afore-mentioned decisions as well as the early authorities, it is apparent that a Kandyan woman who had married in diga, could establish the re-acquisition of binna rights by proof of several instances, which would include -

(a) having a close link with the *mulgedera* even after the marriage;

(b) by a subsequent marriage in *binna*;

(c) by leaving a child with the grand parents at the *mulgedera* ;

(d) by possessing their shares of property in spite of the marriage in *diga*; and most importantly

(e) any evidence to indicate waiver of the forfeiture of her rights.

Having said that, let me now turn to examine the circumstances in which the plaintiff had made a claim to the property in question.

Admittedly, the plaintiff's mother, the said Podimahathmayo married one Dingiri Banda, on 30.05.1906. The certificate of marriage (P1) states that the marriage was in diga. The said marriage had been dissolved on 30.11.1908 (P2). According to the Register of Dissolution, there had been no children from that marriage. The plaintiff was born on 06.06.1915 at Halpandeniya and the Certificate of Birth (P3) discloses that Menawa Ralalage Mudiyanse and Podimahathmayo are the parents and that

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they were not married at the time of the birth oJthe plaintiff. Podimahathmayo had died in 1918 and the plaintiff's maternal grandfather, Mohotti Appuhamy, had died in 1929.

Learned Counsel for the plaintiff, referred to the judgment of the District Court and submitted that the learned District Judge had held that from the fact that the plaintiff was born and bred in the mother's village, that it could be concluded that the plaintiff's mother had close connection with the mulgedera and therefore she does not forfeit her paternal inheritance. I reproduce below the relevant portion from the judgment of the learned District Judge where he had stated that -

Except for the afore-mentioned statement, learned District Judge has not referred to any instances which had indicated that plaintiff's mother had maintained a close and constant affiliation with the mulgedera at Halpandeniya. The Court of Appeal was of the view that the judgment of the District Court would not warrant interference and had stated that -

"In the instant case the plaintiff's paternal grandfather (sic) having brought up the child from tender years and admittedly in the 'mulgedera by the matemal grandfather whose rights the plaintiff claims in the instant action, had not obviously disapproved of the daughter's cohabitation with the plaintiff's father."

On a careful examination of the evidence of the plaintiff and the 1st defendant and on a perusal of the documents that were produced in the District Court, it appears that except for the Certificate of Birth of the plaintiff, there is no other material which reveals detailed information regarding the residence of the plaintiff's parents. The Certificate of Birth clearly indicates that the plaintiff was born at Halpandeniya and that being the village of the plaintiff's mother, Podimahathmayo, it would appear that she had been at the mulgederafor the confinement. However, with reference to the name and residence of informant and in what capacity he had given information, it had been stated that-

The inference that could be clearly drawn from this statement is that Podimahathmayo, who had been living with there husband at Menawa had returned to her mulgedera at Halpandeniya for her confinement, in keeping with the customary traditions. Except for the fact that Podimahathmayo had given birth to the plaintiff at Halpandeniya, there is no other material that indicate that Podimahathmayo had maintained a close relationship with her mulgedera. Although the plaintiff in his evidence in the District disregards the general principle of representation on which the rights of grandchildren are based and also fails to take account of the fact that illegitimacy itself usually arose from the refusal of the grandparents to recognize the marriage, for which very reason the issue of such marriage was debarred from inheriting any property descending from them."

The decision in *Appuhamy vs Lapaya (Supra)* was considered by *Wanasundera, J., in Kiri Puncha vs. Kiri Ukku and others* (13). In that case, the question arose as to the

rights of illegitimate children to paraveni property and it was held that although illegitimate children are entitled to succeed to their father's acquired property, that in the general Kandyan Law an illegitimate child cannot inherit the property of his grandfather. Further it was held that if his father had predeceased the grandfather, he would not be in a better position than if his father had survived and the property would still descend as paraveni.

In Kiri Puncha's (Supra) case, Wanasundera, J. closely examined the decision of Wendt, J. in *Appuhamyvs. Lapaya (Supra)* and was of the view that Wendt, J.,s position was clearly not in accordance with the Kandyan Law. Referring to Wendt J. ,'s judgment in *Appuhamyvs. Lapaya (Supra)*, Wanasundera, J. stated that,

"This view is clearly not in accordance with the principles of Kandyan Law. Hayley at page 392 of his book shows by reference to the passage from Armour and other institutional writers on Kandyan Law that Wendt, J., had overlooked certain basic features of the Kandyan Law in coming to this conclusion."

On an examination of the decision in *Appuhamyvs. Lapaya (Supra)* and *Kiri Puncha vs. Kiri Ukku* and the principles of Kandyan Law referred to by Armour and Hayley, it is apparent that in *Appuhamy vs. Lapaya Wendt, J.,* had overlooked certain basic features applicable to Kandyan Law in coming to his conclusion. It is also to be born in mind that in *Kiri Puncha vs. Kiri Ukku (Supra)* decided in 1981, Wanasundera, J. disapproved the decision in Appuhamyvs. Lapaya (Supra) and did not follow that judgment.

The Court of Appeal in considering the present appeal however has relied on the decision in *Appuhamyvs. Lapaya (Supra)* where it was stated that

"Even in the case of acquired property of a deceased who dies intestate under the Kandyan Law both legitimate and illegitimate children are entitled to such property in equal shares, vide *Appuhamy vs Lapaya 8 (Supra).*

On a consideration of the above, I am inclined to the view that the impugned judgment would not warrant interference."

Thus it is evident that the Court of Appeal in deciding that there should not be any interference with the decision of the District Court, had relied on a decision, which was disapproved by the Supreme Court and has been regarded by Hayley, as a decision which had overlooked certain basic features in succession to property by illegitimate children under the Kandyan Law.

The judgment of the Court of Appeal thus creates the impression that *Appuhamyvs. Lapaya (Supra)* is decided correctly and has to be followed in deciding property rights of illegitimate children.

The position with regard to the intestate succession of illegitimate children in Kandyan Law is quite clear. Under the general Kandyan Law an illegitimate child could not succeed to paraveni property if there are any other relations however

remote *(Rankiri vs. Ukku* (14)). Considering this position Hayley (The Laws and customs of the Sinhalese (Supra) pg 3) has clearly stated that the illegitimate child does not succeed to the grandfather. In Hayleys words:

"Illegitimate children are, however not entitled, to succeed to the *paraveni* if there are any other relations however, remote. It follows therefore that an illegitimate child can never inherit the property of his grandfather, for, even if his father has predeceased the grandfather, he cannot be in a better position than if his father had survived in which case the property would descend as paraveni."

As referred to earlier, the decision in *Appuhamyvs. Lapaya (Supra),* clearly constitutes a departure from the general principles applicable in Kandyan Law dealing with property issues pertaining to an illegitimate child. The Court of Appeal decision is based on the decision in *Appuhamy vs. Lapaya*

7. *Fernando v Perera* (1932) 25 NLR 197

8. *Sallis and another v. Jones* 1936 Probate Division 43

9. *Re Mainland Lloyds Bank Ltd. v. Mainland* (1939) All ER 148

10. *Miller v Solomons* (1852) Exch 560

11. *Nolan v Clifford* 1 CLR 453

APPEAL from the judgment of the Court of Appeal

Rohan Sahabandu for appellants in SC No. 74/2002 and SC No. 75/2002

A. R. Surendran, P. C. with K. V. S. Ganesharajan and Nadarajan Kandeepan v for respondent in SC No. 74/2002 and for respondent in SC No. 75/2002

Cur. adv. vult.

October 14, 2005
SHIRANI BANDARANAYAKE, J.

These are appeals from the judgment of the Court of Appeal dated 31.05.2002. By that judgment the Court of Appeal affirmed the decision of the District Court dated 31.12.1998 and dismissed the appeal. The petitioner-appellant-appellant in S.C (Appeal) No.74/2002 and respondents appellants- appellants in S. C. (Appeal) No. 75/2002 (hereinafter referred to as the appellant) appealed to this Court where special leave to appeal was granted.

The facts of this appeal, albeit brief are as follows:

The appellant is a daughter of one Muthiah Pararajasingham, who had passed away on 02.10.1997. The appellant has a sister, Vinoji who is the 2nd respondent-

appellant-appellant in S. C. (Appeal) No. 75/2002 (hereinafter referred to as Vinoji). The late Pararajasingham was earlier married to one Asoka Wickramasinghe and they were divorced in July 1993. During that marriage the appellant and Vinoji were born. The said Pararajasingham had executed his last will on 24.08.1990 appointing the appellant as his sole heir and appointing one Nithyalakshmi Devi Pararajasingham, the respondent-respondent-respondent in S.C.(Appeal) **74/2002 and petitioner-respondent-respondent in S. C. (Appeal)** No. 75/2002 (hereinafter referred to as the respondent), as the Executor. Later the said deceased had married the respondent. According to the appellant, the said Executor had not taken steps to have the estate administered. The appellant had therefore petitioned the District Court and sought an order of court that the appellant is the sole heir to the Estate of the deceased (Case No. 738/98/T-S. C. (Appeal) No. 74/2002). Thereafter the respondent Nithyalakshmi Devi Pararajasingham, the second wife of the late Muthiah Pararajasingham and the step mother of the appellant had filed papers in the District Court of Mr. Lavinia (Case No. 707/97/T-S.C. (Appeal) No. 75/ 2002) seeking an order to administer the property, claiming 1/2 share of the Estate of the deceased and the other 1/2 share to be given to the appellant and Vinoji, the two daughers of the deceased, on the basis that the deceased died without leaving a last will.

The appellant had objected to the said application of the respondent on the basis that the deceased in terms of his last will had bequeathed his Estate to the appellant as his sole heir.

The District Court considered both cases (Case No. 707/97/T and Case No. 738/98/T) together with one judgment binding the other and on 31.12.1998 dismissed Case No. 738/98/T and appointed the respondent Nithyalakshmi Devi Pararajasingham as the administrator of the Estate of the deceased on the basis that the last will was revoked by the subsequent marriage of the Testator, which position was confirmed by the Court of Appeal.

Both Counsel agree that the only question involved in this appeal is to consider the meaning that should be given to section 6 of the Prevention of Frauds Ordinance in order to decide whether the last will of the Testator was revoked by his subsequent marriage. They also agreed that both cases could be considered together with one judgment binding the other.

Learned Counsel for the appellant strenuously argued that in terms of Section 6 of the Prevention of Frauds Ordinance, there was no revocation of the impugned will by the marriage of the Testator to the respondent. His position was that although ordinarily a last will could be revoked by a subsequent marriage of the Testator by virtue of section 6 of the Prevention of Frauds Ordinance, this rule would be applicable only where an unmarried person contracts a marriage for the first time. Accordingly learned Counsel for the appellant submitted that the said provision would not be applicable in a situation where a person had married for the second time.

Section 6 of the Prevention of Frauds Ordinance is in the following terms:

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construed as being applicable only to the first marriage of the Testator, in as much as the Roman Dutch Law only refers to revocation of wills by a subsequent marriage producing issues and not to any principle whereby revocation of a prior will is postulated only by the first marriage of the Testator. In support of his contention learned President's Counsel for the respondent referred to the observations made by Stewart, J. *in Johannes Muppu's case (Supra).* Referring to the words in section 5 of Ordinance, No.7 of 1840, that 'no will................. shall be revoked otherwise than by the marriage of the 'testator or testatrix or by another will', Stewart, J., observed that,

"probably the grammatical and logical equivalent of the words" no will shall be revoked otherwise than by the marriage of the "testaror or testatrix" may be taken, rendered into affirmative language, as enacting' that every will shall be revoked by the marriage of the testaror or testatrix'."

Having said that, Stewart, J. further proceeded to observe that there was no occasion for the purposes of *Johannes Muppu's case (Supra)* to determine definitively whether the terms of section 5 of Ordinance No.7 of 1840 are sufficiently adequate to abrogate the Roman Dutch Law. In Stewart, J.'s words,

" But as will be seen hereafter, there is no occasion for the purposes of the present case to determine definitively whether the terms of the 5th section are sufficiently express to abrogate the Roman Dutch Law, according to which the person should not only be married when the will was made, but the subsequent marraige should be followed by issue to render the prior will void."

In the light of the aforementioned, it is evident that although Stewart, J., referred to the principles of Roman Dutch law, which are applicable mainly to joint wills and with regard to the application when there is a subsequent marriage, he did not proceed to make any determination regarding the applicability and the effect of any such principle on section 6 of the Prevention of Frauds Ordinance. On the contrary, Stewart, J., has made reference to the English Common Law in *Johannes Muppu's case (Supra)* and his reasoning had been solely on that basis. Consequently, the decision by Stewart, J., in *Johannes Muppu (Supra)* cannot be taken as a binding authority in construing the provision in section 6 of the Prevention of Frauds

Ordinance, which deals with the revocation of a will by a subsequent marriage.

Learned President's Counsel for the respondent, drew our attention to the decision in Re Estate Koshen [(5)]. This decision in my view, suggests an interesting point. In that matter the Testator was a Muslim who contracted two marriages by Islamic Rites; both of which were in terms of Islamic Law potentially polygamous. His first wife died in 1930 and in 1932 he had made a will which contained three (3) beneficiaries, namely his two sons and a nephew. In 1933 the testator married his second wife and had a large family by her. He died in 1954. The question arose as to the validity of his will made in 1932. Hathorn, j., considering that the case relates only to the succession of property and that it also falls within the principles of Mehta's case, held that the Testator's marriage in 1933 was a marriage within the

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meaning of section 7 of the Deceased Estates Succession Act and in the absence of an endorsement as is described in that section that marriage renders null and void the will made by the testator in 1932.

This decision, thus clearly emphasises the fact that, priority had been placed for the governing provisions laid down in statutes and due consideration had been given to such provisions in interpreting the question of the revocation of a will based on a subsequent marriage.

It is also pertinent to note, both Hathorn, J., and R. W. Lee have been specific that consideration should be given to relevant statutory provisions in deciding the validity of a will executed prior to a second marriage of the Testator.

In such circumstances, the question arises as to whether there is any necessity to consider the position which prevailed under the Roman Dutch Law, despite that being our common law, where there are specific statutory provisions which govern the question under consideration.

It is common ground that express provision has been made under the Prevention of Frauds Ordinance on revocation of a will. Accordingly, any such principle of Roman Dutch Law concerned with revocation of a will has been superseded by the express provisions contained in the Prevention of Frauds Ordinance. In the absence of any doubt or ambiguity, there are no means for the appellant to rely on principles governed by Roman Dutch Law, to be applied in their favour.

Referring to principles of interpretation, Sutherland (Statutory Construction, 3rd Edition, Vol. II, pg. 310) stated quite clearly that,

"where the words of an Act of Parliament are clear, there is no room for applying any of these principles of interpretation, which are merely presumptions, in cases of ambiguity in the statute."

Maxwell has-confirmed this position by stating that it is not allowable to interpret what has no need of interpretation (Interpretation of Statutes, 10th Edition, pg. 4.). Stating that the ordinary and natural meaning to be adhered to in the first instance, Bindra had categorically stated that,

"The words of a statute must prima facie be given their ordinary meaning. Where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail unless there be some strong and obvious reason to the contrary.

When there is no ambiguity in the words, there is no room for construction.............No single argument has more weight in statutory interpretation than the plain meaning of the word. 'If the meaning of the language be plain and clear, we have nothing to do, but to obey it - to administer it as we find it, observed Pollock CB in *Miller v Salomans.* If the language of statute is clear and unambiguous, the court must give effect to it and it has no right to extend its

operation in order to carry out the real or supposed intention of the legislature (Interpretation of Statutes, 9th Edition, Bullerworths, pp 394395)"

This position has been accepted by our Courts in several decisions. For instance in *Mudanayake v Sivagnanasunderam* (6) it was held that 'when the language of a statute speaks clearly for itself it is not permitted to rely on extraneous evidence in support of an interpretation, which the words of the statute do not warrant'.

It is thus evident that, when the language of a statute is clear and has no ambiguities, there is no provision for this Court to refer to any other material in view of giving a different interpretation. The only role for the Court, when there is no ambiguity in the language and when it is plain and clear, is to do nothing, but to simply give effect to the statutory provision. It is thereby clear that the Court has no power to add any words to statutory provision which is clear, plain and unambiguous. The contention of the learned Counsel for the appellant is that, the words, **'the marriage'** in section 6 of the Prevention of Frauds Ordinance lays emphasis on 'marriage'. Learned Counsel submitted that 'THE' is a functional word to indicate that following a noun or a noun equivalent is **definite** or has been previously specified by context or by circumstances. The resulting position of the submission of the learned Counsel for the appellant in other terms would be to interpolate the word **'first'** between the words 'the' and 'marriage' in section 6 of the Prevention of Frauds Ordinance to read as by the 'first' marraige.

It has been stated time and again as referred to earlier, that when there is no ambiguity in the words in a statute there is no room for construction. if the language of a statute is clear and unambiguous, Courts must give effect to the words so stated in the statute, without attempting to obtain the intention of the legislature. Moreover when the language is clear and meaningful there is no authority for the Court to add to the language of a statute. This position was cosidered by Jayawardene, A. J. in *Fernando v Perera* (7) where it was held that,

"Courts have no power to add to the language of a statute unless the language as it stands is meaningless or leads to an absurdity."

It is thus evident that in view of the unambiguous language of section 6 of the Prevention of Frauds Ordinance there is no necessity for interpreting that section in terms of the Roman Dutch Law.

Having said that let me now turn to examine the meaning given in section 6 of the Prevention of Frauds Ordinance in a situation where there is a second marriage after Testator had executed his last will.

The second limb of the contention of the learned Counsel for the appellant was that the court of Appeal should have followed the observations of Stewart, J., in *Johannes Muppu's case (Supra)* and not the decision in *Mary Nona v Edward de Silva (Supra).* Learned Counsel's position was that the better view was of Stewart, J. in Johannes Muppu (supra) and not what was expressed by then Supreme Court in *Mary Nona v. Edward de Silva (Supra).*

In *Johannes Muppu* (supra) a husband and wife executed a joint will disposing of their common property. The wife died and the husband married for the second time. It was in evidence that after the first wife's death the husband executed conveyances of portions of the property dealt with by the joint will to legatees under the will. The husband afterwards died leaving heirs surviving his second wife. An executor of the joint will having applied for probate after the husband's death, the application was opposed by the second wife, who contended that the joint will was revoked by the second marriage.

The Court held that the husband had adiated the inheritance under the joint will and that, that being so, the joint will was not revoked by the husband's subsequent marriage. It was further held that the provisions of clause 5 of Ordinance No.7 of 1840, with respect to the revocation of wills by subsequent marriage of the Testator's not to apply to the case of the joint wills made by spouses married before the passing of the Ordinance.

It is to be borne in mind that in *Johannes Muppu's case (Supra)* the question was based on the validity of a joint will and Stewart, J., took the view that the said will is irrevocable in view of the husband adiating the inheritance. In such circumstances there was no necessity for Stewart, J. to consider the application and scope of section 6 of the Prevention of Frauds Ordinance and thereby his position became obiter dictum and could not have been taken as authority on the applicability of section 6.

In *Johannes Muppu's case (Supra),* Stewart, J., had considered the issue in hand on the basis of the corresponding statutory provisions in the English Statute, namely section 18 of the Wills Act and came to the conclusion that the will of the Testator is revoked only when a testator marries for the first time. Section 18 of the Wills Act states that, -

"Every will made by a man or woman shall be revoked by his or her marriage ....."

Section 18 of the Wills Act had been considered by several English decisions where it has been stated that the Testator's second marriage would revoke a will executed prior to the marriage. Considering this position learned President's Counsel for the respondent cited *Sallis and Another v. Jones* (8) where the Testator who was a widower, by his will executed in June 1927 appointed his two daughters his executrices. He married his second wife in November 1927. In the final sentence of his will the Testator had declared that 'this will is made in contemplation of marriage.' After his death in 1936, testamentary proceedings for the grant of probate were instituted by his daughters on the basis of his will executed in June 1927; the second wife resisted the application contending that in terms of section 18 of the Wills Act, the said will was revoked by the testator's marriage to her and that thereafter the testator died intestate.

Section 177 of the Law of Property Act of 1925, excluded the operation of section 18 of the Wills Act, if the will was made before a marriage is expressed to be made

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in contemplation of a particular marriage and is followed by the solemnization of that marriage. However, in Sallis's case Bennett, J., was of the view that, for the operation of section 177 of the Law of Property Act, the will should contain 'something more than a declaration containing a reference to marriage generally'. Therefore Bennett, J., was of the view that the case had to be decided in terms of section 18 of the Wills Act and it was held that the will in question was revoked by the subsequent marriage of the deceased.

In *Re Gilligan* (deceased) the court had to consider the scope of section 18 of the Wills Act of 1837. The court while considering the purpose and effect of section 18 stated that the section provided that wills shall be revoked by subsequent marriage and more importantly was of the view that 'the event which the section contemplates is the re-marriage of a person who has made a will and the circumstances in which a will so made shall be revoked by such subsequent marriage.'

In *Re Mainland, Lloyds Bank Ltd., v Mainland* (9) the Testaror had executed a will prior to entering into his second marriage. After his second marriage he had executed another will. Considering the validity of the will Lord Greene, M. R. was of the view that,

"Section 18 provides that a will shall be revoked by marriage. Here revocation takes place, not by virtue of some action of the testator directed to the revocation of the will, but as a collateral consequence, imposed by law, of an action performed *alio intuitu* ....under section 18, where revocation follows as a matter of law, whether or not the testator wishes it".

The English Wills Act has no direct relevance to the matter in issue. However, the purpose of citing English authorities was for the reason that as correctly pointed out by learned President's Counsel for the respondent, Stewart,J., in his judgment in Johannes Muppu (Supra) had referred to section 18 of the Wills Act in the process of determining whether the subsequent marriage of *Johannes Muppu* had revoked the will executed prior to his second marriage.

All these decisions therefore clearly indicate that section 18 of the Wills Act provides without any doubt that a will which had been executed prior to a second marriage would be revoked as a result of that marriage. In such circumstances, the view taken by Stewart, J., in Johannes Muppu's case (Supra) that in terms of section 18 of the Wills Act, the will of the testator is revoked only when a testator married for the first time cannot be accepted. Having given consideration to that decision I am not in agreement with the view taken by the learned Counsel for the appellant that the Court of Appeal should have followed the observations of Stewart, J., in Johannes Muppu's case (Supra).

Learned President's Counsel for the respondent on the other hand relied on the decision of Mary Nona v Edward de silva (Supra) decided by the Supreme Court in 1948, which had clearly disagreed with the view expressed by Stewart, *J. in Johannes Muppu (Supra).*

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In Mary Nona's case, the question arose in relation to a joint will made by one Charles de Silva and his wife Elizabeth in 1921.By clause A, both movable and immovable property belonging to both of them were given to one Margaret, a daughter of Charles by a previous marriage. Clause B went on to state that if Charles was the survivor he would be entitled absolutely to all the property belonging to the joint estate, and that if Elizabeth was the survivor she would be entitled to the control of all the property and to enjoy the rest and profits thereof, but that Elizabeth would not be at liberty to sell or dispose of that property. Charles died in 1922 and after Charles's death Elizabeth contracted a marriage with one Warakaulle who died in 1938 leaving Elizabeth considerable property. Elizabeth died in 1943. Considering the question whether the second marriage contracted by Elizabeth had revoked her will, Wijeyewardene, A. C. J., clearly stated that the second marriage she had entered into had resulted in revoking her last will. Expressing his view, Wijeyewardene, A. C. J. further stated that,

"It was contended by Mr. H. V. Perera that section 6 of the Prevention of Frauds Ordinance, did not have the effect of invalidating a will of a married person by reason of a second marriage subsequent to the execution of the will, and he relied on the opinion expressed by Stewart, J., *in Re the estate of K. D. Johannes Muppu* (1879) 2 Supreme Court Circular 14. That opinion was an obiter dictum, as it was not necessary for Stewart, J., to consider section 6 in view of the definite decision reached by him that the last will in that case had become irrevocable, since the testator and testatrix there had massed their estates and the surviving testator had adiated the inheritance. **With due respect to the learned Judge, I find myself compelled to disagree with the view expressed by him as to the scope of section 6** (empahsis added)".

Learned Counsel for the appellant submitted quite strenuously that, in *Mary Nona v Edward de Silva (Supra)*, although the Supreme Court decided that the opinion of Stewart,J., in Johannes Muppu (Supra) was obiter and cannot be agreed upon, that there was no analysis of section 6 of the Prevention of Frauds Ordinance and that there was no comparison with other authorities like in Stewart, J.'s judgment.

It would not be correct to state that in *Mary Nona's case, (Supra)* the Court had not given due consideration to the applicability of section 6 of the Prevention of Frauds Ordinance or to applicable case law. The Court had examined the issue in question and had referred to Johannes Muppu's Case (Supra) as a decision relied on by the Counsel. After considering the submissions of the Counsel and the said decision, Court had held that the opinion of Stewart, J. was an obiter dictum. It appears that Johannes Muppu was the only authority available on the subject and therefore it would not have been possible for the Court to have considered any other judgment, decided by our Courts.

Also if I may reiterate, when there is no ambiguity in a specific provision there will not be any necessity for any sort of construction. Pollock C. B. , in *Miller v Solomons* [(10)] quite clearly stated that,

"If the language used by the legislature be clear and plain, we have nothing to do with its policy or impolicy its justice or injustice, or even its, 'absurdity', its being framed according to our views of right or the contrary, we have nothing to do but to obey it, and administer it as we find it; and I think to take a different course is to abandon the office of judge and assume that of a legislator (emphasis added)".

A similar view was expressed by Connor, J. in *Nolon v Cliford*[11]when it was specifically stated that,

"The first and most important rule in the construction of statutes is to give effect to words according to their grammatical meaning. If that meaning is clear, then, whether an alteration is made in the com mon law or the statute law or not, and whether of a serious character or not, is of no moment, effect must be given to the words the legislature has used."

Considering the aforementioned position it is abundantly clear that the words given in section 6 of the Prevention of frauds Ordinance with reference to the phrase **'by the marriage of the testator or testatrix'** conveys the meaning of more than one marriage of the Testator or the Testatrix and has not restricted itself only to the first marriage of the Testator or the Testatrix. In such circumstances, out of the two decisions, which considered the effect of the said provision, I am of the view that the observation of Wijeyewardene A.C. J., in Mary Nona v Edward de Silva (supra) represents the correct position of the scope and applicability of section 6 of the Prevention of Frauds Ordinance that a will could be revoked by the second marriage of the Testator subsequent to the execution of the will.

For the aforementioned reasons, I answer the issue in the affirmative and state that the last will made by the Testator, namely the deceased Muthiah Pararajasingham, was revoked on his subsequent marriage.

I accordingly dismiss the appeal and affirm the judgment of the Court of Appeal dated 31.05.2002.

There will be no costs.

UDALAGAMA, J., - I agree.

FERANDO, J., -I agree.

Appeal dismissed.

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Gamage v. Perera - SLR - 354, Vol 3 of 2006 [2005] LKSC 19; (2006) 3 Sri LR 354 (30 November 2005)

GAMAGE
VS.
PERERA

SUPREME COURT,
BANDARANAYAKEJ.,
DISSANAYAKEJ.,
FERNANDO J.,
SC 16/2002.
OCTOBER 14, 2004,
NOVEMBER 1, 2004,
AUGUST 18, 2005.

Section 12 (8) Provincial Councils Act- Section 12 (2) - Rules of Procedure of Provincial Council.- Judicial Review of proceedings of Council- . Constitutional validity of any Act of Parliament- Can it be called in question? ; - Amenable to writ jurisdiction? -Constitution Article 80 (23) - Article 140-

Ouster clause- Writjurisdiction of the Superior Courts- Announcing of results of an election- No review of proceedings?

  ; The Court of Appeal issued a mandate in the nature of a writ of certiorari directing the 2nd respondent-appellant to announce the result of the election of the petitioner-respondent to the post of Chairman of the Council. The Court also granted a mandate in the nature of a writ of prohibition against the appellant from conducting or taking any action to hold an election in respect of the post of Chairman of the Council.

  ; It was contended in appeal that the Court of Appeal erred in not considering that a Provincial Council is a legislative body and as such the writs prayed for would not lie to review the action of the appellant which forms a part of the proceedings of the Provincial Council.

HELD per Dr. Shirani BandaranayakeJ.

In terms of Article 80 (3), the constitutional validity of any provision of an Act of Parliament cannot be called in question after the certificate of the President or the Speaker is given. Such a law cannot be challenged on any grounds whatsoever even if it conflicts under the provisions of the Constitution even if it is not competent for Parliament to enact it by a single majority or two thirds majority:

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(1) In the instant case what the Court of Appeal had considered is not to question the validity of Section 12 (2) of the Provincial Councils Act, but to decide whether in view of the provisions of Section 12 (2), the Court of Appeal is precluded from examining the performance of the duties of the 2ndrespondent in accordance with Rule 5 (6) of the Rules of Procedure of the Provincial Council.

Per **Dr. Shirani Bandaranayake J.**

"The question before the Court of Appeal was not with regard to reviewing of any proceedings of the respondent Provincial Council in its legislative process but the conduct of the appellant at the proceedings, held on 19.12.2002 of the Council where the election was held to select its Chairman" .

Per Dr. Shirani Sandaranayake J.

"In terms of Rule 5 (6) it was the duty of the appellant to announce the result of the said election. When he failed to announce the said results of the election declaring the 1st respondent as the Chairman of the 2nd respondent Council and proceeded to record and announce that the election of the Chairman was not concluded and scheduled another election for 8.1.2001 the appellant had acted arbitrarily and maliciously".

HELD FURTHER:

(2) The Court of Appeal was correct when it held that its jurisdiction under Article 140 remains intact and unfettered on the face of the preclusive clause contained in Section12 (2) of the Provincial Councils Act.

APPEAL from a judgment of the Court of Appeal.

Cases referred to :

1.Atapattu vs. People's Bank 1997 1 Sri LR 221

2.Sirisena Cooray vs. Tissa Dias Bandaranayake 1999 I Sri LR 1

3.Wijayapa/a Mendis vs. PR.P. Perera 1999 2 Sri LR 110

4.In re the Thirteenth Amendment to the Constitution

5.R vs. Secretary of State for the Environment exparte Nottinghamshire County Council 1986 AC 240

6.Anisminic Ltd. vs. Foreign Corporative Commission 19622 AI 147

7.Pearlman vs. Keepers and Governors of Harrow School 1979 QS 56

8.Re Racai Commodities Ltd. 198023 WLR 181

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Dr. Jayampathy Wickremaratne PC with Cyrene Siriwardhene for appellant. Manohara de Silva for respondents.

November 30, 2005

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 22.02.2002. By that judgment the Court of Appeal issued a mandate in the nature of a writ of mandamus directing the 2ndrespondent-appellant (hereinafter referred to as the appellant) to announce the result of the election of the petitioner-respondent (hereinafter referred to as the 1st respondent) to the post of Chairman of the 1st respondent -respondent Council (hereinafter referred to as the respondent Provincial Council). The Court of Appeal also granted and issued a mandate in the nature of a writ of prohibition against the appellant or his successor in office from conducting and/or taking any action to hold an election in respect of the post of Chairman of the respondent Council. The Court of Appeal also cast the appellant in costs in a sum of Rs.10,000/- considering the manner in which he had acted and directed the said sum to be paid personally by the appellant to the 1st respondent. The appellant appealed against the said judgment of the Court of Appeal on which this Court granted Special Leave to Appeal.

The facts of this appeal, albeit brief are as follows:

The 1st respondent, who was a member of the respondent Provincial Council, filed an application in the Court of Appeal seeking writs of mandamus and prohibition against the appellant. The 1st respondent in his application had stated that, on 19.12.2000an election was held to fill the vacancy in the post of Chairman in the respondent Provincial Council. The names of the 1strespondentand 3rd respondent respondent(hereinafter referred to as the 3rd respondent) were proposed and seconded. At the election held on the same date the 1st respondent and the 3rd respondent received42 votes each. There being an equality of votes, the appellant, who was the Secretary of the respondent Provincial Council, proceeded to conduct an election once again in terms of Rule 5(a) of the Rules of Procedure and at the conclusion of the counting recorded the votes cast in the following manner:

1st respondent	43 votes
3rd respondent	40 votes
Abstained	14 votes
Total	97 votes

The 1st respondent further stated that the appellant having recorded the votes obtained by the candidates failed to announce the results of the election declaring the 1st respondent as the Chairman of the respondent Provincial Council as

required by Rule 5(6). The 1st respondent sought a writ of mandamus directing the appellant to announce the results of the election of the 1st respondent to the post of Chairman of the respondent Provincial Council in accordance with the aforesaid Rule 5(6). He also prayed for a writ of prohibition against the appellant from conducting and/or taking any action to hold another election in respect of the post of Chairman.

As stated earlier the Court of Appeal issued the writ of mandamus and prohibition as prayed by the 1st respondent. Both Counsel agreed that the only question that has to be examined would be as follows:

"Did the Court of Appeal err in not considering that a Provincial Council is a legislative body and as such the writs prayed would not lie to review the action of the appellant which forms a part of the proceedings of the Provincial Council".

Learned President's Counsel for the appellant submitted that the Court of Appeal had relied on the decisions in Atapattu v PeoplesBank[1] Sirisena Cooray v Tissa Dias Bandaranayake[2] and Wijeyapala Mendis v P. R. P Perera [3] and had made a grave error in following the said decisions. The contention of the learned President's Counsel was that the dictum in the aforementioned decisions that the jurisdiction which the Supreme Court exercises under Article 140 is unfettered, cannot be accepted. It was further contended that Section 12(2)of the Provincial .Councils Act contains a preclusive clause, which prevents the Court of Appeal from issuing a writ against the appellant.

Section 12(2) of the Provincial Councils Act deals with the preclusive clause and reads as follows:

"No officer or member of a Provincial Council in whom powers are vested, by or under this Act, for regulating the procedure ,or the conduct of business, or for maintaining order, in such Council shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers"

The question at issue therefore is that in terms of the aforementioned Section 12(2) of the Provincial Councils Act, whether the Court of Appeal was prevented from issuing the writs of mandamus and prohibition. If the answer to the aforesaid question is in the affirmative, the next 'question that would arise would be whether a grave error was made in the decisions referred to in the judgment of the Court of Appeal, viz., Atapattu v People s Bank (Supra), Sirisena Cooray v Tissa Dias Bandaranayake (Supra) and Wijayapala Mendis v P.RP Perera (Supra) as well as by the Court of Appeal in its own decision, The contention of the learned President's Counsel for the appellant is that the validity of Section 12 of the Provincial Councils Act, as the validity of the proceedings of the 1st respondent Council held on 19.12.2000, cannot be questioned in terms of Article 80(3) of the Constitution and on the basis of the preclusive clause embodied in Section 12(2) of the Provincial Councils Act.

  ; Article 80(3) of the Constitution refers to a Bill becoming law and reads as follows:

  ; "Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no Court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever"

  ; The aforesaid Article thus had clearly stated that in terms of that Article, the constitutional validity of any provision of an Act of Parliament cannot be called in question after the certificate of the President or the Speaker is given. Reference was made to the provisions in Article 80(3) of the Constitution and its applicability by Sharvananda, J. in re the Thirteenth Amendment to the Constitution (4)and had expressed his Lordship's views in the following terms:

  ; "Such a law cannot be challenged on any ground whatsoever even if it conflicts with the provisions of the Constitution, even if it is not competent for Parliament to enact it by a simple majority or two third majority."

  ; Whilst agreeing with the views expressed by Sharvananda, CJ, in re **The Thirteenth Amendment to the Constitution,** regarding the scope of Article 80(3) of the Constitution, it is to be borne in mind that the question which arises in this appeal is not connected to the applicability of the said Article. The appellant's contention is that, the Court of Appeal had questioned the validity of Section 12 of the Provincial Councils Act and in terms of Article 80(3) of the Constitution that the Court of Appeal could not have questioned such validity of the said provision. However, what the Court of Appeal had considered is not to question the validity of Section 12(2) of the Provincial Councils Act, but to decide whether in view of the provisions of Section 12(2),the Court of Appeal is precluded from examining the performance of the duties of the 2ndrespondent, in accordance with Rule 5(6) of the Rules of Procedure of the respondent Provincial Council.

Section 12(2) of the Provincial Councils Act states that no officer or member of a Provincial Council shall be subject to the jurisdiction of any Court in respect of his exercise of the powers which were vested under the Act, for regulating the procedure, or the conduct of business or for maintaining order in such Council. This Section, prima facie, thus precludes the intervention by any Court to examinethe exerciseof powers of the officers or members of a Provincial Council.

The applicability of a preclusive clause was discussed in detail by Dheeraratne, J, in Sirisena Cooray v Tissa Dias Bandaranayake (Supra). In that case Court examined several preclusive clauses contained in Special Presidential Commissions of Inquiry law, No.7 of 1978, as amended, either ousting or partially ousting writ jurisdiction. After considering those clauses as well as the decisions which had examined the applicability of the preclusive clauses, it was held that the jurisdiction conferred on this Court by Article 140 is unfettered. In a later decision (Wijeyapala Mendis v PRP Perera and others [supra]), Fernando, J, endorsed the

views expressed by Dheeraratne, J., in Sirisena Cooray case (supra). Considering the provisions in the Special Presidential Commission of Inquiry Law, Fernando, J, stated that,

"I respectfully agree with Dheeraratne, J., that the jurisdiction which this Court exercises under Article 140 is unfettered (Cooray v Bandaranayake)."

Learned President's Counsel for the appellant contended that in Cooray v Bandaranayake (supra) when the Court held that the preclusive clause inserted by Section 18(A)1 must be read subject to Article 140, it did what was prohibited by the Constitution, namely judicial review of legislation.

However, it is to be borne in mind that in Cooray v Bandaranayake (supra), the 1st and 2nd respondents inter alia had raised objections that the writ jurisdiction of the Superior Court had been ousted by preclusive clauses contained in the Special Presidential Commissions of Inquiry law and the Interpretation Ordinance. Considering those objections, this Court had held that the writ jurisdiction of the Superior Courts is conferred by Article 140 of the Constitution and it cannot be restricted by the provisions of ordinary legislation contained in the ouster clauses enacted in Sections 9(2) and 18A of the Special Presidential Commission of Inquiry Law or Section22 of the Interpretation Ordinance. The Court therefore held that its jurisdiction is unfettered.

Learned President's Counsel for the appellant further contended that granting power to Courts with unlimited judicial review is although a welcome move, the Courts must necessarily function within the limits set down by the Constitution and the Law. Learned President's Counsel relied on the dictum of Lord Scarman in R v Secretary of State for the Environment ex parte Nottinghamshire County Council (5)where it was stated that,

"Judicial review is a great weapon in the hands of the judges, but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficient power."

However, it is to be noted that referring to the aforementioned, Professor Wade has commented that it is only the criterion of reasonableness that is restricted by this doctrine and also only in special situations dominated by questions of political judgment. He further clarifies the position and states that, (Administrative Law, 9thEdition, pg. 380) 'The normal rule is that parliamentary approval does not affect the operation of judicial review, whether for unreasonableness or otherwise.

For this the decisions on delegated legislation, which is frequently approved by Parliament, afford ample illustration:

Judicial review is for the purpose of challenging the legality of the action or inaction of a public authority. Such review is the gateway to a remedy for the grievance complained of by the aggrieved party and Acts of Parliament makes

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provision from time to time to restrict or at certain times to eliminate such judicial review such as Section 12(2) of the Provincial Councils Act, which is presently in question.

The approach of the Courts ,with regard to the applicability of ouster clauses could be clearly seen in the leading case of Anisminic Ltd. v Foreign Compensation Commission<6) where the words of 'shall not be called in question in any Court of law' contained in the Foreign Compensation Act of 1950 came under scrutiny and the House of Lords held that the ouster clause did not protect a determination which was outside jurisdiction. This fresh approach was expanded by the decisions in Pearlman v Keepers and Governors of Harrow School (7)and Re Racai Communications Ltd. (8)

Considering the aftermath of the decision in Anisminic (Supra), Prof. Wade has succinctly expressed wider consideration given to the applicability of ouster clauses in the following words:}

'The *Anisminic* case and its sequels were the culmination of the judicial insistence, so often emphasized in this work, that administrative agencies and tribunals must at all costs be prevented from being sole judges of the-validity of their own acts. If this were allowed, to quote Denning L J. again, **'the rule of law would be at an end'** (emphasis added)'

  ; In fact in Anisminic (supra) Lord Wilberforce expressed a similar view in different words. According to Lord Wilberforce,

"What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed?" It is thus clear that the Court of Appeal was correct when it held that, its jurisdiction under Article 140 remains intact and unfettered on the face of the preclusive clause contained in Section 12(2) of the Provincial Councils Act.

The next question that has to be examined would be whether a writ would lie against the Provincial Council which is a legislative body. Learned President's Counsel for the appellant contended that the Provincial Councils are legislative bodies and that therefore the question in issue, being an internal matter of the Provincial Council, it cannot be subject to Administrative Law. It is to be borne in mind that the Court of Appeal had taken the view that the Provincial Councils are legislative bodies. However, the question before the Court of Appeal was not with regard to reviewing the validity of any proceeding of the respondent Provincial Council in its legislative process, but the conduct of the appellant at the proceedings held on 19.12.2002 of the respondent Provincial Council where an election was held to select their Chairman. The 1st respondent's complaint was that after the election, was conducted in which he had obtained 43 votes, the appellant failed to announce the result of the election declaring the 1st respondent as the Chairman of the Council as required by Rule 5(6). The said Rule reads as follows:

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"At the conclusion of counting, the name of the member who has obtained the highest number of votes shall be written and the number of votes shall be indicated against the name. The name of the member or names of members who have obtained the next highest number of votes shall be indicated with the respective amount of votes polled against their names and the result shall be marked in descending order and the result shall be announced."

Therefore in terms of Rule 5(6) it was the duty of the appellant to announce the result of the said election. When he failed to announce the said results of the election declaring the 1st respondent as the Chairman of the 2nd. Respondent Council and proceeded to record and announce that the election of the Chairman of the 1st respondent Council was not concluded and scheduled another election to be held on 08.01. 2001, the appellant had acted arbitrarily and maliciously. Therefore the 1st respondent had come before the Court of Appeal challenging the conduct of the appellant in proceedings held on 19.12.2000 of the respondent Provincial Council for the election of a Chairman and not the validity of any of the proceedings of the respondent Provincial Council. In such circumstances the submissions of learned President's Counsel for the appellant that the proceedings of the Provincial Council cannot be subjected to Administrative Law does not arise in this appeal.

For the reasons aforesaid, I answer the question in this appeal in the negative.

This appeal is accordingly dismissed and the judgment of the Court of Appeal dated 22.02.2002 is affirmed.

I make no order as to costs in these proceedings in this Court.

DISSANAYAKE,J. -agree.

RAJA FERNANDO,J. - I agree.

Appeal dismissed.

The Manager, Bank Of Ceylon, Hatton v. The Secretary, Hatton Dickoya Urban Council - SLR - 1, Vol 3 of 2005 [2005] LKSC 7; (2005) 3 Sri LR 1 (7 December 2005)

THE MANAGER, BANK OF CEYLON, HATTON
VS
THE SECRETARY, HATTON DICKOYA URBAN COUNCIL

SUPREME COURT.
BANOARANAYAKE, J.
AMARATUNGAJ.AND
MARSOOFJ.
SC APPEAL 67/2004.
H. C. (CENTRAL PROVINCE).
MAGISTRATE'S COURT (HATTON).
30TH MAY, 13TH JULY AND 30TH SEPTEMBER, 2005.

By laws under Urban Councils Ordinance - Urban Councils Ordinance, sections 164, 165, 165B and 165C - Whether the appellant Bank is liable to pay licence fees separately for money lending and pawn brokering-Meaning of "Banking' under common law and statutes such as the Bank of Ceylon Ordinance and Banking Act, No. 30 of 1988- Existence of doubt regarding the meaning of "Banking" (whether money lending and pawn brokering can be separated) Interpretation of statutes - Doubts in taxing statutes to be resolved in favour of the tax payer - Validity of the Magistrate's order on the appellant Bank to pay licence fees on pawn brokering in addition to payment for money lending.

On the application of the respondent Secretary aforesaid, the Magistrate, Hatton ordered the recovery of Rs.3,375 from the appellant Bank as licence fees for pawn brokering with GST whilst the Bank had already paid Rs. 3000 (or money lending for the year 2000 on Document XI.

HELD:

1. Having regard to the common law and statutes such as the Bank of Ceylon Ordinance and the Barking Act, No. 30 of 1988 and the meaning of "Banking", the Bank of Ceylon is carrying on banking business including money lending and pawn-brokering. These two activities cannot be separated.

2. In any event there is a doubt whether money lending and pawn-brokering may be separated. In the circumstances the doubt should be resolved in favour of the Bank being the tax payer. Taxing statutes should be strictly construed in favour of the tax payer.

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3. As such, the order of the Magistrafe that the appellant is liable to De additionally taxed for pawn-brokering and the order of the High Court affirming that order are invalid and cannot be sustained.

APPEAL from the judgment of the High Court.

Cases referred to ;

1. United Dominions Trusts. Kirwood (1966) 2 QB 431.

2. State Saving Bank of Victoria Commissioners vs. Per. Mewan Wright and Co. Ltd. (1915) 19CLR459.

3. Tuck and Sons vs. Priesrer(1887) 19 QBD 629.

M. K. Muthukumar with Jinadasa Gamage for appellant.

S. Mandaleswaran with P. Peramunagama for respondent.

Cur.adv. vult.

7 December, 2005.

SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the order of the High Court of the Central Province dated 21.05.2004. By that order the learned High Court Judge had affirmed the judgment of the learned Magistrate of Hatton and dismissed the appeal. The respondent - appellant - appellant (hereinafter referred to as the appellant Bank) appealed against the said order on which this Court granted special leave to appeal.

The facts of this appeal, albeit brief, are as follows :

The complainant - respondent - respondent (hereinfter referred to as the respondent), being the Secretary of the Hatton - Dickoya Urban Council, filed a complaint against the appellant Bank in the Magistrate's Court of Hatton to recover the tax due under section 165B(3) of the Urban Councils Ordinance for conducting the business of pawn-brokering. The respondent had claimed in the said complaint that the appellant Bank was liable to pay Rs. 3,000 as the licence fees for pawning business, Rs. 375 as goods and services tax and Rs. 625 being charges for office expenses, totalling to a sum of Rs. 4,000. Learned Magistrate by his order dated 23.01.2001 allowed the respondent's application and imposed a fine of Rs. 3,375 payable to the respondent Urban Coucil, which order was affirmed by the learned High Court Judge of the Central Province by his order dated 21.05.2004.

Both counsel agreed that the only question that has to be examined in this appeal is whether the respondent is entitled to levy a tax from the appellant Bank

separately for the business of pawn brokering carried on oy the appellant Bank in Hatton apart from various businesses of banking carried on by the appellant Bank in the said area.

Learned Counsel for the respondent contended that the respondent is entitled to levy a tax under section 165B(1) of the Urban Councils Ordinance for the two businesses carried on by the appellant Bank, namely money lending and pawn brokering set out in item 2 and item 7 of the third Schedule to the Gazette notification dated 14.02.1997, published in terms of the Urban Councils Ordinance. He further contended that the sum of Rs. 3,000 paid by the appellant by document marked XI for the year 2000 was for the business of money lending and that the present claim was for the recovery of the taxes for the business of pawnbrokering in terms of section 165B(3) of the Urban Councils Ordinance.

It is common ground that the appellant Bank is a branch office of the Bank of Ceylon established under the Bank of Ceylon Ordinance No. 53 of 1938 as amended, it is also common ground that the Bank had paid Rs. 3,000 as licence fee for the year 2000 (x). The contention of the respondents is that the said payment of Rs. 3,000 was made by the appellent Bank for carrying on the business of money lending and that a further sum has to be paid in terms of schedule II! of the Gazette notification dated 14.02.1997 (P1) published under section 165 of the Urban Councils Ordinance for carrying on the business of pawn-brokering.

The Gazette notification dated 14.02.1997 (P1) refers to the by -laws made by the Urban Council in terms of sections 164,165,165Band 165C of the Urban Councils Ordinance. The said by -laws refer to 3 Schedules. The first Schedule deals with the licence duty referred to in section 164 of the Ordinance (or the use of the premises for the specific purpose set out therein. The second Schedule refers to the tax imposed and levied on the trade, set out in section 165 of the Ordinance. The third Schedule deals with the tax imposed and levied on the business set out in section 165B of the Ordinance. It is apparent that none of these schedules refer to banking business. The third Schedule, which deals with the business in the area, has 23 listings, but has not included banking business. However, the third Schedule refers to money lending and pawn-brokering among the other type of business.

Section 5 of the Bank of Ceylon Ordinance makes provision for the said Bank to establish and maintain branches in Sri Lanka or elsewhere. Part 1 of the first Schedule to the said Ordinance refers to the business, which the Bank is authorized to carry on and transact, subject to the limitations mentioned in Part II of the first Schedule. In fact,section 71 of the Bank of Ceylon Ordinance, clearly refers to the scope of its business, which reads as follows:

"Subject to the provisions of this Ordinance the business which the Bank is authorized to carry on and transact shall be the several kinds of business specified in Part I of the first Schedule subject to the limitations mentioned in Part II thereof."

It is thus evident that the Bank of Ceylon is empowered to carry on and transact business relating to money lending and pawn-brokering. However, it is apparent

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that none of the provisions in the Money Lending Ordinance, or the Debt Conciliation Ordinance or the Pawnbrokers Ordinance shall apply to such transactions. Sections 68 and 69, which are reproduced below, had quite clearly laid down that such Ordinance has no application to debts which are due to the Bank.

"Section 68- Nothing in the Money Lending Ordinance or the Debt Conciliation Ordinance shall apply or be deemed to apply to any debt due to the Bank, or to prejudice or affect the rights of the Bank in respect of the recovery of any such debt.

Section 69 - The Pawnbrokers Ordinance shall not apply to the Bank where the Bank carries on the business of a pawnbroker".

The claim made by the respondent was on the basis that the appellant Bank had been carrying on different businesses in terms of the Bank of Ceylon Ordinance. The respondent therefore was of the view that money lending and pawn-brokering are two different business. In fact learned Council for the respondent contended that in terms of the definition given under section 165B of the Urban Council's Ordinance, the financier, money lender and pawnbroker are regarded as three different entitiies and therefore took up the position that the appellant Bank, being a establishment which carried on money lending as well as pawn-brokering, should pay the relevant taxes for the said businesses separately.

A careful examination of the definition given to the word "takings" under section 165B(b) indicates that the statute has referred to financier, money lender and a pawnbroker not as three different entities, but as a single person. The wording in the aforesaid provision, which is referred to below, clearly shows this position.

"takings in relation to any business, means the total amount received or receivable from transactions entered into in respect of that business or for services performed in carrying on that business, and includes - (a) in the case of financier, moneylender or pawnbroker the money given out by him as loans, the interest received or receivable by him on such loans, and the sums received by him as fees or other charges in respect of such loans."

What the definition referred to above, explains is that, takings should include the total amount received from the transactions relating to financier, moneylender or the pawnbroker. When one refers to these three items, it is apparent that a modern day Bank would be forced to carry out all these transactions. Moreover, it is to be borne in mind that considering the characterietics of banking takings, in relation to a Bank would undoubtedly include handling deposits as well as make use ol such deposits by lending it out at interest or investing it on mortgages etc. This was the view taken by Lord Denning M. R. in United Dominios Trustvs. Kirkwood (1) where reference was made to the characteristics of banking in the following terms :

"Seeing that there is no statutory definition of banking, we must do the best we can to find out the usual characteristics which go to make up the business of Banking. In the eighteenth century, before cheque came into common use, the principal characteristics were that the banker accepted the money of the others on the terms that the persons who deposited it could have it back again from the banker when they asked for it, sometimes on demand, at other times on notice, according to the stipulation made at the time of deposit, and meanwhile the banker was at liberty to make use of the money by lending it out at interest or investing it on mortgage or otherwise (emphasis added)."

A similar view was taken as far bak as in 1914, by Issacs, J. in the High Court of Australia in State Savings Bank of Victoria Commissioners v Permewan Wright and Co. Ltd.,2 With regard to the definition of Banking, Issacs, J. thus stated that-

"The essential characteristics of the business of banking... may be described as the collection of money by receiving deposits on loan, repayable when and as expressly or impliedly agreed upon, and the utilisation of the money so collected by lending it again in such sums as are required (emphasis added)."

Thus it is apparent that the business of Banking would include the acceptance of deposits of money as well as utilisation of such money so collected by lending them on interest. This position is clearly laid down in the definition given to 'banking business' in Section 86 of the Banking Act, No. 30 of 1988, where it is stated that.

"banking business means the business of receiving funds from the public through the acceptance of money deposits payable upon demand by cheque, draft, order or otherwise, and the use of such funds either in whole or in part for advances, investments or any other operaton either authorized by law or by customary banking practices."

The question that would arise at this juncture is that, if lending is part of the banking business, whether that would include pawning as well. The Pawnbrokers Ordinance, No. 8 of 1893 defines the pawnbroker in wide terms that includes every person who carries on the business of taking goods in pawn. The Encyclopedia Britannica (Vol. 15-pg. 354) refers to pawnbrokering and states that-

"the oldest security device that is common everywhere is the pledge (or pawn). The borrower delivers the goods to be charged to the lender, who keeps them until repayment of the secured loan.... But pawnbrokers continued to operate on a minor scale, and Banks keep documents of title (such as property deeds) as security."

On an examination of the Pawnbrokers Ordinance it is clear that the Ordinance does not speak of security for loans as only gold article. A pledge is defined as an article pawned with a pawnbroker obviously of value. Thus in simple terms the pledge is the security for the purpose of the money borrowed and when the pledge is with a movable item such as gold, it could not change the nature of the main business of money lending carried out by a Bank.

The tax in question was imposed by the respondent, in terms of section, 165A of the Urban Councils Ordinance. Section 165A reads as follows:

"An Urban Council may by resolution impose and levy annually on every person who.... carries on any business for which no license is necessary under the provisions of this Ordinance ... a tax according to the takings of the business."

As the appellant Bank came under the category that was carrying on a business for "which no licence was necessary", the respondent could impose only a tax. When such tax was imposed, the appellant Bank had duly paid the relevant and assigned amount for which a receipt was issued stating that the amount was paid for the purpose of payment for business licence (). The contention of the respondent is that the Council is entitled to levy a tax from the appellant Bank separately for the business of pawnbrokering carried on by the Bank apart from the various businesses of Banking carried on by the appellant Bank.

It is not disputed that the question at issue is regarding whether the appellant Bank has to pay for separate business licences to carry out business pertaining to money lending as well as for pawn brokering. It is also not disputed that the appellant Bank has already paid Rs. 3,000 being the payment as conceded by the respondent for business licence. As referred to earlier, section 165A of the Urban Councils Ordinance states that a business entity would be liable to pay a tax 'according to the takings of the business*. Depending on the 'takings' the amount that has to be paid as tax would be decided. Non payment of such tax would create a pecuniary burden on the person liable to pay such tax in terms of section 165B(3) of the Urban Councils Ordinance.

Referring to such statutes which incur pecuniary burdens, Maxwell is of the view that they should be subject to strict interpretation. It was further stated that (Interpretation of Statutes, 11th Edition, Sweet Maxwell p. g. 278)

"Statutes which impose pecuniary burdens, also, are subject to the same rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language because of some decree they operate as penalties. The subject is not to be taxed unless the languages of the statute clearly imposes the obligation.

In a Taxing Act one has to merely look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no prescription as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used. A construction for example, which would have the effect of making a person liable to pay the same tax twice in respect of the same subject matter would not be adopted unless the words were very clear and precise to that effect. In a case of reasonable doubt the construction most beneficial to the subject is to be adopted (emphasis added)'

In fact Lord Esher, M. R. InTuck and Sons vs Priester (3) referring to strict construction in construing penal Saws, stated that,

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"if there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. It there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

On a careful consideration of the issue before us, it is clear that the appellant Bank is carrying on banking business, which includes money lending as well as pawn-brokering. Both money lending and pown-brokering are part and parcel of the banking business of the appellant Bank and pawn-brokering cannot be separated from the money lending business of the appellant Bank. Therefore the respondent could levy a tax on the basis of the issuance of business licence for the banking businesses of the appellant Bank which in turn would include money lending as well as pawn-brokering carried out by them.

It is common ground that the appellant Bank has already paid money for its business license (XI). In the circumstances there cannot be any basis for the respondent to levy a further tax tor the business of pawn-brokering carried out by the appellant Bank.

For the aforementioned reasons I answer the question in the negative This appeal is accordingly allowed and the order of the learned Magistrade Hatton dated 23.11.2001 and the order of the learned High Court Judge of the Central Province, dated 21.05.2004 are set aside.

I make no order as to costs.

N. G. AMARATUNGA, J. -I agree.

SALEEM MARSOOF, J. I agree.

Appeal allowed.

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