CORNEL & COMPANY LIMITED

v.

MITSUI AND COMPANY LIMITED AND OTHERS

SUPREME COURT
FERNANDO, J.
WADUGODAPITIYA, J. AND
BANDARANAYAKE, J.
SC APPEAL NO. 36/98
SC (HC) L/A 21/98
HC (Civil) No. 1/98 (2)
24th JUNE, 1999

Jurisdiction of the High Court in respect of commercial transactions - Section 2(1) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 read with item (1) of the First Schedule to the Act - Whether reference to "actions" in item (1) includes not only actions for recovery of a debt but also actions for annulment or denial of a debt - Sections 7 to 9 of the Act - Inconsistency between Sinhala and English texts of item (1) - The right of a litigant to canvass in appeal an interlocutory order not directly challenged when made.

The plaintiff-appellant instituted action in the High Court of the Western Province as a share-holder of the 5th defendant - respondent company, praying inter alia, for a declaration that four agreements entered into by the 5th defendant - respondent with Mitsui Company Ltd., Japan, Taiser Corporation of Japan and one Amarasekera (the 1st, 2nd and 4th defendants - respondents) for the payment of certain monies to the 5th defendant - respondent were null and void, not binding and were unenforceable against the 5th defendant - respondent. In filing the said action the plaintiff invoked the jurisdiction conferred upon the High Court by section 2(1) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 read with item (1) of the First Schedule to the Act.

The High Court Judge granted enjoining orders which were also sought by the plaintiff, but on 31.3.98 refused the plaintiff's application for interim injections, holding that he had no jurisdiction in respect of the action; but he did not dismiss the action. Having realised it the judge proceeded ex mero motu to dismiss the plaint on 27.8.98. The plaintiff

challenged both orders in two separate proceedings (i) a leave to appeal application in the Supreme Court (ii) a notice of appeal in the High Court followed by a petition of appeal to the Supreme Court. Counsel for the 1st and 2nd defendants took a preliminary objection that the plaintiff could not proceed with both matters but must first opt which one he wished to pursue and abandon the other.

Held :

1. Taking into consideration the Sinhala text of Item (1) of the First Schedule to the Act which must prevail over the English text in view of an inconsistency and the provisions of sections, 7, 8, and 9, a wider construction should be given to Item (1). Accordingly, it is not limited to actions for the recovery of a debt exceeding the prescribed amount but includes an action which "relates to" or "involves" such a debt. Therefore, the plaintiff's action which is for the annulment or denial of a debt is within the jurisdiction of the High Court, conferred by Item (1).

Per Fernando, J.

"Even if there had been some ambiguity ..... the wider interpretation must be preferred"

2. Sections 7 to 9 indicate that the jurisdiction of the High Court (a) is not exclusive in some respects, and (b) is wider than section 2(1) and the First Schedule suggest.

Per Fernando, J.

"Accordingly, section 8 gives the District Court competence to dispose of any claim in reconvention even though it involves a matter beyond its jurisdiction."

Per Fernando, J.

"Where an action, which should have been filed in the High Court, is filed in the District Court, section 9 compels transfer to the correct court, ... But the 1996 Act makes no provision for the converse case, where an action that should have been filed in the District Court is filed in the High Court; *expressio unius, exclusio alterius*, and so the inference would be that the transfer to the District Court was not permissible"

3. Section 7, considered in the context of section 9 impliedly confers on the High Court jurisdiction to entertain and determine certain actions which otherwise would have been within the exclusive jurisdiction of the District Court subject to the power to deny the successful plaintiff his costs, unless the court chose to exercise its discretion in his favour.

4. On the preliminary objection :

Per Fernando, J.

"..... it has long been recognised that it is the clear right of every litigant to invite the Appeal Court to consider on a final appeal any interlocutory decree (or order) even if he does not directly challenge it at the time when it was made"

Cases referred to :

1. *Shannon Realties Ltd. v. Ville de St. Michel* (1924) AC 185, 192-3
2. *Nagan v. Rodrigo* (1914) 7 NLR 348
3. *Werthelis v. Daniel Appuhamy* (1909) 12 NLR 196
4. *James v. Medduma Kumarihamy* (1957) 58 NLR 560
5. *Ponnambalam v. Paramanayagam* (1905) 9 NLR 282
6. *Don Siman v. Johanis* (1898) 4 NLR 343
7. *Abubakker v. Ismail Lebbe* (1908) 11 NLR 309, 313
8. *Perera v. Battaglia* (1956) 58 NLR 447, 449

APPEAL from the judgement of the High Court of the Western Province.

S. Sivarasa, PC, with *S. L. Gunasekera, S. Mahenthiran* and *N. R. Sivendran* for the plaintiff-appellant.

M. A. Sumanthiran for the 1st and 2nd defendants-respondents.

Nihal Jayawardena, SSC, with *Milinda Gunethilaka* for the 3rd defendant-respondent.

I. S. de Silva, PC with *N. Bartholomeusz* for the 4th to 9th defendants-respondents.

Harsha Cabraal with *M. A. Sumanthiran* for the 10th and 11th defendants-respondents.

Cur. adv. vult

December 16. 1999
FERNANDO, J.

The Plaintiff-Appellant in SC Appeal 36/98 (which is also the Plaintiff-Petitioner in SC (HC) Leave to Appeal Application 21/98), instituted action, on 27.3.98, in the High Court of the Western Province against the ten Defendants-Respondents. I will refer to them as "the Plaintiff" and "the Defendants", respectively. The principal question I have to decide is whether or not the High Court had jurisdiction in respect of that action, under and by virtue of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 (which I will refer to as "the 1996 Act") - particularly, by virtue of section 2(1) read with item (1) of the First Schedule thereto.

Although this is one of a series of actions, some of which have resulted in proceedings in the Court of Appeal and in this Court, the facts relevant for the purpose of deciding that question of jurisdiction are few. The Plaintiff filed this action as a shareholder of the 5th Defendant-Company. On behalf of the Plaintiff, Mr. Sivarasa, PC, relied on just one aspect of the Plaintiff's claim, and the pleadings relevant to that aspect may be summarized as follows.

The 5th Defendant-Company had entered into four Agreements (P36 to P39) with Mitsui & Company Ltd of Japan, Taisei Corporation of Japan, and one Nihal Srinath Ameresekera (the 1st, 2nd and 4th Defendants). While submitting that the four Agreements were inter-related and interconnected, Mr. Sivarasa relied mainly on the first of those Agreements (P36). According to clause 4 of that Agreement the rescheduled balance due to the 1st and 2nd Defendants (from the 5th Defendant) was Japanese Yen 7.834 billion, and was to be repaid in 15 equal annual instalments of Japanese Yen 522 million (together with interest thereon), commencing 1.7.96; details were set out in Annexure "A". The next instalment falls due on 1.7.2000.

Clause 5(b) of P36 stipulated that for the purpose of making such payments to the 1st and 2nd Defendants, the 5th Defendant shall open a separate bank account in the name of the Secretary to the Treasury, and shall deposit in that account in Japanese Yen, from time to time, such sums as will enable it to meet its obligations.

The reliefs which the Plaintiff prayed for included declarations that the four Agreements were null and void, were not binding, and were of no force or avail in law, and that they were not binding and were unenforceable against the 5th Defendant; an order that the 5th Defendant was not obliged to comply with them; permanent injunctions restraining the Government of Sri Lanka, its agents the Secretary to the Treasury and its nominee directors on the board of the 5th Defendant), and the 5th Defendant (and its directors etc), from implementing and/or giving effect to the terms and provisions of those Agreements; and interim injunctions and enjoining orders to the like effect.

The learned High Court Judge granted enjoining orders, *ex parte*, on 31.8.98, and issued notice of interim injunction. After inquiry, on 13.8.98, he refused the Plaintiff's application for interim injunctions, holding that he had no jurisdiction in respect of the action; but he did not dismiss the action on 27.8.98, he noted that he had already determined that he had no jurisdiction, but that he had not then dismissed the action - for the reason that the plaint had already been accepted and any subsequent order made in respect of such a plaint was subject to appeal. Observing that during the preceding two weeks no appeals had been filed against the order made on 13.8.98, and that it was necessary to prevent an abuse of the process of the Court, he proceeded, *ex mero motu*, to "dismiss the plaint acting under section 839" of the Civil Procedure Code.

The Plaintiff challenged both orders in two separate proceedings : on 31.8.98 he filed SC (HC) Leave to Appeal application No. 21/98 in this Court.

When SC (HC) LA application No 21/98 was supported in this Court, on 10.9.98, Counsel for the Defendants took a preliminary objection that this Court had no jurisdiction to grant leave to appeal. Mr. Sivarasa stated that the petition of appeal, in respect of the connected appeal, would be filed within a week. The Court directed that the application for leave to appeal b taken up together with the appeal.

The Plaintiff then filed a petition of appeal, on or about 15.9.98, and that appeal was numbered as SC Appeal No. 36/98.

When these two matters were taken up in this Court on 24.6.98, Mr. Sumanthiran, on behalf of the 1st and 2nd Defendants, took a preliminary objection, that the Plaintiff could not proceed with both matters but must first opt which one he wished to pursue, and abandon the other.

If a party aggrieved by an order is uncertain whether in law it is a final order or not, obviously he would not know whether the correct remedy is an appeal or an application for leave to appeal. It seemed to us, at first sight, that it is not unreasonable for a party in that situation to invoke both remedies, so that he might avoid procedural obstacles, and ensure that his substantive grievance would be determined on the merits. However, as Counsel desired to press that point, we directed that written submissions be filed on that point, and confined the oral hearing to the substantive issue of jurisdiction.

Exhaustive written submissions were filed by all the parties the last being on 30.9.99 and that has contributed to the delay in preparing this judgment.

JURISDICTION OF THE HIGH COURT

Section 19 of **the Judicature Act,** No 2 of 1978, as amended, provides that :

"Every District Court shall be a court of record and shall within its district have unlimited original jurisdiction in all civil, revenue, trust, matrimonial, insolvency and testamentary matters *save and except such of the aforesaid matters as are* by or under this Act or by virtue of the provisions of any other enactment *exclusively assigned by way of original jurisdiction to any other court* or vested in any other authority . . .". [emphasis added throughout]

That Act conferred no civil jurisdiction on the High Court (other than Admiralty jurisdiction).

Section 2(1) of **the 1996 Act** provides:

"Every High Court . . . shall, with effect from such date as the Minister may . . . appoint, 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 . . . within the Province for which such High Court is established".

The dispute in this case is mainly about the meaning of **item (1)** of the First Schedule ("item (1)") :

"(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, or the construction of any mercantile document) **is** *[sic] which the debt, damage or demand is for a sum exceeding* **on** *[sic] 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."

Reference to the Bill confirms that "is" and "on" are misprints for "in" and "one", respectively.

We were informed that before this action was instituted the Minister had fixed "three million rupees" in place of "one million rupees".

In the course of the hearing reference was made to the original Sinhala text of the 1996 Act, as printed. As there appeared to be an ambiguity in the Sinhala text of item (1), as well as inconsistencies between the Sinhala and English texts, we obtained from the Secretary-General of Parliament photo-copies of the original Bill, as enacted by Parliament and certified by the Speaker.

There is no inconsistency - relevant to the question now before us - between the Sinhala and English texts in regard to section 2(1), and I do not need to refer to the Sinhala text of that section. The Sinhala text of item (1), which gives rise to a difficult question of interpretation, is as follows :

"1990 අංක 2 දරන ණය ආපසු අය කරගැනීමේ (විශේෂ විධිවිධාන) පනත යටතේ පවරා ඇති නඩු හැරෙන්නට රුපියල් එක් මිලියනයක් හෝ ඉඇට් පත්‍රයේ පළ කරන ලද නිවේදනයක් මඟින් අමාත්‍යවරයා විසින් කලින් කල නියම කරනු ලබන වෙනත් යම් මුදලක් ඉක්මවන යම් මුදල් ප්‍රමාණයක ණය මුදලක් අලාභයක් හෝ ඉල්ලීමක් **සම්බන්ධයෙන්** වන්නා වූද (බැංකු කටයුතු, වෙළෙඳ බඩු අපනයනය හෝ ආනයනය, සේවා, නැව් කුලී, රක්ෂණය, වෙළෙඳ නියෝජ්‍යත්වය, වෙළෙඳ ව්‍යවහාරය සහ යම් වෙළෙඳ ලියවිල්ලක් අර්ථ නිරූපණයට අදාළ නඩු නිමිති ද ඇතුළුව, වාණිජ ගනුදෙනු කිරීම් වලින් උද්ගතවන්නා වූ නඩු නිමිති හා **සම්බන්ධයෙන්** වූද පියලු නඩු."

Item (1) of First Schedule

Mr. Sivarasa conceded that the Plaintiff's claim was not for the *recovery* of a sum (exceeding three million rupees) based on a debt, damage, or demand. However, he contended that the phrase "actions . . . in which the debt, damage or demand is for a sum exceeding [three] million rupees" includes not only actions for the *recovery* of a debt, but also actions for the *annulment* or *denial* of a debt exceeding three million rupees - and that, he argued, was the substance of the Plaintiff's claim.

All four Counsel appearing for the Defendants submitted, however, that this phrase only covers actions in which recovery is sought *of a sum of money*, exceeding three million rupees, by way of debt, damage, or demand.

Mr. I. S. de Silva, PC, submitted further that the intention of Parliament in enacting the 1996 Act was to provide for the speedy disposal of cases of a commercial nature, avoiding the long delays in litigation in the District Court.

According to the English text of the 1996 Act, item (1) gives the High Court jurisdiction in respect of an action only if two conditions are satisfied: (a) that the action is one "in which the debt, damage or demand is *for* a sum exceeding [three] million rupees", and (b) that the cause of action had arisen from a commercial transaction.

(Although the question arose during the oral hearing whether according to the Sinhala text the High Court has jurisdiction even if only one of those conditions was satisfied, on further consideration I think that the better view is that both conditions must be fulfilled.)

If the English text prevails, there is much to be said for the Defendants' contention that in order to satisfy the first condition an action must be for the recovery of a sum (exceeding three million rupees) in respect of or arising from a debt, damage or demand. Counsel also cited several decisions interpreting the very similar language used in the Courts Ordinance (1956 Revision) when conferring jurisdiction on the Court of Requests :

> "75. Every Court of Requests shall be a court of record and shall have original jurisdiction, and shall have cognizance of and full power to hear and determine all actions in which the debt, damage, or demand shall not exceed three hundred rupees, and in which the party or parties defendant shall be resident within the jurisdiction of such court, or in which the cause of action shall have arisen within such jurisdiction, . . ."

The English text of item (1) has, besides the phrase "debt, damage or demand", the additional words "is for a *sum*". That text does not easily lend itself to an interpretation which includes an action to annul or to deny, or which "relates to", a debt, damage or demand, exceeding three million rupees. Such an action can hardly be described as "an action . . . in which the debt [etc] is *for* a sum exceeding three million rupees", and therefore would not satisfy the first condition. Further, that condition is not satisfied by the mere fact that *the value* of the commercial transaction, from which the cause of action or the debt arises, exceeds three million rupees.

However, the Sinhala text - which must prevail in the event of inconsistency - is significantly different. In describing the required link between an action and the relevant debt, damage or demand, the word used is "සම්බන්ධයෙන්". Counsel for the Defendants did not come to grips with this aspect in their submissions, oral or written.

In the context, that word only requires that the action "relates to", or is "connected with", or "*involves*", a debt, damage or demand (exceeding the prescribed amount); and that is consistent with its dictionary meanings. It is unnecessary for me to try to determine the exact English equivalent of that word. For the purpose of the question of interpretation that arises in this case, it is enough to note that Parliament has used that word repeatedly in the Sinhala text of the 1996 Act in a wider sense. In particular, it has used that word twice in section B (quoted later in this judgment) - in the wider sense - and I find that the English text of that section translates it as "*involves*" and "*relates* to". There is no reason to think that in item (1) Parliament used the same word in any different or narrower sense.

Accordingly, the first condition is much wider than the English text suggests, and is satisfied even if the action only "relates to" or "involves" a debt, damage or demand in a sum which exceeds three million rupees (although it does not seek

to recover such a sum). Turning to the plaint, I find that the Plaintiff seeks declarations that certain agreements are null and void, etc: so the action "relates to", or "involves", those agreements. Those agreements are alleged to create or to give rise to a debt which exceeds three million rupees: therefore the action also "relates to", or "involves", a debt (and not just a transaction) exceeding in value the prescribed amount. I hold, therefore, that the Plaintiff's action is within the jurisdiction of the High Court, conferred by item (1).

This interpretation must be preferred for two other reasons. Not only does it tend to avoid anomalies, and to reduce the inconvenience, expense and delays of litigation, but other provisions of the 1996 Act converge to compel a wider rather than a narrower interpretation of item (1).

Consequences of the Defendants' interpretation

An illustration is useful. A "creditor" may claim that he is entitled to a sum exceeding three million rupees by virtue of a commercial transaction, which is founded on an agreement (or instrument). The "debtor" may allege that the agreement is null and void (or should be annulled, or declared unenforceable) - on the ground of fraud, forgery, duress, ***ultra vires,*** or otherwise. That dispute may give rise to litigation.

The "creditor" may be the first to institute action, to recover the sum claimed. If he files that action in the High Court (because it has "exclusive jurisdiction"), the "debtor" would resist the claim. Apart from other defences, he would wish to make a claim in reconvention to have the agreement declared void (etc). But if the Defendants' interpretation is right, such a claim in reconvention would be outside the jurisdiction of the High Court, and can only be made in the District Court. Thus one claim will be dealt with by the High Court (with a single appeal to the Supreme Court), while the other, arising out of the same transaction, will be determined by the District Court (with appeals first to the Court of Appeal,

and thereafter to this Court). There will then be not only a multiplicity of proceedings in the original courts, but also in appeal. Further, unacceptable conflicts of jurisdiction may result: the District Court may decide that the "agreement" is null and void, but the High Court may give judgment for the "creditor" without considering the "debtor's" position that the "agreement" is a nullity on the ground that it has no jurisdiction over that claim. Although the High Court is higher in the hierarchy of courts, yet on principle, the decree of the District Court that the "agreement" is null and void must prevail: because a Court should not permit the enforcement of an agreement which is a nullity. In any event, can the decree of the High Court be executed? Obviously, justice and convenience, and the elimination of anomalies, delay and expense, demand that both claims should be considered - as far as possible - by the same Court and in the same proceedings. Thus accepting the Defendants' interpretation would defeat the objectives of "speedy disposal of cases of a commercial nature, avoiding the long delays in litigation in the District Court", while the Plaintiff's interpretation would not.

On the other hand, the "debtor" may file action first, in the hope of having the agreement speedily declared void. On the Defendants' interpretation, that action can only be instituted in the District Court. The "creditor" would be free to make his claim in the High Court. Indeed - if only item (1) is considered - the jurisdiction of the High Court would be exclusive, and the "creditor" would have no choice but to make that claim in the High Court: giving rise to two distinct and parallel proceedings, and consequent inconvenience, delay and expense.

As observed in *Shannon Realties Ltd. v. Ville de St. Michel*[1],

> "Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute

purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

I therefore hold that even if there had been some ambiguity as to the meaning of "සම්බන්ධයෙන්", the wider interpretation must be preferred.

Sections 7 to 9

Furthermore, in their written submissions Counsel have referred to other sections of the 1996 Act. These provisions indicate that the jurisdiction of the High Court (a) is not exclusive in some respects, and (b) is wider than section 2(1) and the First Schedule suggest.

I will deal first with section 8:

"8. Where in any proceeding before any District Court any defence or claim in reconvention of the defendant *involves* a matter beyond the jurisdiction of the Court, such defence or claim in reconvention shall not affect the competence or duty of the Court to dispose of the matter in controversy in so far as it *relates* to the demand of the plaintiff and the defence thereto, and the *claim in reconvention*.

Provided that . . . ."

Accordingly, section 8 gives the District Court competence to dispose of *any* claim in reconvention even though it involves a matter beyond its jurisdiction.

Thus in the illustration I have taken, if the "creditor" institutes action in the "higher" Court, that Court lacks jurisdiction to entertain the "debtor's" claim in reconvention; but if the "debtor" institutes action in the "lower" Court, that Court would nevertheless have jurisdiction over the "creditor's" claim in reconvention (despite section 2(1) having

conferred "exclusive jurisdiction" on the High Court). The wider interpretation of item (1), which commends itself to me, has the advantage of reducing that anomaly.

Section 8 is virtually a re-enactment of section 79 of the Courts Ordinance (1956 Revision) :

> "79. Where in any proceeding before any Court of Requests any defence or claim in reconvention of the defendant involves matter beyond the jurisdiction of the court, such defence or claim in reconvention shall not affect the competence or duty of the court to dispose of the matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, *but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such claim in reconvention :*
>
> Provided always that . . . ."

It appears, at first sight, that section 79 created a similar anomaly, in that it did not expressly provide that the District Court could likewise determine a claim in reconvention which was within the jurisdiction of the Court of Requests. But in fact there was no anomaly. Section 62 of the Courts Ordinance gave the District Court general civil jurisdiction; and section 75 gave the Court of Requests jurisdiction (but not *exclusive* jurisdiction) over certain small claims. Hence an express grant, to the District Court, of jurisdiction in respect of claims in reconvention was superfluous.

What is more, the jurisdiction given to the Court of Requests was restricted: its power to give relief was subject to the same limit as its jurisdiction.

Under the Courts Ordinance there was no anomaly of the "lower" Court being able to determine a claim in reconvention which was beyond its jurisdiction, but the "higher" Court being unable to entertain a claim which was beneath its jurisdiction.

The Courts Ordinance, the Judicature Act and the 1996 Act are statutes *in pari materia.* In enacting section 8, Parliament departed from the scheme of section 79 of the Courts Ordinance, and gave the District Court jurisdiction to deal with *all* claims in reconvention, whether or not they arose from commercial transactions, and regardless of their value; and omitted - and it must be presumed, deliberately - the limitation as to value imposed by section 79. While giving the "lower" Court jurisdiction over a claim which would otherwise be within the exclusive jurisdiction of the "higher" Court, Parliament refrained from making a similar provision giving the "higher" Court a similar jurisdiction over a claim which was within the jurisdiction of the "lower" Court.

This Court cannot, under the guise of interpretation, cure that anomaly by holding that the High Court has jurisdiction over all such claims. However, adopting the wider, rather than the narrower, interpretation of item (1), has the virtue of reducing the extent of that anomaly.

There is another implication of section 8. Since section 8 expressly confers on the District Court a jurisdication in derogation of the *exclusive* jurisdiction which section 2(1) (read with item (1)) purports to confer on the High Court, it follows that the ambit of the jurisdiction of the High Court cannot be determined solely by reference to section 2(1) - it is subject to express and implied provisions elsewhere in the 1996 Act.

I turn now to section 7, which in my view enlarges, by necessary implication, the jurisdiction conferred by section 2(1). Section 7 provides:

Objection to jurisdiction

7. If any action or proceeding is commenced in any High Court established by Article 154P of the Constitution *for* any debt, demand or damage which might have been recovered in a District Court, the plaintiff in such action or

proceeding shall not be entitled to any costs whatever but it shall be competent for the judge to make such order *as to* costs as justice may require.

(The marginal note is clearly misleading. The section does not deal with objection to jurisdiction, but with the deprivation of costs. I will come back to this later. The wider term "සම්බන්ධයෙන්" used in the Sinhala text has been translated as "for" and "as to" in the English text).

Let me consider those provisions, taking another illustration. A claim of, say, one million rupees (arising from a commercial transaction) does not come within the scope of item (1). If the creditor nevertheless institutes action in the High Court, does section 7 impliedly grant that Court jurisdiction to entertain and decide that action?

Undoubtedly, section 7 does not expressly empower or require the High Court either to hear such an action or to refuse to entertain it.

One possible interpretation is that section 7 impliedly requires the High Court to refuse to hear such an action. If that is correct, then the Court must dismiss the action (subject to section 47 of the Civil Procedure Code). The plaintiff would not be entitled to costs, but the Court would have a discretion to award costs (and that can only be to the defendant). But even if section 7 had been omitted, that would have been the legal position. This interpretation makes section 7 superfluous.

The other interpretation is that it is implicit in section 7 that the High Court can entertain and determine the action, even though it is outside the scope of item (1), and that its effect is only to penalize the successful plaintiff for having instituted proceedings in the "higher" Court, by denying his entitlement to costs, unless the Court chose to exercise its discretion in his

favour. This interpretation gives some meaning to section 7, and is therefore preferable.

Further, section 7 must be considered in the context of section 9, which provides :

> "9. Where there is evidence that *the value* [sic] of any action filed in any District Court *is one that should have been filed* in a High Court established by Article 154P of the Constitution exercising jurisdiction under section 2, the Judge shall record such fact and make order accordingly and thereupon the action shall stand removed to the appropriate Court."

(The first clause - ". . . evidence that *the value* of any action . . . is one that should have been filed . . ." - is clearly ungrammatical. What seems to have been intended is that if by reason of its value, an action is one which should have been instituted in any High Court, it shall stand removed to the appropriate Court. The Sinhala text adds to the confusion by omitting any word equivalent to "appropriate").

Where an action, which should have been filed in the High Court, is filed in the District Court, section 9 compels transfer to the correct Court; it does not require or permit dismissal of the action on that ground. But the 1996 Act makes no provision for the converse case, where an action that should have been filed in the District Court is filed in the High Court: *expressio unius, exclusio alterius*, and so the inference would be that transfer to the District Court was not permissible. That seems even to exclude the principle recognised in section 47 of the Civil Procedure Code :

> "In every case where an action has been instituted in a court not having jurisdiction by reason of the amount or value involved, or by reason of the conditions made necessary to the institution of an action in any particular court by section 9 not being present, the plaint shall be returned to be presented to the proper court."

Section 47 has been applied even at the stage of appeal: *Nagan v Rodrigo*[2], (1914) 7 NLR 348; *Werthelis v Daniel Appuhamy*[3], (1909) 12 NLR 196.

I have again to choose between two interpretations: first, that although an action wrongly instituted in the "lower" Court *shall* stand removed to the "higher" Court, an action wrongly instituted in the "higher" Court, an action wrongly instituted in the "higher" Court must be *dismissed;* second, that Parliament proceeded on the basis that section 7, by necessary implication, gave the "higher" Court jurisdiction over such an action, and therefore that a provision for transfer was unnecessary.

I think this Court must lean in favour of the latter view, because Parliament must be assumed to have intended that Courts should hear and decide on their merits, rather than dismiss them on grounds unrelated to the merits.

I therefore hold that section 7 impliedly confers on the High Court jurisdiction to entertain and determine certain actions which otherwise would have been within the exclusive jurisdiction of the District Court.

Reference to the legislative history of section 7 confirms that view. Section 7 is virtually a re-enactment of section 72 of the Courts Ordinance (1956 Revision), except for the portion underlined:

Penalty for proceeding in District Court where case cognizable by Court of Requests

72. If any action or suit shall be commenced in any District Court for any debt or demand which might have been recovered in some Court of Requests, the plaintiff or plaintiffs in any such action or suit shall not *by reason of any judgement for him or them, or otherwise, have or* be entitled to any costs whatever, but it shall be competent for the judge to make such order as to costs as justice may require.

This section has been interpreted (e.g. *James v Medduma Kumarihamy*[4], *Ponnambalam v Paramanayagam*[5], *Don Siman v Johanis*[6] as recognising the jurisdiction of the District Court to entertain an action which was within the jurisdiction of the Court of Requests, subject to the power of the Court to deprive a successful plaintiff of the whole or part of his costs - as a penalty for having instituted action in the "higher" Court. That assumption was unquestionably justified under the Courts Ordinance, because (as I have already noted) the District Court did have concurrent jurisdiction. The 1996 Act has enacted a similar provision, on a similar assumption that the High Court has jurisdiction.

Section 9 also throws light on the scope of item (1). It shows that the factor which determines whether an action should have been instituted in the High Court is not the "debt, damage or demand" for the recovery of which the action is brought, but "the value" of the action - which is plainly consistent with the wider interpretation of item (1).

I must add that needless confusion has been caused by the marginal note to section 7 - "objection to jurisdiction". Section 7 does not provide for any such "objection". Section 72 of the Courts Ordinance contained the appropriate marginal note: "*penalty* for proceeding in District Court when case cognizable by Court of Requests". "Objection to jurisdiction" was the marginal note to section 71, which actually dealt with such objections and their waiver. The 1996 Act has inadvertently combined the marginal note to section 71 with the substance of section 72.

I hold that section 7 only imposes a penalty for instituting an action in the High Court, and impliedly recognizes that the High Court nevertheless has jurisdiction over such an action.

For all these reasons I hold that the High Court did have jurisdiction over the Plaintiff's action, and should not have dismissed it.

PRELIMINARY OBJECTIONS

The Defendants' submissions are as follows. Since the Plaintiff's action had been dismissed on 27.8.98, thereby fully disposing of the Plaintiff's claims, it was only a regular appeal that could have been filed; leave to appeal was not available. The notice of appeal was bad in law as it also sought to challenge the first order made on 13.8.98. The petition of appeal "contains the number SC Appeal (HC) 21/98", which is the number of the leave to appeal application, and was therefore defective and should be rejected.

It is unnecessary to decide whether the first order was a final order or not. If it was, there can be no objection to a notice of appeal being lodged in respect thereof. If it was not, nevertheless it has long been recognised that it is "the clear right of every litigant to invite the Appeal Court to consider on a final appeal any interlocutory decree [or order] even if he did not directly challenge it at the time when it was made": *Abubakker v Ismail Lebbe*[7], cited with approval in *Perera v Battaglia*[8].

In any event, however defective the notice of appeal might have been in relation to the first order, it was valid in regard to the second.

As for the error in regard to the number of the appeal, that is a mere misdescription.

The preliminary objection must therefore fail in regard to the appeal, and it is unnecessary to consider either the preliminary objection to the application for leave to appeal or that application itself - which is, *pro forma*, dismissed.

ORDER

I hold that the High Court had jurisdiction over the Plaintiff's action. I allow the Plaintiff's appeal, and set aside the orders dated 13.8.98 and 27.8.98 in relation to the question of

jurisdiction. The Defendants will file answer on or before 21.1.2000, and the High Court will make every endeavour to conclude the hearing of the action before 1.6.2000. Since the next instalment falls due on 1.7.2000, it is unnecessary to make any order for interim relief at this stage.

Having regard to all the circumstances, I make no order in regard to costs.

WADUGODAPITIYA, J. - I agree.

BANDARANAYAKE, J. - I agree.

Appeal allowed.