



THE  
**Sri Lanka Law Reports**

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

**[2013] 2 SRI L.R. - PART 1**

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## THANKARAJAH VS. UNIVERSITY OF JAFFNA AND OTHERS

COURT OF APPEAL  
SATHYAA HETTIGE PC.J [P/CA]  
ANIL GOONERATNE, J.  
JULY 25, 2009

*Writ of certiorari – Extension not granted – Does the employer possess an absolute discretion – Should reasons be given? – Should there be a prompt reply? – Constitution Art 12 [1] – Discretion of Court – Conduct, delay laches, - Waiver – Submission to jurisdiction, to be considered? – Is there a legitimate expectation?*

The petitioner challenged the decision of the respondents not to grant her extension on reaching the age of 57 years – the third extension. It was contended that the employer did not possess an absolute discretion – that the employee has a legitimate expectation to continue till 60 – that the employer failed to follow the circulars in force – the decision should be communicated promptly with reasons for the refusal – that the decision was arbitrary – unreasonable – capricious.

The respondents contended that they have acted in good faith and in compliance with relevant circulars and had at all times adhered to the principles of natural justice and further contended that the application is misconceived in law and the petitioner is guilty of laches.

### **Held**

- (1) The petitioner has served the University for a long period. However the authorities had granted the 1<sup>st</sup> and 2<sup>nd</sup> extensions in spite of the fact that disciplinary action has been taken against the petitioner.
- (2) Granting of an extension is in the discretion of the authorities concerned. This is an instance where there had not been a total denial of the extension – one cannot be even mindful of the fact that an inquiry held against the petitioner found her guilty of charges.

The prerogative writs are discretionary remedies of Court, and are not available as of right, nor can a writ be issued as a matter of course or as a matter of routine.

*Per Anil Gooneratne, J.*

“I find that . . . . . there is a delay in filing this application. This Court cannot ignore a delay of this nature since it is a traditional approach which would disentitle a party for a remedy by way of a prerogative writ.”

- (4) His post is no longer vacant and a person has been appointed from 11.3.2009. Although the petitioner indicated to Court that the petitioner would be content with payment of salary, it would not be proper to consider such a request in the absence of service to the 1<sup>st</sup> respondent since the petitioner has not worked beyond 8.8.2006. One could be remunerated only for the work done and not otherwise.
- (5) A writ would not lie if the final relief sought is a futile remedy.

**APPLICATION** for a writ of certiorari.

**Cases referred to:-**

1. *Suranganie Marapona Vs. Bank of Ceylon and others* – 1997 – 3 Sri LR 156
2. *Pinnawala vs. Sri Lanka Insurance Corporation Ltd and others* – 1997 – 3 Sri LR 85
3. *Shanmugam Vs. Maskeliya Plantations Ltd.* – 1996 – 1 Sri LR 208
4. *Amarasinghe Vs. Board of Directors Co-operative Establishment and others* – 1998 – 1 Sri LR 367
5. *A.E.M.G. Fernando Vs. People’s Bank and others* – SC FR 283/2004
6. *Jayaweera vs. Asst. Commissioner of Agrarian Services, Ratnapura* – 1996 – 2 Sri LR 73
7. *Dissanayake Vs. Fernando* – 71 NLR 356
8. *President of Malagodapitiya Co-operative Society Vs. Arbitrator of Co-operative Societies, Galle* – 51 NLR 187

9. *Hopman and others Vs. Minister of Lands and Land Development and others* – 1994 – 2 Sri LR 240
  10. *Madanayake Vs. Schrader* – (1928) – 29 NLR 389
  11. *Air Vice Marshall Elmore Perera Vs. Liyange and others* – 2003 – 1 Sri LR 331
- A. R. Surendran, PC with N. Kandeepan for petitioner.
- A. Gnanadasan, PC, ASG with Uresha de Silva S.S.C. for 1<sup>st</sup> – 27<sup>th</sup> and 32<sup>nd</sup> respondents
- J. C. Boange for 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> respondents.

April 29<sup>th</sup>, 2010

**ANIL GOONERATNE, J.**

In this writ application the Petitioner challenges the decision of the Respondents not to grant her extension of service on reaching the age 57 years. Petitioner has sought writs of Mandamus, Prohibition and Certiorari. However the learned President's Counsel for the Petitioner informed this court that the Petitioner would be content with the payment of salary and other benefits for the period 9.8.2006 to 8.8.2009.

In the written submissions the Petitioner refers to the background facts and it would be necessary to understand the case of the Petitioner as stated below which were obtained from the written submissions of the Petitioner.

1. While the Petitioner was functioning as the Registrar of the 1<sup>st</sup> Respondent University, in February 2004 the Petitioner was instructed by her superiors to implement the decision of the 2<sup>nd</sup> Respondent (University Grants Commission) instructing the University to engage the services of outside service providers to perform sanitary,

cleaning and security work at the 1<sup>st</sup> Respondent University. As the Petitioner was in charge of implementing the directions of her superiors with regard to the engagement of outside service providers, she was targeted for hostile action by minor employees who were protesting against the measures taken by the Petitioner to engage outside service providers. Consequently the University Employees' Union began a campaign against the Petitioner with the sole objective of securing her interdiction. (Vide Documents marked 'P2' and 'P2A' annexed to the Petition). These documents (the contents of which have been dealt with in detail in the submissions), clearly demonstrate that the real reason for the protest staged by the minor employees' union was the Petitioner's involvement in the engagement of private service providers on the instruction of the UGC.

2. The 1<sup>st</sup> Respondent due to severe pressure exerted by the Union proceeded to summarily interdict the Petitioner on 28.6.2004 and caused a disciplinary inquiry to be conducted by a panel consisting of three members. At the conclusion of the inquiry, the inquiry panel submitted a report whereby it unanimously recommended reinstatement of the Petitioner (vide P12). Having decided at the 295<sup>th</sup> Council meeting held on 26.2.2005 to accept the recommendation of the panel to reinstate the Petitioner (P13), at a special meeting of the Council hurriedly summoned on 9.4.2005 (P14) it was decided to terminate the Petitioner's services with effect from her date of interdiction. This drastic action was taken by the Council due to the undue pressure exerted by the minor employees' union. Subsequently on an

appeal made by the Petitioner the University Services Appeal Board by its order dated 07.02.2006 quashed the decision of the Council to terminate the services of the Petitioner and affirmed the original decision of the Council to reinstate her in service.

3. Though the Petitioner was granted two extensions of service after she reached the age of 55 years, she was not granted any extensions after her second extension of service.

The Petitioner contends that extensions cannot be refused arbitrarily and relies on several decided cases and drew the attention of this court to the following paragraphs.

- (i) The employer does not possess an absolute discretion in taking a decision regarding extensions of service.
- (ii) The employee has a legitimate expectation to continue in service till the age of 60.
- (iii) In taking a decision on an application for extension made by the employee the appointing authority is bound to act according to the directions contained in the relevant circular governing the matter.
- (iv) The decision should be communicated with reasons for the refusal.
- (v) The decision should be communicated without undue delay, giving the employee adequate notice of refusal.
- (vi) Applications for extensions of service should be dealt with annually. Employer cannot refuse in advance all future extensions of service for ensuing years.

(vii) Any refusal which is unreasonable/arbitrary/capricious would be invalid.

Vide *Suranganie Marapona Vs. Bank of Ceylon and Others*<sup>(1)</sup> *Pinnawala Vs. Sri Lanka Insurance Corporation Ltd and Others*<sup>(2)</sup> *Shanmugam Vs. Maskeliya Plantations Limited*<sup>(3)</sup> *Amarasinghe Vs. Board of Directors, Co-operative Establishment and Others*<sup>(4)</sup> *A.E.M.G. Fernando Vs. People's Bank and Others*<sup>(5)</sup>

It is also stressed by the Petitioner that the decision by the employer should be communicated promptly. In this regard the case of *A. E. M. G. Fernando Vs. People's Bank (supra)* "the impugned order refusing the Petitioner's application for extension of service is bereft of any reasons for such refusal besides it is dated 14.6.2004 and undoubtedly delayed".

In *Surangani Marapona Vs. Bank of Ceylon and Others (supra)* it was held that 4 months delay to decide an application for extension of service had been an inordinate delay. Further failure to give reasons violated the fundamental rights guaranteed under Article 12(1) of the Constitution.

Petitioner states that document P24 refusing extension of service does not give any reasons. P24 states "the Council did not approve the request made by you in your letter dated 18.4.2006 for the 3rd extension from 9.8.2006 to 9.8.2007. P24 does not give any reason as submitted by the Petitioner.

The 1<sup>st</sup> to 27<sup>th</sup> and 32<sup>nd</sup> Respondent take up the position that they have acted in good faith and in compliance with relevant circulars and had at all times adhered to the principles of natural justice. Respondents also state that the Petitioner's application is misconceived in law and Petitioner is guilty of laches.



It is stated by the Respondents that the Petitioner was appointed by document 4R1. Petitioner thus became entitled to sabbatical leave and such leave was approved from 1.1.2003 for the purpose of accepting an assignment in the Eastern University and for the purpose of attending a four month certificate programme at the University of Arkansas U.S.A. Petitioner was issued a cheque (BOC) for Rs. 257,192/- to enable the Petitioner to travel to U.S.A. However the Respondents state that the Petitioner had utilized part of the money to travel to India, Singapore and Malaysia without approval by the Eastern University. Petitioner resumed duties on 7.1.2004 but had not informed the Eastern University. Only on Internal Auditors request the Petitioner revealed above. (by June 2004)

Thereafter the Petitioner was interdicted on 26. 4. 2004. Charge sheet served on the Petitioner on 30.6.2004 and called upon to show cause. Petitioner's explanation is marked P9. An inquiry was held by a Tribunal with Petitioner's participation. Petitioner was found guilty and reprimanded and called upon to pay Rs. 109,000/- being money utilized to travel to India, Malaysia and Singapore. 4R9 is the report of the inquiry panel.

The Council minutes marked 4R10 & 4R11 show that in order to recover the sums of money utilized to travel to India, Singapore & Malaysia by the Petitioner a decision was taken by the Council to allow the Petitioner to continue as Registrar for the remaining period of the Petitioner's 1<sup>st</sup> extension.

Petitioner on 15.5.2006 appealed to the University Services Appeal Board (USAB) regarding the decision of the 1<sup>st</sup> Respondent to terminate the services of the Petitioner and the USAB quashed the decision taken by the Council on

9.4.2005 and directed the Petitioner to be reinstated since the 1<sup>st</sup> extension granted to the Petitioner ended on 8.8.2005. 1<sup>st</sup> Respondent sought clarification by 4R12 from the UGC. By 4R13 UGC informed that the extension be granted with effect from 9.8.2005 to 9.8.2006 and granting further extension should be based on the recommendations of the council.

Upon receiving a request of the Petitioner dated 18.04.2006, seeking her 3<sup>rd</sup> extension, the Council of 1<sup>st</sup> Respondent University was convened for the purpose of deciding on the matter.

At its 307<sup>th</sup> meeting held on 22.07.2006, the Council took a decision not to grant the Petitioner another extension and to pay the salary and other financial benefits up to 08.08. 2006 and also to recover Rs. 109,000 being the amount utilized by the Petitioner without the approval of the Council to travel to Malaysia, Singapore and India. The Petitioner was informed thereof by way of letter dated 03.08.2006 and certified copies of the aforementioned minutes of the Council and the letter dated 03.08.2006 have been annexed to the Statement of Objections marked as 4R14 and 4R15.

Approval of the University Grants Commissions was sought, as stated in UGC Establishments Circular No. 16/2001 and the University Grants Commissions by way of letter dated 11.07.2006 informed that the UGC has accepted the decision of the Council not to grant the Petitioner her 3<sup>rd</sup> extension. Certified copies of the aforementioned letter and the Circular have been annexed to the Statement of Objections marked as 4R16 and 4R17.

Pursuant to which, the Petitioner was informed of the decision of the University Grants Commission by way of letter

dated 11.09.2006 and a certified copy of it has been annexed to the Statement of Objections marked as 4R18.

The Petitioner no doubt has served the University for a very long period. However the authorities concerned had granted the 1<sup>st</sup> and 2<sup>nd</sup> extensions, in spite of the fact the disciplinary action against the Petitioner was initiated. Either party to this application have placed sufficient material before court to arrive at a decision regarding the 3<sup>rd</sup> extension. Notwithstanding the position of the Petitioner I take the view that granting an extension is in the discretion of the authorities concerned. This is an instance where there had not been a total denial of the extension, since the 1<sup>st</sup> & 2<sup>nd</sup> extensions were in fact granted. One cannot be unmindful of the fact that an inquiry held against the Petitioner found her guilty of charges.

The prerogative writs sought from court are discretionary remedies of court. Writs are not available as of right. Nor can a writ be issued as a matter of course or as a matter of routine.

Even if a Petitioner is entitled to relief, still the court has a discretion to deny the Petitioner relief having regard to his conduct, delay, laches, waiver submission to jurisdiction are all valid impediments which stand against the grant of relief. *Jayaweera vs. Asst. Commissioner of Agrarian Services, Ratnapura* <sup>(6)</sup>

Having examined the material, I find that as pointed out by the Respondent, documents P25 & P29 are documents sought to be quashed and there is in fact a delay in filing this application. This court cannot ignore a delay of this nature since it is a traditional approach which would disentitle a party for a remedy by way of a prerogative writ.

In *Dissanayake Vs. Fernando*<sup>(7)</sup>, it was held that;

“where there has been a delay in seeking relief by way of Certiorari, it is essential that the reasons for the delay should be set out in the papers filed in the Supreme Court.”

In *President of Malalgodapitiya Co – operative Society Vs. Arbitrator of Corporative Societies, Galle*<sup>(8)</sup>, it was held that;

“a writ of certiorari will not be issued where there has been undue delay in applying for the writ”.

In *Hopman and Others Vs. Minister of Lands & Land Development and Others*<sup>(9)</sup>, it was held that;

“allegation of delay in filing the writ application is not irrelevant”.

“...the appellants have failed to give a satisfactory explanation for their conduct and the delay in making their application to the Court of Appeal and hence Court cannot be faulted for exercising its discretion against the issue of the writ. I therefore dismiss this appeal and affirm the judgment of the Court of Appeal.”

In *Jayaweera Vs. Assistant Commissioner of Agrarian Services, Ratnapura and another (supra)*, it was held that,

“a Petitioner who is seeking relief in an application for the issue of a Writ of Certiorari is not entitled to be treated as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction – as all are valid impediments which stand against the grant of relief.

An application for a writ of Mandamus should be filed within a reasonable period of time. Applications for the writ

of Mandamus have been refused on numerous occasions for undue delay.

In the case of *Madanayake Vs. Schrader*<sup>(10)</sup> an application for a writ of mandamus was refused as there was a delay of 8 months between the election and the filing of the application for a writ of Mandamus.

The other matter that is apparent is that the Petitioner's failure to challenge document P25A (issued by the UGC). This also refers to the fact of not granting the 3<sup>rd</sup> extension. It is also submitted on behalf of the Respondents that the Registrar's post is no longer vacant and a person has been appointed to the post as from 11.3.2009. Even if it is argued that such appointment would not have a bearing on the 3<sup>rd</sup> extension sought by the Petitioner, I do not consider it to be in order to grant the 3<sup>rd</sup> extension as a decision has been taken by the University Council refusing extension and this court need not interfere with such decision. Although the Petitioner indicated to court that Petitioner would be content with payment of salary it would not be proper to consider such a request in the absence of service to the 1<sup>st</sup> Respondent since the Petitioner has not worked beyond 8.8.2006. One could be remunerated only for the work done, and not otherwise. In these circumstances the final relief sought is futile. In the case of *Air Vice Marshall Elmore Perera Vs. Liyanage & Others*<sup>(11)</sup> . . . held "writ would not lie if the final relief sought is a futile remedy".

In all the above circumstances we are not inclined to grant relief to the Petitioner. As such application is refused and dismissed with costs.

**HETTIGE P.C., J, P/CA** – I agree.

**ARALIYA IMPEX (PVT) LTD. AND OTHERS V  
BANK OF CEYLON**

SUPREME COURT  
TILAKAWARDANA, J  
EKANAYAKE, J. AND  
DEP, PC., J  
SC(CHC) APPEAL NO. 55/2006  
HC (CIVIL) NO. 1197/2003 (1)  
JULY 8, 2013

*High Court of the Provinces (Special Provision) Act, No. 10 of 1996 – Section 7 – Jurisdiction of the High Court (Commercial) in respect of commercial transactions – Companies Act, No. 7 of 2007 – Section 189 – Fiduciary duties of Directors of a company – Law of Banking – Letter of Guarantee*

The Appellants preferred this appeal from a judgment of the Commercial High Court which had held in favour of the Respondent Bank. The issues before the Supreme Court were as follows.

1. Whether there was evidence in support of the amounts claimed by the Plaintiff – Respondent (Respondent) and whether the amounts claimed had been arrived at arbitrarily. Whether the learned Judge had manifestly failed to assess and /or evaluate the evidence before the Court.
2. Whether personal guarantees were sought from the 2<sup>nd</sup> Defendant – Appellant (2<sup>nd</sup> Defendant) and the 3<sup>rd</sup> Defendant – Appellant (3<sup>rd</sup> Defendant) at any stage.
3. Whether the Commercial High Court had jurisdiction to hear and determine this matter.

The 1<sup>st</sup> Defendant – Appellant (Appellant Company) obtained credit facilities up to a limit of Rs. 30 million. Thereafter the Appellant – Company obtained a Hypothecation Loan from the Respondent upon a security of a Mortgage Bond and a joint and several guarantee of the Directors of the Appellant Company in favour of the Respondent.

**Held:**

- (1) The interest rate imposed on the appellant company's loans was not an arbitrary figure but one the Respondent would have arrived at in relation to loans issued at the time.
- (2) A Director signing a document on behalf of a company is expected to read the document and ensure that it is in the company's best interests, prior to signing it. It would be deemed to be a breach of their duties as Directors if they had failed to read the conditions and terms of a document.
- (3) When a loan is secured by a guarantor the Bank retains the right to sue both the borrower and the guarantor, in the event of default by the borrower. The guarantor's liability only arises when the debt becomes due. The 2nd and 3rd Defendants provided a personal guarantee for the Hypothecation loan and did not sign the documents in their capacity as Directors of the Appellant company as the company then would be guaranteeing itself.
- (4) Section 7 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 when read in conjunction with item (1) of the First Schedule of the said Act indicates that the High Court has jurisdiction over this case as any case pertaining to debt where the cause of action relates to banking and exceeds Rupees three million falls within the jurisdiction of the Commercial High Court.

**APPEAL** from the High Court of the Western Province (exercising) Civil Jurisdiction.

**Cases referred to:**

- (1) *Lister V. Romford Ice and Cold Storage Co. Ltd.* – (1957) AC 555
- (2) *Cornel and Company Ltd. V. Mitsui and Company Ltd and Others* – (2000) 1 Sri L. R. 57

*M. Javed Mansoor* for Defendants – Appellants.

*S. Rajaratnam, DSG, with Fazly Rasik, SC,* for Plaintiff – Respondent

July 30<sup>th</sup>, 2013

**TILAKAWARDANE, J.**

The High Court of the Western Province (exercising Civil Jurisdiction) holden in Colombo, (hereinafter referred to as the Commercial High Court) in its judgment dated 9<sup>th</sup> October 2006 found in favour of the Respondent on all issues and granted relief accordingly. The Application was preferred to this Court on 07.12.2006 and appeal taken up on the 29.05.2012. Issues before the Court are as follows:

1. Whether there was evidence in support of the amounts claimed by the Plaintiff – Respondent (hereinafter referred to as the Respondent) and whether the amounts claimed had been arrived at arbitrarily. Whether the Learned Judge had manifestly failed to assess and/or evaluate the evidence before the Court.
2. Whether personal guarantees were sought from the 2<sup>nd</sup> Defendant - Appellant (hereinafter referred to as the 2<sup>nd</sup> Defendant) and the 3<sup>rd</sup> Defendant – Appellant (hereinafter referred to as the 3<sup>rd</sup> Defendant) at any stage.
3. Whether the Commercial High Court had jurisdiction to hear and determine this matter.

The 1<sup>st</sup> Defendant – Appellant (hereinafter referred to as the Appellant Company) applied for credit facilities (marked “P2”) up to a limit of Rs. 30 Million on 2nd September 1998. Thereafter the Appellant Company obtained a Hypothecation Loan (marked “P1”) from the Respondent. This was on the security of a Mortgage Bond No. 15/98 (marked “P3”) and a joint and several guarantee of the Directors of the Appellant



Company in favour of the Respondent as stated at the bottom of page 1 of the Hypothecation Loan marked P1. The guarantee bond by the 2<sup>nd</sup> Appellant and the 3<sup>rd</sup> Appellant who were Directors of the Appellant Company, dated 2<sup>nd</sup> September 1998, is marked P 22.

The Appellant Company by letters dated 08.09.2000 (marked "P4"), 22.09.2000 (marked "P7"), 22.09.2000 (marked "P10"), 04.10.2000 (marked "P13"), 19.10.2000 (marked "P16") and 02.08.2000 (marked "P 19") admittedly borrowed money from the Respondent under the Hypothecation Loan marked P1.

Under the Guarantee Bond marked P22, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants provided a guarantee for the loans taken by the Appellant Company under Hypothecation Loan P1. Under law, the loan is secured by the guarantor and the Bank retains the right to sue both the borrower and the guarantor in the event of default by the borrower. The guarantor's liability only arises when the debt becomes due. Therefore when the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants signed P22, they were providing a personal guarantee of a maximum of Rs. 30 Million, although they were Directors of the Appellant Company. This would not have been in their capacity as Directors of the Appellant Company, as the Company would then be guaranteeing itself, which is not the intended purpose of a guarantee. Therefore at no time could it have been the intention, of the Respondent, the Appellant Company or the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants. for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants to provide a guarantee for the Hypothecation Loan, P1, in their capacity as Directors.

The Guarantee Bond P22 dated 2<sup>nd</sup> September 1998, was signed on the same date as the Application for the

Hypothecation Loan P2, and the Hypothecation Loan, P1. Paragraph 15 of the Guarantee Bond P22 states;

“IT BEING AGREED that I/we and each of us am/are is liable in all respect hereunder not merely as surety or sureties or guarantor or guarantors but as sole or principal debtor or where this guarantee is signed or executed by more than one person as sole or principal debtors severally or separately and jointly and severally to the extent aforementioned, including the liability to be sued before recourse is had against the debtor, or without any recourse whatsoever being had to the debtor for any reason or cause whatsoever and in the absolute discretion of the Bank.”

This clearly indicates that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants provided a personal guarantee for the Hypothecation Loan and did not sign the documents in their capacity as Directors of the Appellant Company. Furthermore the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants as Directors are responsible for reading all the terms of any agreement pertaining to the business of their Company, in fulfillment of their fiduciary duty as Directors to act for the benefit of the company. Further Section 189 (1) of the Companies Act No. 7 of 2007 states that a director should not act in a manner which is reckless or grossly negligent and should exercise the level of skill and care that may reasonably be expected of a person of his knowledge and expertise. This concept is also supported by the case of *Lister Vs. Romford Ice and Cold Storage Co. Ltd.* <sup>(1)</sup>

It is apparent therefore that a Director signing a document on behalf of a company is expected to read the document thoroughly and ensure that is in the company's best interests, prior to signing it. Therefore as the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants are

Directors of the Appellant Company, it would be deemed a breach of their duties as Directors if they had failed to read the terms of the Guarantee Bond P 22.

In addition it is this Court's finding that even if, as argued by the Appellant Company and 2<sup>nd</sup> & 3<sup>rd</sup> Appellants, the guarantee was in their capacity as Directors at the point of making their signatures the word 'Director' would have been printed under the signature. However this is not the case in relation to the signatures on the Guarantee Bond P 22.

For these reasons it is the finding of this Court that the Commercial High Court was correct in finding that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had provided personal guarantees on the Hypothecation Loan.

The Appellant Company challenges the 26% interest claimed on the loans, by the Respondent and the total sum deemed, by the judgment of the Commercial High Court, to be owed to the Respondent. This position is based on the interest rate indicated in paragraph 4 of P1 which provides that; "interest to be payable monthly at a rate of 24% per centum per annum". However this Court highlights the fact that in the same paragraph it is provided that the interest rate can be changed by the Respondent from time to time or as agreed in relation to a specific loan. Furthermore similar wording is used at paragraph (f) of P3. Therefore it is this Court's finding that the interest rate imposed on the Appellant Company's loans was not an arbitrary figure but one the Respondents would have arrived at in relation to loans issued at the time.

Furthermore, the letters by the Appellant Company, P4, P7, P10, P 13, P 15 and P 19, requesting the loans expressly

state the interest rate as 26%. Further the letters were on the Appellant Company's letter head which is an indication that the Company was aware of the interest rate. By signing the letters the Appellant Company's Directors acknowledged the interest rate as 26%, and therefore it would be the applicable interest rate on the loans.

Further the learned Judge of the Commercial High Court in his judgment clearly set out his reasoning and indicated that he had considered the Statements of Account entered into evidence, and marked P 11, P14, P17, P20, when calculating the sums due by the Appellant Company. Having perused these documents this court concurs with these findings.

Furthermore as the loans obtained by the Appellant Company were over a single year it is the finding of this Court that the change in interest would have been detected by the Appellant Company prior to this action being brought by the Respondent. Therefore if the Appellant Company found the interest rate to be incorrect it could have brought this error to the attention of the Respondent Bank by written communications. This was not done.

The Appellant Company and 2<sup>nd</sup> & 3<sup>rd</sup> Appellants submit that the figures inserted as interest were inserted after the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants' signatures were obtained. However no evidence to support this submission could be identified. Therefore it is the finding of this Court that such an accusation is baseless.

In addition this Court highlights the fact that any application for a loan, made by a Company, would be evaluated thoroughly by the Company's Directors prior to agreement, specifically provisions relating to the interest payment. As

there is no evidence to suggest that the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants, Directors of the Appellant Company, were unable to carefully scrutinize the agreements prior to signing them, it is the finding of this Court that the learned Judge of the Commercial High Court had correctly given the necessary weight to the evidence put forward when considering the amounts due.

The Appellant Company and 2<sup>nd</sup> & 3<sup>rd</sup> Defendants also appeal on the grounds that the Commercial High Court had no authority to hear the case. Section 7, High Court of Provinces (Special Provisions ) Act No. 10 of 1996 states;

2. *(1) 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.*

This section when read in conjunction with Item (1) of the First Schedule indicates that the High Court has jurisdiction over the case as any cases pertaining to debt where the cause of action relates to banking and exceeds Rs. 3 Million (to which the Minister has changed the Rs. 1 Million requirement) the case falls within the jurisdiction of

the High Court. In the current circumstances as the parties to the case are in the Western Province the case falls within the jurisdiction of the Commercial High Court holden in Colombo. The case of *Cornel and Company Ltd. Vs. Mitsui and Company Ltd. and Others*<sup>(2)</sup> confirms the issue of jurisdiction where the sum in question is over Rs. 3 Million.

This Court holds that the Commercial High Court had jurisdiction over the case at hand and therefore the findings of the learned Judge of the Commercial High Court dated 09.01.2006 are affirmed. Further where the Appellant Company is unable to pay the total sum due it is enforceable against the 2<sup>nd</sup> & 3<sup>rd</sup> Appellants, up to Rs. 30 Million. The appeal is dismissed and this court order costs to be paid by the Defendant Appellants in sum of Re. 100,000/- to the Plaintiff Respondent.

**EKANAYAKE, J** – I agree.

**DEP,PC, J.** – I agree.

*Appeal dismissed.*

**ILLANGAKOON V. ANULA KUMARIHAMY**

SUPREME COURT  
SRIPAVAN, J.  
HETTIGE, P. C. J. AND  
DEP, P. C. J.  
S.C.H.C.C.A.L.A. NO 277/2011  
C.P/H.C./CA/15/2009  
D.C. MATALE NO. 3773/L  
JANUARY 21, 2013

*Supreme Court Rules (1990) – Rule 28(2) – Appeal should contain, inter alia a plain and concise statement of the facts and the grounds of objection – Rule 28(5) – Is it mandatory in every such petition of appeal to name as respondents, all parties in whose favour the judgment or complaint against, was delivered? – High Court of the Provinces (Special Provisions) Act No. 19 of 1990 – High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.– Constitution No. Article 27 Article 128, Article 154(P) – High Court of the Provinces (Special Provisions) Act, No.54 of 2006, Section 5 (c)(1)*

When this application was taken up for hearing in the Supreme Court, the learned Counsel for the Defendant took up a preliminary objection that the leave to appeal application should be rejected *in limine* for failure to make the necessary parties as Defendants. The preliminary objection is based on Rule 28(2) of the Supreme Court Rules, 1990.

**Held:**

- (1) As the Plaintiff has produced Deed No. 264 and other evidence of fact for the first time along with written submission in the Supreme Court the position taken up in the written submissions of the Plaintiff is irrelevant and cannot be considered at the stage of appeal.
- (2) The words “full title” necessarily has to include all the persons cited as parties in the proceedings of the Original Court and the failure to set out the “full title” is a fatal irregularity for leave to appeal. Accordingly, the present application should be dismissed

on that ground alone for non-compliance with the mandatory rule 28(2) of the Supreme Court Rules, 1990.

- (3) Since the present appeal before the Supreme Court falls within the category of “other appeals” the combined effect of both Rule 28(2) and Rule 28(5) is that the requirement of “full title” must be complied with and be supplemented by other parties required to be added under Rule 28(5)

**APPLICATION** for leave to appeal from the judgment of the High Court (Civil Appellate) Matala.

**Cases referred to:**

- (1) *Sudath Rohana and another V. Mohamed Cassim Mohammed Zee-na* S. C. H.C. C.A.L.A No 111/2010 (SC Minutes of 14.7.10)
- (2) *Jamburegoda Gamage Lakshman Jinadasa V. Pilitthu Wasana Gal-lage Pathma Hemamali and Others* – S. C.H.C./CALA No. 99/2008 – (S.C. Minutes of 8.11.2010)
- (3) *Ibrahim Vs. Nadarajah* – (1991) Sri L.R. 131
- (4) *Attanayake V. Commissioner General of Elections and Others* – S. C. Minute of 21.07.2011
- (5) *De Silva V. Wettamuny* – (2005) 3 Sri L.R. 251

*S. K. Sangakkara* for the Plaintiff – Respondent – Petitioner  
*Riad Ameen* for the Defendant – Appellant – Respondent

*Cur.adv.vult*

April 05<sup>th</sup>, 2013

**SRIPAVAN, J.**

The Plaintiff-Respondent – Petitioner (hereinafter referred to as the “Plaintiff”) being dissatisfied with the judgment pronounced by the High Court established by Article 154P of the Constitution preferred a leave to appeal application dated 21.07.11 to this Court to have the said judgment set aside on various grounds set out in paragraph 12 of the Petition of Appeal.



When the said leave to appeal application was taken up for support, the Learned Counsel for the Defendant –Appellant –Respondent (hereinafter referred to as the “Defendant”) took up a preliminary objection to the maintainability of the application on the basis that the Plaintiff has failed to comply with the mandatory requirements set out in Rules 28(2) and /or 28(5) of the Supreme Court Rules, 1990 and therefore the application filed by the Plaintiff should be dismissed *in limine*.

The Plaintiff filed his Complaint dated 21.04.86 in the District Court naming the following four Defendants:

Illangakone Mudiyanseelage Gnanathilake Illangakone

Plaintiff

Vs.

1. Kalinga Seneviratne Kumarasinghe Bandaranayake  
Mudiyanse Ralahamilage William Bandara Lenawala.
2. Kalinga Seneviratne Kumarasinghe Bandaranayake  
Mudiyanse Ralahamilage Thilakaratne Bandara Lenawala
3. Anula Kumarihamy Lenawala
4. Hetitiarachchige Don Lootus Leelaratne

Defendants

When this application came up for hearing before this Court on 25.05.2012, Learned Counsel for the third Defendant informed Court that he would be taking up a preliminary objection that the leave to appeal application should be rejected *in limine* for failure to make the necessary parties as

Defendants. The inquiry into the preliminary objection was fixed for 18.09.2012. However, on 07.09.2012, the written submissions of the Plaintiff was filed and he took up the following matters, moving that the preliminary objections be rejected.

1. Paragraph (2)

The first and the second defendant died after filing the answers, but before the trial and their legal representatives were substituted as 1A and 2A Defendants.

2. Paragraph (3)

On the date of the trial the second and the third Defendants were alive. Only the 3<sup>rd</sup> Defendant appeared at the trial; the Court ordered *ex-parte* trial against all the other Defendants and entered judgment against the 3<sup>rd</sup> Defendant.

3. Paragraph (4)

Before the appeal was heard by the High Court and after the *ex-parte* decree was served on the 4<sup>th</sup> Defendant H.D.L. Leelaratne, met the Plaintiff and requested him to execute Deed No. 264 dated 19th January 2011 in order to avoid ejection from the portion he occupied pertaining to the decree in the case.

4. Paragraph (6)

As the Court had already ordered *ex-parte* trial against the 4<sup>th</sup> Defendant H.D.L. Leelaratne and no final judgment has been entered against him he will not be bound by the Order of this Court. Thus, there was no need to make

the 4<sup>th</sup> Defendant as a party respondent to this leave to appeal application.

5. Paragraph 7(a)

The Provincial High Court failed to issue any notice on the substituted Defendants and thereby deprived their rights to be present at the hearing and to exercise their rights under Section 772 of the Civil Procedure Code.

6. Paragraph 7(b)

The judgment of the Provincial High Court does not bind the substituted Defendants and the Defendants who have died.

It is on the abovementioned basis the Plaintiff submitted that except Anula Kumarihamy Lenawala, others had not been made parties in the appeal preferred to the Supreme Court.

The petition of appeal dated 21.07.11 filed in this Court did not contain any of the matters now referred to in the written submissions. Rule 28(2) mandatorily requires that the appeal should contain, inter alia, a plain and concise statement of the facts and the grounds of objection to the judgment appealed against. The Plaintiff has now produced Deed No. 264 dated 19<sup>th</sup> January 2011 and other evidence of fact for the first time along with the written submissions. The aforesaid Deed was not even produced in evidence before the District Court. The position now taken up in the written submissions of the Plaintiff is irrelevant and cannot be considered at this stage. It is also noted that the written submission filed is teemed with mistakes and irregularities.

While in paragraph 2, the Plaintiff states that the second Defendant died after filing the answer, in paragraph 3, he states that the second Defendant was alive, on the date of the trial.

Learned Counsel for the Defendant argued that in the application for leave to appeal, only the Plaintiff and the Defendant were made parties whereas the proceedings before the High Court indicate the following three more parties as Defendants-Defendants:

2. Kalinga Seneviratne Kumarasinghe Bandaranayake  
Mudiyanse Ralahamilage William Bandard Lenawala,  
Upupihilla, Matale,
3. Kalinga Seneviratne Kumarasinghe Bandaranayake  
Mudiyanse Ralahamilage Thilakaratne Bandara  
Lenawala, Lenawala
4. Hettiarachchige Don Lootus Leelaratne, No. 28,  
Siyambalagastenna Road, Kandy.

Thus, Counsel submitted that the application for leave to appeal has excluded the aforesaid Defendants- Defendants in its title thereby violating Rule 28(2) and/or Rule 28(5) of the Supreme Court Rules, 1990.

Learned Counsel for the Plaintiff on the other hand submitted that no Rules have been enacted under Article 136 of the Constitution in respect of matters relating to leave to appeal from a High Court established by Article 154P of the Constitution to the Supreme Court and that Rule 28(2) did not specify any requirements as to how a leave to appeal application be drafted when invoking the appellate jurisdiction

of the Supreme Court. It is on this basis Counsel contended that the preliminary objection raised by the Learned Counsel for Defendant regarding the application of Supreme Court Rules, 1990 cannot be accepted.

The Plaintiff has filed this application seeking leave to appeal from the judgement of the High Court of the Province in terms of Section 5C of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006, which reads as follows:-

*“5c (1) An appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction granted by section 5a of this Act, with leave of the Supreme Court first had and obtained. The leave requested for shall be granted by the Supreme Court where in its opinion the matter involves a substantial question of law or is a matter fit for review by such Court.*

*(2) The Supreme Court may exercise all or any of the powers granted to it by paragraph (2) of Article 127 of the Constitution, in regard to any appeal made to the Supreme Court under subsection (1) of this section.*

It may be relevant to note that in the case of *L. A. Sudath Rohana and another Vs. Mohamed Cassim Mohammed Zeena*<sup>(1)</sup> this Court had the occasion to consider the mode of preparing appeals and applications for leave to appeal to the Supreme Court. In this judgment Justice (Dr.) Shirani A. Bandaranayake (as she then was) observed the difference in language between Article 128 (2) of the Constitution which refers to “Special

leave to appeal” and Section 5C(1) of the High Court of the Provinces (Special Provisions) Amendment Act, No. 54 of 2006 which refers to the “leave of the Supreme Court First had and obtained” and after subjecting the Supreme Court Rules, 1990 to a close critical examination noted that:-

*“Part I of the Supreme Court Rules, 1990 refers to three types of appeals which are dealt with by the Supreme Court, viz., special leave to appeal, leave to appeal and other appeals. Whilst applications for special leave to appeal are from the judgments of the Court of Appeal, the leave to appeal applications referred to in the Supreme Court Rules are instances, where the Court of Appeal had granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal, where the Court had decided that it involves a substantial question of law. The other appeals referred to in Section c of Part I of the Supreme Court Rules are described in Rule 28(1) which is as follows:-*

*“Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal” (emphasis added)*

*The High Court of the Provinces (Special Provision) Act, No. 19 of 1990 and High Court of the Provinces (Special Provisions) Amendment Act, No. 54 of 2006 do not contain any provisions contrary to Rule 28 (1) of the Supreme Court Rules, 1990 thus enabling the fact that Section C of Part I of the Supreme Court Rules, which deals with other appeals to the Supreme Court, should apply to the appeals from the High Courts of the Provinces”.*



