THE

Sri Lanka Law Reports

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

[2011] 2 SRI L.R. - PART 1

PAGES 1 - 28

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

Price: Rs. 25.00

DIGEST

SIRIWARDANA V. SENEVIRATNE AND 4 OTHERS

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, J.,
SRIPAVAN, J. AND
SURESH CHANDRA, J.
S.C. (F.R.) APPLICATION NO. 589/2009
JULY 22ND, 2010
AUGUST 26TH 2010

Constitution – Fundamental Rights – Article 12 (1) – All persons are equal before the law and are entitled to the equal protection of the law – Concept of legitimate expectation

The Petitioner complained that the 1st and 2nd Respondents had delayed her appointment as a Social Welfare Superintendent and thereby had violated her fundamental rights guaranteed in terms of Article 12 (1) of the Constitution. The Petitioner contended that she had a legitimate expectation that she would be appointed to the next available vacancy based on the result of the examination held on 23.06.2007. The Petitioner submitted that she believed that the said appointment was delayed or not filled due to the representations that were made by the Trade Union of the Social Services Officers of the Western Province, to the 1st Respondent.

Held

(1) A careful consideration of the doctrine of legitimate expectation shows that whether an expectation is legitimate or not is a question of fact. This had to be decided not only on the basis of the application made by the aggrieved party before Court, but also taking into consideration whether there had been any arbitrary exercise of power by the administrative authority in question.

(2) The concept of equal protection referred to in Article 12(1) of the Constitution embodies a guarantee against arbitrariness and unreasonableness. The concept of legitimate expectation would embrace the principle that in the interest of good administration it is necessary for the relevant authority to act fairly.

(3) A mere hope or an expectation cannot be treated as having a legitimate expectation.

Per Dr. Shirani A. Bandaranayake, C.J.

> "The interpretation suggested by the learned Counsel for the petitioner, that the petitioner had a legitimate expectation that she would be appointed for the next available vacancy, since she was placed 3rd in the order of merit at the examination cannot be accepted, as such an interpretation to paragraph 3 of the Gazette Notification of 08.12.2000(A) would give rise to uncertainty in filling future vacancies. Moreover, that would create an unreasonable and irrational procedure in filling up future vacancies as that would prevent persons, who would be eligible to apply for the said positions".

Cases referred to:

(1) *Schmidt v. Secretary of State for Home Affairs* – (1969) 1 All ER 904

(2) *Breen v. Amalgamated Engineering Union* – (1971) 1 All ER 1148

(3) *Re Westminister City Council* – (1986) AC 668

(4) *Attorney – General of Hong Kong v. Ng Tuen Shiu* – (1983) 2 All ER 346

(5) *Council of Civil Service Unions v. Minister for the Civil Service* – (1984) 3 All ER 935

(6) *Union of India v. Hindustan Development Corporation* – (1933) 3 SCC 499

(7) *Attorney General for New South Wales v. Quinn* – (1990) 64 Australian LJR 327

APPLICATION complaining of infringement of fundamental rights guaranteed under Article 12 (1) of the Constitution.

A.H.H. Perera for Petitioner

Nerin Pulle, SSC, for 1st to 3rd and 5th Respondents

Cur.adv.vult

March 10th 2011

DR. SHIRANI A. BANDARANAYAKE, J.

The petitioner was a Matron at the Seth Sevana State Elders Home at Mirigama and had commenced her duties on

15.10.1996. Consequent to a notice published in the government Gazette of 08.12.2006 by the Secretary to the Provincial Public Service Commission of the Western Province (A), the petitioner had sat for the examination pertaining to the recruitment of Social Welfare Superintendent of the Department of Social Services of the Western Province. According to the petitioner she was placed 3rd in order of merit at that examination. However as there had been only two vacancies to be filled on the basis of the said examination, viz., at the Bellantara Specialized Children's Home and the Gangodawila House of Detention, she could not be appointed as a Social Welfare Superintendent. Nevertheless, the petitioner had a legitimate expectation founded on the basis of paragraph 3 of the Gazette Notification dated 08.12.2006 (A), that she would be appointed to the next available vacancy.

On 12.12.2008, the Social Welfare Superintendent of the Department of Social Services of the Western Province, who was the Administrator and the Supervisor of the State Elder Home at Mirigama had retired and a vacancy of the said position had arisen since that date. The petitioner submitted that the officer, who retired had availed himself of his leave prior to retirement in September 2008 and acting arrangements were made to attend to the duties of that officer. Accordingly the petitioner stated that she was requested to attend to the relevant duties for two (2) days each week.

The petitioner also submitted that she was directed to appear before the 3rd respondent on 22.06.2009 with documents inclusive of a certificate from the Head of the Department. Accordingly, the petitioner had appeared before a Committee, where the 3rd respondent was the Chairman and later the 4th respondent had told her that the said Committee

had summoned her to scrutinize her qualifications to recommend her for an appointment as a Social Welfare Superintendent.

The petitioner also submitted that she verily believed that the said appointment was not filled due to the representations that were made by the Registered Trade Union of the Social Services Officers of the Western Province, to the 1st respondent. She had alleged that the 1st respondent is of the view that there is merit in the representations made by the Trade Union against her.

Accordingly, the petitioner complained that the 1st and 2nd respondents had delayed her appointment and thereby had violated her fundamental rights guaranteed in terms of Article 12(1) of the Constitution for which this Court had granted leave to proceed.

The petitioner's complaint is based on paragraph 3 of the Gazette Notification dated 08.12.2006 (A). The said paragraph 3 is as follows:

"03. Number of vacancies existing –

(1) Bellantara Specialized Children's Home – 01

(2) Gangodawila House of Detention – 01

Although the number of vacancies calculated at present is as indicated above, the said number of vacancies is likely to be more or less depending on exigencies of the service at the time of recruitment. The decision of the Western Provincial Public Service Commission with regard to the number of vacancies that would be filled will be final and conclusive."

Learned Counsel for the petitioner contended that he relies on the phrase that 'although the number of vacancies calculated at present is as indicated above, the said number of vacancies is likely to be more or less depending on the exigencies of the service at the time of recruitment' and therefore that the petitioner had a legitimate expectation that she would be recruited for the next vacancy in December 2008 based on the results of the examination held on 23.06.2007.

It is to be noted that in paragraph 3 of the said Gazette Notification of 08.12.2006 (A), reference was made only for two vacancies that existed at the time of the said Notification. It was further stated that the number of vacancies could be more or less depending on exigencies of the service, however at the time of recruitment.

It is not disputed that the closing date for applications was 26.01.2007 and the recruitments were made on the basis of the examination held on 23.06.2007 to fill up the two vacancies that had existed. It is also not disputed that at the time of the publication of the Gazette Notification in December 2006 and at the time of the examination, there had been only two vacancies to be filled in the positions of Social Welfare Superintendents of the Western Provincial Department of Social Services.

As stated earlier, paragraph 3 of the Gazette Notification of 08.12.2006 clearly had stated that the number of vacancies would be more or less depending on exigencies of the service **'at the time of recruitment'**. A plain reading of the said paragraph 3 therefore clearly indicates that the number of vacancies should be advertised or finally decided at least by the date of recruitment. On the date of recruitment, the respondents had filled only two (2) vacancies that had been

advertised and there is no material to indicate as to whether there had been any other vacancies at that time. In the circumstances, along with the filling of the said two (2) vacancies, the purpose of the holding of the relevant examination on 23.06.2007 became fulfilled and the results of that examination thereafter cannot be used for filling any other vacancies of the post of Social Welfare Superintendents.

The contention of the learned Counsel for the petitioner was that in view of paragraph 3 of the Gazette Notification of 08.12.2006 (A), the petitioner had a legitimate expectation that she would be appointed as a Social Welfare Superintendent and therefore the petitioner should be appointed to the existing vacancy at the Seth Sevane State Elders Home at Mirigama.

The term, now known as legitimate expectation, was first used by Lord Denning, in *Schmidt v. Secretary of State for Home Affairs*[1]. The Court, referring to a decision of the government to reduce the period already allowed to an alien to enter and stay in England, had held that the person had a legitimate expectation to stay in England that cannot be violated without following a reasonable procedure. This was immediately followed in *Breen v. Amalgamated Engineering Union*[2].

Discussing the concept of legitimate expectation, David Foulkes (Administrative Law, 7th Edition, Butterworths, 1990, pg. 272) had expressed the view that a promise or an undertaking could give rise to a legitimate expectation. Explaining his view, Foulkes had stated thus:

> "The right to a hearing, or to be consulted, or generally to put one's case may also arise out of the action of the

authority itself. This action may take one of two, or both forms; a *promise* (or a statement or undertaking) or a regular *procedure.* **Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that is, an expectation of the kind which the Court will enforce"** (emphasis added).

The concept of legitimate expectation was considered and discussed in *Re Westminster City Council*[3], where Lord Bridge had introduced the concept in the following words:

"The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation."

The observations of *David Foulkes (supra)* in the applicability of the concept of legitimate expectation was clearly illustrated by the decision in *Attorney General of Hong Kong v. Ng Tuen Shiu*[4] and *Council of Civil Service Unions v. Minister for the Civil Service*[5].

In *Ng tuen Shiu (supra)* the decision that he had a legitimate expectation was based on a promise given by the government whereas in *Council of Civil Service Unions (supra)* the decision was based on the legitimate expectation that arose out of a regular practice. In the circumstances a mere hope or an expectation cannot be treated as having a legitimate expectation.

The meaning and scope of the doctrine of legitimate expectation was considered at length in *Union of lndia v Hindustan Development Corporation*[6] where it was clearly stated that:

"Time is a three-fold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purpose, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in a natural and regular sequence. Again it is distinguishable from a mere expectation. Such expectation should be justifiable legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and, therefore, it does not amount to a right in a conventional sense."

A careful consideration of the doctrine of legitimate expectation, clearly shows that, whether an expectation is legitimate or not is a question of fact. This has to be decided not only on the basis of the application made by the aggrieved party before Court, but also taking into consideration whether there had been any arbitrary exercise of power by the administrative authority in question.

Accordingly, the question that would have to be looked into would be as to whether there was a promise given to the petitioner or a regular procedure that future vacancies would be filled on the basis of a previously held examination on which there had been selections made on the results of the said examination.

As stated earlier, a plain reading of the words in paragraph 3 of the Gazette Notification clearly shows that the number of vacancies would depend on the exigencies of the service at the time of recruitment. When the examination was held on 23.06.2007, in terms of the Gazette Notification, there had been only two (2) vacancies. The petitioner had not disputed this position. Admittedly, those two (2) vacancies had been filled in terms of the Gazette Notification of 08.12.2006 (A) and the subsequent examination held on 23.06.2007. The impugned vacancy had arisen in December 2008 and as had been shown, by that time, the vacancies which had arisen in December 2006 had been filled by the respondents. It is not disputed that at the time the vacancies were advertised by way of the Gazette Notification dated 08.12.2006 (A), and thereafter when the examination was held on 23.06.2007, there was no vacancy for the post of Social Welfare Superintendent at the State Elders Home at Mirigama. By the Gazette Notification (A), steps were taken to fill up the two (2) existing vacancies, which were clearly stipulated in the said Gazette Notification. In the event, if there were to be other vacancies that should have been taken into consideration in filling up on the basis of the examination that was held on 23.06.2007, they should have been vacancies that would have arisen **'on exigencies of the service at the time of recruitment'**. Accordingly, beyond the point of recruitment, the results of that examination cannot be considered for any other appointment. The interpretation suggested by the learned Counsel for the petitioner, that the petitioner had a legitimate expectation that she would be appointed for the next available vacancy, since she was placed 3rd in the order of merit at the examination cannot be accepted, as such an interpretation to paragraph 3 of the Gazette Notification of 08.12.2006 (A) would give rise to uncertainty in filling future vacancies.

Moreover, that would create an unreasonable and irrational procedure in filling up future vacancies as that would prevent persons, who would be eligible to apply for the said positions.

The applicability of the doctrine of legitimate expectation, which imposes in essence a duty to act fairly, was described vividly by Brennan, J., in *Attorney General for New South Wales v. Quinn* (7) in the following terms:

> "The Court must stop short of compelling fulfillment of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power. **It follows that the notion of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the Court out of review on the merits"** (emphasis added).

The reasons stated above, clearly indicate that the petitioner's claim that since she was placed 3rd in order of merit at the examination, that she had a legitimate expectation that she would be appointed at the next vacancy for Social Welfare Superintendent cannot be accepted. The petitioner's allegation that her fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated was on the basis of the aforesaid legitimate expectation. Article 12(1) of the Constitution, which refers to the right to equality reads as follows:

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

The concept of equal protection referred to in Article 12(1) of the Constitution embodies a guarantee against arbitrariness and unreasonableness. The doctrine of legitimate expectation had developed in the context of reasonableness and in the light of the decision in *Attorney General of Hong Kong v. Ng Tuen Shiu (supra)* the concept of legitimate expectation would embrace the principle that in the interest of good administration it is necessary for the relevant authority to act fairly.

Considering all the aforementioned facts and circumstances, it is clear that the decision of the respondents cannot be categorized as arbitrary and unlawful which had violated the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

For the reasons aforesaid, I hold that the petitioner has not been successful in establishing that her fundamental right guaranteed in terms of Article12(1) of the Constitution had been infringed by the respondents. This application is accordingly dismissed. I make no order as to costs.

SRIPAVAN, J. – I agree.

SURESH CHANDRA J. – I agree.

Application dismissed.

MARTIN AND ANOTHER VS. ASSISTANT COMMISSIONER OF AGRARIAN SERVICES AND 2 OTHERS

COURT OF APPEAL
SISIRA DE ABREW, J.
GOONERATNE, J.
CA (PHC) 42/99
HC HAMBANTOTA 93/97
AUGUST 29, 31, 2010

Agrarian Services Act – Section 26 – Writ of Mandamus – Could it be issued against the Assistant Commissioner of Agrarian Services ordering him to issue a certificate under Section 26?

The 1st respondent made an application to the Assistant Commissioner of Agrarian Services to issue a certificate under Section 26. This was refused. The High Court issued a Writ of Mandamus on the Assistant Commissioner of Agrarian Services directing him to issue a Section 26 certificate. On appeal.

Held:

A Writ of Mandamus can only issue against a natural person who holds public office. Relief can only be obtained against a natural person and High Court could not have issued a Writ of Mandamus directing the Asst. Commissioner of Agrarian Services to issue a Section 26 certificate.

APPEAL from an order of the High Court of Hambantota.

Cases referred to:-

1. *Haniffa vs. Chairman, Urban Council, Nawalapitiya* – 66 NLR 48
2. *P.B.D. Dayarathne vs. Dr. Rajitha Senaratne* – CA 1790/2003 – CAM 2004

Daya Guruge for respondent–appellant

Sarath Weerakoon for 1st respondent

Yuresha de Silve S.C. for 2nd and 3rd respondent.

November 04th 2010

SISIRA DE ABREW J.

The 1st respondent in this case made an application to the 2nd respondent to issue a certificate under Section 26 of the Agrarian Services Act against the two appellants as they have, as ande cultivators of the 1st respondent's paddy field, failed to give their praveniya (due share) to him (the 1st respondent). The 3rd respondent, appointed by the 2nd respondent, took up the position that as the appellants have ceased to be the ande cultivators in 1973, the 1st respondent was not entitled to get a certificate under Section 26 of the Agrarian Services Act. The 2nd respondent, therefore, refused to issue the said certificate. The 1st respondent challenged the said decision of the 2nd respondent in the High Court by way of a writ application. The learned High Court Judge (HCJ), by his judgment dated 23.2.99, set aside the said decision of the 2nd respondent and directed to issue a certificate under Section 26 of the Agrarian Services Act. Being aggrieved by the said judgment the appellants have appealed to this court.

It is undisputed that the appellants were the ande cultivators of the 1st respondent's paddy field during the period commencing from yala season in 1982 to maha season in 1991/1992. The inquiring officer Agrarian Services, on 30.3.93, has decided that the appellants should give praveniya to the 1st respondent for the said period. The application by the 1st respondent to the 2nd respondent under Section 26 of the Agrarian Services Act was in respect of the said period. Therefore it is incorrect to decide that the appellants were not entitled to give praveniya on the basis that they ceased to be the tenant cultivators. One should not forget the fact that they were the tenant cultivators during the relevant

period. Therefore the decision of the learned High Court Judge on the facts appears to be correct. But the learned counsel for the appellant took up a legal objection before us and contended that the writ issued against the 2nd and the 3rd respondents could not have been issued as they were not natural persons. I now advert to this contention. The 2nd and the 3rd respondents are Assistant Commissioner of Agrarian Services and the Inquiring Officer Agrarian Services. They are not natural persons. In *Haniffa vs. Chairman Urban Council Nawalapitiya* (1) Thambiah J held: " A mandamus can only issue against a natural person who holds a public office. Accordingly in an application for a writ of mandamus against the Chairman of an Urban Council, the petitioner must name the individual person against whom the writ can be issued."

In *P.B.D. Dayarathne vs. Dr. Rajitha Senarathne*(2) Marsoof J observed: "Firstly this being an application for mandamus, relief can only be obtained against natural person who holds a public office as was decided by the Supreme Court in Haniffa vs. Chairman, Urban Council Nawalapitiya."

Applying the principles laid down in the above judicial decisions, I hold that the learned High Court Judge could not have issued a writ of mandamus directing the 2nd respondent to issue a certificate under Section 26 of the Agrarian Services Act. I therefore hold that the learned High Court Judge was in error when he, by his judgment dated 23.2.99, issued a writ of mandamus against the 2nd respondent. For these reasons I set aside the judgment of the learned High Court Judge dated 23.2.99 and allow the appeal.

ANIL GOONERATNE J. – I agree.

Appeal allowed.

DIAS VS. COMMISSIONER GENERAL OF INLAND REVENUE

COURT OF APPEAL
ERIC BASNAYAKE, J.
CHITRASIRI, J.
CA 764/2000 (REV)
DC COLOMBO 68552/TAX
JULY 28, 2008
JULY 24, 2009

Inland Revenue Act 38 of 2000 – Section 146, Section 149 (1), Section 166, Section 166(1) – Income Tax Ordinance – Section 62 – Similarities? Inland Revenue Act 4 of 1963 – Defaulter a Company - Is a Director or Principal Officer of a limited liability Company liable to pay taxes due from Company from his personal assets – Jurisdiction? Vicarious liability – Exceptional circumstances – Applicability of the amendment 12 of 2004

The Deputy Commissioner of Inland Revenue filed a certificate of tax in default in the name of the petitioner claiming a certain sum of money. The tax defaulter is the Company and the petitioner was sued on the basis of vicarious liability. The trial Court held that in terms of Section 166 (1) an action could be instituted against the Managing Director to recover tax defaulted by the Company.

It was contended that, the petitioner cannot be a defaulter since he has not been duly assessed. It is the Company that was duly assessed and that there is no provision under the Act to recover taxes in default from the Managing Director of a Company - who is only a representative of the Company – in his personal name.

Held:

(1) Imposition of vicarious liability under a statute is not lightly to be presumed and such liability must necessarily be imposed on clear and unambiguous language.

(2) There is no provision in the Act which makes the principal officer liable for tax due from the Company – he is not liable to pay from his personal assets.

Per Eric Basnayake, J.

> "Provision has now been made by Section 144(B) of the Inland Revenue (Amendment Act) 12 of 2004 – making the directors and principal officers liable to pay income tax payable by Companies – this provision could not affect the present case."

Per Eric Basnayake, J.

> "Liability was imposed on the petitioner without having authority to do so. It could be considered as constituting an exceptional ground for the Court to exercise extra-ordinary jurisdiction."

APPLICATION in Revision from an order of the District Court of Colombo.

Cases referred to:-

1. *M.E. de Silva vs. The Commissioner of Income Tax* - 53 NLR 280.
2. *Rajan Philip vs. Commissioner of Inland Revenue* - CA 1174/81 – DC 15676/Tax Vol IV Tax Cases pg. 211.
3. *Hamza vs. Commissioner of Inland Revenue* – 1991 – Vol IV Tax Cases at 301

A.S.K. Senarath Aratchi for respondent – petitioner

Anusha Samaranayake SSC for plaintiff-respondent.

October 15th 2009

ERIC BASNAYAKE J.

The Deputy Commissioner of Inland Revenue filed a Certificate of Tax in Default (P1) in the District Court of Colombo, under section 149 (1) of the Inland Revenue Act No. 38 of 2000 (the Act) in the name of the respondent – petitioner (petitioner), claiming a sum of Rs. 4,442,500/-. The address of the petitioner is given as Managing Director, Multisacks Pvt. Co. No. 222, Galle Road, Gorakana, Panadura. The certificate P1 refers to File No. 114133159 for the year 2002/2003.

It is common ground that the tax defaulter is the company and the petitioner is sued on the basis of vicarious liability. The learned Additional District Judge by his order dated 20.4.2006 held that in terms of section 166 (1) of the Act, an action could be instituted against the Managing Director to recover tax defaulted by the company. Section 166 of the Act makes the secretary, manager, director or other principal officer liable to do all such acts as required to be done by the Act. The section further makes them liable for any offences committed by the company. Section166 reads as follows:-

1. **The secretary, manager, director or other principal officer of every company or body of persons corporate or unincorporated shall be liable to do all such acts, matters, or thing as required to be done under the provisions of this Act by such company or body of persons.**

   Provided that any person to whom a notice has been given under the provisions of this Act on behalf of a company or body of persons shall be deemed to be the principal officer thereof unless he proves that he has no connection with that company or body of persons or that some other person resident in Sri Lanka as the principal officer thereof.

2. **When an offence under this Act is committed by a company or body of persons, corporate or unincorporate, every person who at the time of the commission of that offence was the secretary, manager, director or other principal officer of that company or body of persons shall be deemed to be**

guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all such diligence to prevent the commission of that offence as he ought to have exercised having regard to the nature of his functions in such capacity and to all the other circumstances.

The submission on behalf of the petitioner

It was submitted that the petitioner cannot be a defaulter since he has not been duly assessed. It is MULTISACKS PVT. COMPANY that was duly assessed. There is no provision under the Act to recover taxes in default from the Managing Director of a company in his personal capacity. He is only a representative of the company.

Submission made on behalf of the plaintiff

The learned Senior State Counsel appearing for the plaintiff-respondent (plaintiff) concedes in the written submission filed that the defaulter is the company, namely, MULTISACKS PVT. COMPANY. She submitted that in imposing a fine on the defaulter it is the assets of the company and not the principal officer which becomes liable.

Could a Director be sued for the defaults of payments of tax by a company.

The certificate is filed under section 149(1) of the Act. This section empowers the Commissioner-General to issue a certificate to a Magistrate or District Judge. The certificate contains particulars such as the name of the defaulter and the amount defaulted. On receipt of the certificate, the Magistrate or the District Judge is empowered to summon

the defaulter to show cause, why further proceedings should not be taken against him. Failure to sow cause would make the amount (tax in default) a fine imposed by the Magistrate. Thereupon subsection (1) of section 291 of the Code of Criminal Procedure Act No. 15 of 1979 (except paragraph (a), (b) and (i)) relating to default of payment of fines shall apply. Section 291 (1)(f) gives a scale according to which a term of imprisonment not exceeding six months could be imposed where the amount of fine exceeds one hundred rupees. In the event of allowing time to show cause or time for payment, the court may require bail to be granted (section 149 (5)).

Such being the consequences of default, the question that has to be posed is whether a certificate could be filed against the petitioner, being the Managing Director, against payments due from the company. The learned Judge had answered this question in the affirmative on the strength of section 166 (1). The learned Judge made the Managing Director liable on vicarious liability. Does section166 constitute vicarious liability?

Gratian J in *M. E. de Silva vs. The Commissioner of Income Tax*[1] held that the provisions of section 62 of the Income Tax Ordinance (Cap 188) (similar to section 166(1) of Act 38 of 2000) do not make the principal officer of a company chargeable out of his personal assets with tax levies on the companies assessable income. Section 62 is as follows:-

62: The secretary, manager or other principal officer of every company or body of persons corporate or incorporate shall be answerable for doing all such acts, matters or things as required to be done under the provisions of this Ordinance by such company or body of persons: provided that any

person to whom a notice has been given under the provisions of this Ordinance on behalf of a company or body of persons shall be deemed to be the principal officer thereof unless he proves that he has no connection with the company or body of persons or that some other person resident in Ceylon is the principal officer thereof.

Gratian J held that "the imposition of vicarious liability under a statute is not lightly to be presumed, and such liability must necessarily be imposed on clear and unambiguous language." G.P.S. De Silva J (later Chief Justice) in *Rajan Philip vs. Commissioner of Inland Revenue*[2] held that proceedings in terms of section 111(1) of the Inland Revenue Act No. 4 of 1963 (similar to section 149 (1) of Act 38 of 2000) are available only against a defaulter, a person who has been assessed to tax and had defaulted in the payment of such tax. This is a condition precedent to the institution of proceedings for the recovery of tax. A court has no jurisdiction to proceed against the principal officer under section 111 of the Act (at 213). (also *Hamza vs Commissioner of Inland Revenue*[3] at 301.

There is no provision in the Act, which makes the principal officer liable for the tax due from the company. Thus the petitioner, as director or the principal officer of a limited liability company, is not liable to pay of his personal assets, the tax liability of the company *(G.S.P. De Silva J in Rajan Philips (supra)* at 214. His Lordship arrived at this conclusion having considered section 90 (1) of Act No. 4 of 1963 which is similar to section 62 of the Income Tax Ordinance (Cap 188) and 166 (1) of Act No. 38 of 2000. The facts relating to the case under consideration is similar. Therefore I am

of the view that at the time of institution the court had no jurisdiction to entertain this action. Hence the learned Judge had erred in making the order dated 20.4.2006.

Provision has now been made by section 144B of the Inland Revenue (Amendment Act) No. 12 of 2004 making the directors and principal officers liable to pay income tax payable by companies. However this provision would not affect the present case.

Does revision lie?

I have already held that the plaintiff could not have filed this certificate in the year 2005 against the petitioner to recover unpaid taxes of a company. The reason for that is that the court did not have jurisdiction to entertain such certificate. Liability was imposed on the petitioner without having authority to do so. It could be considered as constituting an exceptional ground for the court to exercise extraordinary jurisdiction. Thus by exercising revisionary jurisdiction the order dated 20.4.2006 is set aside. The application is allowed. Under the circumstances of this case I make no order with regard to costs.

CHITRASIRI, J. – I agree.

Application allowed.

KARUNARATNE VS. SIMON SINGHO AND OTHERS

COURT OF APPEAL
SATHYA HETTIGE PC.J (P/CA)
GOONERATNE, J.
CA 424/2009 (TR)
DC KALUTARA 5722/L
JULY 24, 2009
MARCH 5, 2010

Judicature Act – Section 46 – Section 47 – Section 47(1)(b) – Transfer of case – Question of jurisdiction and prescription – Are they questions of law of unusual difficulty?

The petitioner sought to transfer the instant case from the District Court of Kalutara to the District Court of Horana – and contended that the petitioner made a Justus error in filing the case in the District Court of Kalutara, and if the transfer to the District Court of Horana is not allowed, then the action gets prescribed and irreparable loss and damage would be caused to the petitioner.

The respondents contended that, the case should be dismissed on the ground of jurisdiction and he should have recourse to Section 47 and contends that question of jurisdiction and prescription are not questions of law of unusual difficulties an in Section 47 (1) (b) of the Judicature Act.

Held:

(1) When instituting action 'jurisdiction' and prescription' play a vital role and those are matters to be checked, verified and rechecked at the beginning even prior to filing action. Prescription and jurisdiction are very fundamental principles of law and basic to our legal system.

(2) The Civil Procedure Code gives the procedure and method to be adopted in case where the land in question does not fall within the jurisdiction of the original Court's jurisdiction.

If the party concerned cannot move Court under Section 47 he would no doubt be subject to the consequences that flow.

(3) The circumstances pleaded are trivial in nature and unacceptable to bring the case within Section 46 of the Judicature Act.

APPLICATION to transfer case from the District Court of Kalutara to the District Court of Horana.

Cases referred to:-

1. *R.C. Kurukulasuriya vs. S.M.H. Shahul* 1986 CALR 564
2. *Daya Wettasinghe vs. Mala Ranawaka* 1989 Sri L.R. 86
3. *Abdul Hasheeb vs. Mendis Perera and Others* 1991 Sri L.R. 244
4. *Lewis Tissera vs. Cotin* – 77 C.L.W. 11
5. *Chinnadurai vs. Rajasuriya* – 32 NLR 86
6. *Werthelis vs Daniel Appuhamy*

Dhamasiri Karuanaratne for petitioner.

S. Mandaleshwaran for respondent.

July 29th 2010

ANIL GOONERATNE, J.

This is an application in terms of Section 46 of the Judicature Act, to transfer a District Court, Kalutara case to the District Court of Horana. Petitioner pleads that the action is a Possessory Action in respect of a land called 'Weliketaya Owita' in the village of Panagoda. It is stated that part of village Panagoda fall within the jurisdiction of Horana and the other part comes within the Kalutara D.C. In the Written Submissions filed the following special circumstances are urged:

(a) If this transfer to D.C.. Horana is not allowed by this court, then the action gets prescribed and irreparable loss and great injustice would cause to the petitioner.

(b) If the said action gets prescribed the petitioner looses all her legal rights to the land which is described in the schedule to P7 in this case.

(c) The Respondents are trying their best to get L/5722 dismissed due to the enormous profits to them by freely capturing a valuable land and they will be unduly enriched. After that they will reap the benefits forever from their act of thuggery and it may be an encouragement to capturing lands in the future by violent means.

(d) The Police could not take action against the violence of the respondents and as the last resort the petitioner has sought the relief from the courts.

(e) A part of this land is used by a large number of farmers in that area as a threshing ground (කමත) during the paddy harvesting season with the consent of the petitioner. The respondents violent act has deprived them and they were badly affected in the last season and now a public unrest exists due to the illegal capturing of this land by the Respondents. A copy of the Police complaint made by the Secretary of the "Farmers Association" of the area in this regard is marked "X1" and attached in support of this.

(f) The petitioner has explained the circumstances that compelled her to file the case in Kalutara DC in paragraphs 5.1 to 5.8 of the petition.

(i) The respondents in the paragraph 9 of their objections admit that the relevant land is situated at Yatawara junction, Yatawara, Kalutara. That itself shows that one may reasonably think that jurisdiction is Kalutara.

(ii) The land is situated in the village of Panagoda a part of which comes under the jurisdiction of D.C. Horana and the other part comes under Kalutara D.C.

(iii) The Petitioner and his Registered Attorney has exercised due care, diligence and caution to file the case in the correct jurisdiction and apparently made a Justus error which is an excusable error.

The Respondents take up the position that the District Court, Kalutara case need to be dismissed on the ground of jurisdiction and that the Petitioner should have recourse to Section 47 of the Civil Procedure Code. Respondents argue that the question of Jurisdiction and prescription are not questions of law of unusual difficulties as in Section 47(1) (b) of the Judicature Act.

It is evident that the Petitioner runs the risk of getting his case dismissed on the ground that the land in question falls within the jurisdiction of the District Court of Horana. The question is whether the Petitioner is entitled to apply to the Court of Appeal under Section 46 of the Judicature Act or whether in the first instance itself whether the Petitioner should have had recourse to Section 47 of the Civil Procedure Code. (plaint presented to wrong Court). The Civil Procedure Code gives the procedure and method to be adopted in case where the land in question does not fall within the jurisdiction of the Original Court's Jurisdiction.

The Petitioner rejects the position of the Respondent that one must have recourse to Section 47 of the case. Petitioner draws the attention of this court to the following authorities where under Section 46 of the Judicature Act cases were transferred.

Court considers the convenience of parties and witnesses. 'Expedient" *R.C. Kurakulasuriya vs. S.M.H. Shahul*[1] and expedient would mean advisable in the *Interest of Justice Daya Wettasinghe vs. Mala Ranawaka*[2]; court to give

maximum effect to the language used in the Section *Abdul Hasheeb vs. Mendis Perera and Others* [3].

This court needs to consider the circumstances that compelled the Petitioner of file action in the District Court of Kalutara. In paragraph 5 of the petition with sub paragraphs 1- 8, several grounds are suggested. Having examined those paragraphs in paragraph 5 of the petition it appears that the Petitioner is merely trying to find excuses or cure a defect which should have been considered at the very outset or on instituting of action. It is no excuse to urge that land adjoining to the land in question or the police area and the Post Office which serves summons fall within the Judicial Division of Kalutara. Nor can the Petitioner plead that the Respondent was a party in Case No. 30/03 in Kalutara Courts where there was no objection to jurisdiction or that the land is closer to Kalutara or that the courts staff gave an assurance regarding jurisdiction of Courts. It is also no excuse to state that the relevant gazette could not be traced. I find that all the above circumstances are trivial in nature and unacceptable to bring the case within Section 46 of the Judicature Act.

I find it difficult to agree with the Petitioner that 'jurisdiction' and 'prescription' would cause some question of unusual difficulty or that such legal principles cause some questions of law or unusual difficulties are likely to arise, when applying the facts of the case in hand. Document P6 define the area, and jurisdiction of Court. There is no ambiguity as regards same. 'Prescription' and jurisdiction are very fundamental principles of law and basic to our legal system.

When instituting action 'jurisdiction' and 'prescription' play a vital role and those are matters to be checked, verified and rechecked at the beginning even prior to filing action. If the party concerned cannot move court under Section 47 of the Civil Procedure Code, he would no doubt be subject to the

consequences that flow. I had the benefit of reading the case of *Lewis Tissera vs. Cotin*[4]. Even from earlier times courts have taken a strict view on basic principles of jurisdiction. The other old decided case is *Chinnadurai vs. Rajasuriya*[5]

> Where an action was dismissed on the ground that the Court had no jurisdiction and an application was made to the Supreme Court in appeal that the plaint should be returned to the plaintiff to be filed in the proper Court.
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> Held, that the Supreme Court would not entertain the application at that stage of the action.
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> Semble, the order, which is made upon a plead to jurisdiction made and upheld by the Court, is almost invariably an order dismissing the action. . . . .
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> At 87 –
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> > Counsel for the appellant, however, applied to us to make an order returning the plaint in order that it may be filed in the proper Court. He referred to the provisions of section 47 of the Civil Procedure Code, and in support of his application, he invited our attention to the case of *Werthelis v. Daniel Appuhamy*[6]. That certainly is an instance where this Court in appeal made an order directing the plaint in that case which was found to be instituted in the wrong Court to be returned to the plaintiff in order that he might file it in the Court which had jurisdiction. Wendt J., in making that order, said that he felt justified in doing so by reason of certain Indian cases which were cited to him. An examination of these decisions shows that they are based upon what is said to have been the inveterate practice in those Courts. Here, however, the practice has always been the other way. With

> one or two isolated instances, such as the case to which I have referred, the order which is made upon a plea to jurisdiction tried and upheld by the Court is almost invariably an order dismissing the action. It is unnecessary, however, for the purpose of the disposal of the application now before us to hold that it is not competent for this court to make such an order. Ordinarily there can be no advantage to the plaintiff in a plaint being returned except that he might possibly benefit by being relieved of the obligation to affix fresh stamps to the paper upon which it is written. The real reason for the present application is that the claim is now out of time and it is hoped that by this means an avenue of escape will be found. But there is a decision of this Court to the effect that a plaint returned under the provisions of section 47 and thereafter field in the Court which has jurisdiction must be taken to date from the date of the presentation to that other Court. I am not disposed in a case in which the issue has been properly raised and fully tried and then finally determined here in appeal to make such an order even if I had the power to do so for the sole purpose of enabling the plaintiff to renew a litigation upon a state claim.

In the above circumstances having considered all the facts and circumstances presented to this court by either party I am compelled to reject and refuse the application of the Petitioner to transfer the case.

Application dismissed without costs.

HETTIGE J. PC J. (P/CA) – I agree.

Application dismissed.