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] 1 SRI L.R. - PART 10

PAGES 253 - 280

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

Price: Rs. 25.00

DIGEST

be convicted for the offence. Further if the proved facts are not consistent with the guilt of the accused he cannot be convicted for the offence. This view is supported by the judgment of Dias J in *Podisingho Vs King*(3) wherein His Lordship held thus: "That in a case of circumstantial evidence it is the duty of the trial Judge-to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt." On the above ground alone the appellant should be acquitted.

Finding a *Kuppiya* (small bottle) with some substance near the dead body.

P.S Wiesinghe who, on information received from Anura Kumara, the Grama Sevaka of the area, went to the place where the dead body was lying fallen, on 26.4.94 around 9.45 p.m. but could not make observation due to the lack of light. Around 6.30.a.m. on the following day he observed a kuppiya (a small bottle) with some substance near the dead body. He could not say anything about the substance found inside the bottle. No one can say that this kuppiya is a can. The deceased had taken a can marked P2 when she left for Adam's Peak. The mother of the deceased had identified this can. The small bottle (kuppiya) found near the dead body is not this can. Needless to say that there is a big difference between a kuppiya (small bottle) and a can. Although some substance was found inside the kuppiya (small bottle) this was not sent to the Government Analyst. The substance found in the kuppiya was suppressed from court. This attacts the presumption under Section 114(f) of the Evidence Ordinance which is as follows: Court may presume that

evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it." When I consider all these matters, I hold that the substance found in the kuppiya was suppressed from court because it was unfavourable to the prosecution.

Possibility of the deceased committing suicide must be excluded

As I pointed out earlier the small bottle (kuppiya) was not sent to the Government Analyst. Substance found inside the small bottle (kuppiya) was suppressed from court. Although the can was produced as P2 the small bottle (kuppiya) was not produced in court. At this stage it is pertinent to consider the evidence of Dr. Alwis who conducted the PME. He was unable to say that the death was due to strangulation since the internal organs of the neck were not present. He however through his experience says that it was probable that she had been strangled to death. But he says he can't give a definite opinion (page 190 of the brief). Doctor in his post mortem report says that there were no injuries caused by intentional violence with weapons. Doctor was not questioned about suicide. A kuppiya (small bottle) was found with a plastic cup near the dead body. PS Wijesinghe was unable to say anything about the substance found in the kuppiya (small bottle). The said kuppiya was not sent to the Government Analyst. Under these circumstances it was necessary for the prosecution to exclude the possibility of suicide. Failure to exclude this possibility creates a reasonable doubt in the prosecution case. The above facts are compatible with the innocence of the appellant and are not consistent with his guilt. Therefore the appellant should be acquitted.

Law relating to cases of circumstantial evidence

In the case of *King Vs Abeywickrama (supra)* Soertsz J remarked as follows. "In order to base a conviction on circumstantial evidence the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence".

In *King Vs Appuhamy*[5] Keuneman J held that "in order to justify the inference of guilty from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hupothesis than that of his guilt"

In *Podisingho Vs King Dias* J *(supra)* held that "in a case of circumstantial evidence it is the duty of the trial Judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt"

In *Emperor Vs Browning*[5] court held "the jury must decide whether the facts proved exclude the possibility that the act was done by some other person, and if they have doubts, the prisoner must have the benefits of those doubts."

Don Sunny Vs AG[6]

"The accused-appellant and two others were indicted on the first count with having between 1.9.86 and 27.2.87 committed conspiracy to commit murder by causing the death of Amarapala with one G. and others under Section 113(8) and Section 102 Penal Code and on the second count having committed murder by causing the death of the said Amarapala on 27.2.87 under Section 296 Penal Code. After

trial the accused-appellant and the absent-accused were convicted and sentenced to death.

Held:

1. When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

   On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.

2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.

3. If upon a consideration of the proved items of circumstantial evidence the only inference that can be drawn is that the accused committed the offence then they can be found guilty.

   The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence."

Applying the principles laid down in the above judicial decisions, I hold that in a case of circumstantial evidence if proved facts are consistent with the innocence of the accused, he must be acquitted. Further if the proved facts

are not consistent with the guilt of the accused, he must be acquitted. I have earlier pointed out that some proved facts are consistent with the innocence of the accused and also not consistent with the guilt of the accused. Therefore the appellant should be acquitted.

In my view, in a case of circumstantial evidence, if an inference of guilt is to be drawn such inference must be the one and only irresistible and inescapable inference. When I consider the facts of this case, can I draw such an inference? I say no.

For the aforementioned reasons, I hold the prosecution has not proved the charge against the appellant beyond reasonable doubt. I therefore set aside the conviction and the sentence and acquit the appellant of the charge with which he was convicted.

SILVA J. - I agree.

LECAMWASAM J. -I agree.

Appeal allowed.

WANIGASINGHE VS. JAYARATNE

COURT OF APPEAL
BASNAYAKE.J
CHITRASIRI.J
CALA 294/005 (LG)
DC RATNAPURA 18166/MR
OCTOBER 15, 2009
MAY 11, 2010
JULY 26, 2010

Civil Procedure Code - Section 146 - Raising of Issues - Is it restricted to the pleading? - Pure questions of law - Should Court accept such issues?

The trial Judge permitted the defendant to raise an issue though there was no averment found to that effect in the pleadings filed. The plaintiff sought and obtained leave.

It was contended that the defendant cannot raise the issue in the manner suggested unless the answer is amended to include the matters raised therein.

Held:

(1) Plain reading of Section 146 does not impose a blanket prohibition to frame issues on the matters that have not been averred in the pleadings filed in the case. The object of the legislature in having Section 146 had been to allow the issues on which the right decision of the case appears to the Court to depend.

Per Chitrasiri.J

> "Line of authorities permit a trial Judge to allow an issue to be raised though the matters contained therein had not been pleaded when justice demands it and also to arrive at the right decision of the case at the same time while adhering to the said position of

the law, Courts have repeatedly held that issues cannot be raised preventing the opposing party being taken up by surprise of the facts raised in the case".

(2) In the instant case the defendant was fully aware of the contents of the agreement in issue therefore the matter that was raised viz the alleged penal clause was within the knowledge of the defendant even before filing of this action. There is no element of surprise.

(3) It is clear that, the matters raised are pure question of law. Court should accept issues concerning pure questions of law though such matters are not pleaded.

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

Cases referred to:-

1. *Silinduhamy vs. Weerapperuma* 56 NLR 182 at 196
2. *Jayawardane vs. Amerasuriya* 20 NLR 289
3. *Silva vs. Obeysekera* 24 NLR 97
4. *Brampy Appuhamy vs. Gunasekara* 50 NLR 253
5. *Marfer vs. Thenuwara* 70 NLR 332
6. *De Alwis vs. De Alwis* 76 NLR 444
7. *Gnanarathan vs. Premawardane 1999* 3 Sri LR 301
8. *Ranasinghe vs. Somawathie and others 2004* 2 Sri LR 159
9. *Candappa vs. Ponnambalampillai BALJ* 1994 Vol 5 Part 2 - page 3
10. *A.G. vs. Smith* 8 NLR 241
11. *Mackinnon Mackenzie & Co vs. Grindlays Bank Ltd 1982* - 2 Sri LR 212
12. *Nadarajah vs. Ramesh 1991* 1 Sri LR 240
13. *Hameed vs. Cassim* 1992 2 Sri LR
14. *Lanka Orient Leasing Company Ltd vs. Ali and another 1999* - 3 Sri LR 109
15. *Herath vs. Jayasinghe* BALJ 2008 page 93

Navin Marapana with *Nishanthi Mendis* for plaintiff-petitioner

M.V.M. Ali Sabry with *Shamith Fernando* for defendant-respondent.

December 09th 2010

CHITRASIRI, J.

Plaintiff-petitioner (hereinafter referred to as the plaintiff) filed this application seeking to set aside an order made by the learned Additional District Judge of Ratnapura which is dated 14th July 2005. On that day being the date of the commencement of the trial learned Additional District Judge, having considered the submissions of both parties, made order accepting an issue suggested by the defendant-respondent. (hereinafter referred to as the defendant) The issue so accepted was numbered as 10 (ඇ) and it reads thus:

" අ පැ 2 දරණ ගිවිසුමේ 7 වන කොන්දේසිය අපැහැදිලි (Vague) . . .?

ආ එම කොන්දේසිය 1997 අංක 26 දරණ අසාධාරණ ගිවිසුම් . . . .?

ඇ එම කොන්දේසි දණ්ඩන වගන්තියක්ද?"

Being aggrieved by the said order of the learned Judge, plaintiff filed this application and moved that leave be granted to proceed with the same. Consequently, this Court granted leave and the matter was then fixed for argument. Thereafter, both Counsel made their submissions on the matter.

Learned Counsel for the plaintiff argued that the aforesaid issue raised by the respondent should not have been accepted by Court since no averments are found to that effect in the pleadings filed. He also submitted that it would lead to change the scope of the defence, taken up by the defendant in the event the said issue is accepted. Learned Counsel for

the plaintiff also contended that the defendant cannot raise the issue in the manner it is suggested unless the answer is amended to include the matters raised therein.

As it concerns raising an issue, I will first refer to Section 146 of the Civil Procedure Code which is the section relevant to framing and acceptance of issues in a civil suit. It reads thus:

"146(1) On the day fixed for hearing of the action, or on any other day to which the hearing is adjourned, if the parties are agreed as to the question of fact or law to be decided between them, they may state the same in the form of an issue, and the court shall proceed to determine the same.

(1) If the parties, however, are not so agreed, the court shall, upon the allegation made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or law the parties are at variance, and that thereupon proceed to record the issues on which the right decision of the case appears to the court to depend.

(2) Nothing in this section requires the court to frame and record issues when the defendant makes no defence.

Aforesaid section requires Judges to record issues of facts or of law in order to arrive at the right decision of the dispute before Court when the parties to the action are at variance to such facts or law. Plain reading of the section too does not

impose a blanket prohibition to frame issues on the matters that have not been averred in the pleadings filed in the case. Hence, it is clear that basically the object of the legislature in having the aforesaid section 146 in the Civil Procedure Code had been to allow the issues on which the right decision of the case appears to the Court to depend.

However, the Courts in this country have highlighted the importance of framing issues restricting to the matters that have been averred in the pleadings filed in the case since such an attitude may prevent the opposing party being taken up by surprise of the facts raised in an issue. This position is very well embodied in our law and a bundle of authorities also are available to support this proposition.

In the early case of *Silinduhamy Vs. Weeraperuma*(1) Court disallowing an application to frame an issue on the question of "res judicata" had stated:

"I would refer to the two principles which must govern this matter. One is that a judgment of a Court of competent jurisdiction directly upon the point in dispute is a bar between the same parties or those claiming through them if pleaded; but if not so pleaded, the matter is left at large."

In the cases of *Jayawickrema v. Amarasuriya*(2), *Silva v. Obeysekera*(3) *Brampy Appuhamy v. Gunasekara*(4), *Martin v. Thenuwara*(5), *De Alwis v. De Alwis*(6), *Gnanaathan v. Premawardane*(7) it had been repeatedly held that issues which are not strictly arisen out of the pleadings should not be permitted to be raised. In a recent decision made in the case of *Ranasinghe v. Somawathie and others*(8) it was held that a party will not be entitled to raise an issue on an unpleaded defence, if it would materially change the complexion of the case placed on record by that party.

Also, in *Candappa v Ponnambalampillai* [9] it was held that:

"the case enunciated by a party must reasonably accord with its pleadings. No party can be allowed to make at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet."

Having discussed the aforesaid position in law, I will now turn to the way in which the Courts in this country have looked at the issue when the matters raised in an issue had not been pleaded.

In the case of *Silva Vs. Obeysekara (supra)* at 107, Bertram C.J. held:

> *"Counsel for the plaintiff raised objection that these issues did not arise on the pleadings and that the defendant should have got his answer amended so as to raise the issues. On this objection being taken the learned District Judge disallowed the issues. Here the learned Judge was certainly led into a mistake. No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the trial has commenced. But he should do so when such a course appears to be in the interest of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings".*

Also, in the early case of *Attorney General Vs. Smith*[10] it was held that the issues need not be confined to the pleadings. This principle had been followed in *Mackinon Mackenzie & Co Vs. Grindlays Bank Limited*[11] and *Nadarajah Vs. Daniel*[12] as well. In the case of *Hameed Vs. Cassim*[13]

Ranaraja J held:

> *"if it is not necessary that a new issue should arise in the pleadings. The only restriction is that they urge in framing a new issue should act in the interest of justice."*

In the case of *Lanka Orient Leasing Company Ltd Vs. Ali and Another*(14) it was held thus:

> *"1. The arbitration agreement was part and parcel of the plaint.*
>
> *2. The amendment is a necessary amendment on which the right decision of the case appears to depend .....*
>
> *The agreement being part and parcel of the plaint even without an amendment of the answer an issue could have been raised at the trial under section 146(2) of the Civil Procedure Code, according to which, "where parties are not agreed as to questions of fact or of law to be decided between them, the Court shall upon the allegation made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party ... ... proceed to record the issues on which the right decision of the case appears to the court to depend."*

Moreover, in the case of *Herath Vs Jayasinghe*(15) where an issue as to the presence of a trust that had not been pleaded; it was held that:

> *"issues are not restricted to pleadings and an issue may be raised even after the commencement of the trial, if such a course appears to be in the interest of justice and necessary for the right decision of the case."*

In the circumstances, it is evident that the line of authorities permits a trial Judge to allow an issue to be raised

though the matters contained therein had not been pleaded when justice demands it and also to arrive at the decision of the case. As mentioned herein before even the Section 146 of the Civil Procedure Code envisages allowing an issue ensuring the right decision of the case. At the same time, while adhering to the said position of law, courts have repeatedly held that the issues cannot be raised preventing the opposing party being taken up by surprise of the facts raised in the issue. However in doing so, trial judges should consider all the circumstances of the case in order to avoid any surprise to the opposing parties that would take away their opportunity to reply to those matters.

However, it must also be noted that the **issues raised to determine a pure question of law should be accepted even if those matters have not been specifically pleaded.** Such a rule has to be in place as no one is allowed to overlook the law of the land merely because such a matter had not been mentioned in the pleadings.

I will now examine the matter that is being argued in this instance. Admittedly, the matters raised in the issue that had been accepted in the impugned order had not been pleaded. Contention of the plaintiff is that the issue 10 (ඉ) should not be accepted as the matters referred to therein had not been pleaded by the defendant. The said issue 10 (ඉ) concerns a question of a penal clause namely Clause 7 (ඉ) of the agreement marked P2 contained in the agreement put in suit.

The said agreements put in suit marked P1 and P2 had been filed with the plaint and the defendant also is a party to the said two agreements. Hence, it is clear that the defendant was fully aware of the contents of the agreements and therefore the matter that was raised in the issue 10 (ඉ)

namely the alleged penal clause was within the knowledge of the defendant even before the filing of this action. Hence, it is clear that there had not been an element of surprise as far as the defendant is concerned when it comes to the facts referred to in the issue in question.

The issue also poses the question whether the clause 7(ඇ) in the agreement marked P2 would amount to a penal clause. Then again the question arises whether the action filed in the district Court being an action to claim damages for violation of the terms of the agreements put in suit, could the plaintiff claim penal damages along with liquidated damages.

It is clear that such a matter is a pure question of law. As I have mentioned before, Court should accept issues concerning pure questions of law though such matters have not been pleaded. If such a question of law is not determined due to not pleading the same, it would allow the Court to disregard the positive rules of law when determining the issues of the case. Such an attitude will certainly not mete out the justice.

In the circumstances, it is my considered view that the plaintiff had sufficient knowledge as to the facts contained in issue No.10 (ඇ) and also it is necessary to have same as an issue, more specifically in the interest of justice. Hence I am not inclined to interfere with the decision of the learned District Judge who accepted the said issue.

For the aforesaid reasons this appeal is dismissed with costs.

ERIC BASNAYAKE, J. - I agree.

Appeal dismissed.

PANNIPITIYA VS. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW J
UPALY ABEYRATHNE J
CA 260 - 262/2009
MC GAMPAHA B/400/2009
JUNE 1,3,6,2009.

Antiquities Ordinance as amended by Act 24 of 1998 - Section 15C - Bail Act 3 of 1997 - Section 3 (1), Section 7 g - Code of Criminal Procedure Act 15 of 1979 – Immigrants and Emigrants Act 20 of 1948 – 31 of 2006 – Section 45, Section 47(1) – Prevention of Terrorism (Temporary Provisions) Act 48 of 1979 – Do the provisions of the Bail Act apply to persons charged under Antiquities Ordinance – Constitution - Article 13(2) Article 80 (3), Article 126

Three accused who were taken into custody on an allegation that they committed offences under the Antiquities Ordinance sought bail. The application was made under Section 7 of the Bail Act.

Held:

(1) On a careful consideration of Section 3 of the Bail Act it is clear that the Bail Act does not apply to any person accused or suspected of having committed or convicted of an offence under

(1) The Prevention of Terrorism (Temporary Provisions) Act 48 of 1979

(2) Regulations made under the Public Security Ordinance

(3) Any other written law which makes express provisions in respect of the reliance on bail of persons accused or suspected of having committed or convicted of offences under such other written law.

(2) Section 15 (c) of the Antiquities Ordinance makes express provisions in respect of the release on bail of persons charged with or accused of offences under the said Ordinance. The

persons charged with or accused of offences under the Antiquities Ordinance are covered under the 3rd category above - Provisions of the Bail Act do not therefore apply to a person charged with or accused of offences under the Antiquities Ordinance.

APPLICATION for bail under the Bail Act.

Cases referred to:

(1) AG vs. Sumathipala 2006 2 Sri LR 126

(2) Sumanadasa vs. AG 2006 3 Sri LR 202

Wijedasa Rajapakse PC with *Luxman Livera* and *Nimal Rajapakse* for the petitioner.

Rajinda Jayarathne SC for AG.

June 19th 2010

SISIRA DE ABREW J.

This is an application for bail to release suspects taken into custody on an allegation that they committed offences under Antiquities Ordinance as amended by Act No.24 of 1998.

Learned President's Counsel (P.C) for the petitioner was directed by this court to support the application after serving notice on the Attorney General. We have heard submission of both Counsel. The important question that must be decided is whether this court has jurisdiction to release the said suspect on bail in view of Section 15C of the said Ordinance which is as follows;

"Notwithstanding anything to the contrary in the Code of Criminal Procedure Act No.15 of 1979 or any other written law, no person charged with, or accused of an offence under this Ordinance shall be released on bail."

Section 47(1) of the Immigrants and Emigrants Act No. 20 of 1948 (before enactment of Act No.31 of 2006) which is somewhat similar to Section 15C of the Antiquities Ordinance was interpreted by a bench of five judges of the Supreme Court in *A.G Vs Sumathipala*[1] Section 47(1) of the Immigrants and Emigrants Act before the enactment of Act No 31 of 2006 is as follows:

"Notwithstanding anything in other written law-

(a) every offence under paragraph (a) of sub – section (1) of section 45;

(b) every offence under sub-section (2) of section 45 in so far as it relates to paragraph (a) of sub-section (1) of that section;

(c) .....

(d) .....

(e) .....

shall be non-bailable and no person accused of such an offence shall in any circumstances be admitted to bail."

Supreme Court In *A.G Vs Sumathipala (supra)* held thus:

"Section 47(1) Immigrants and Emigrants Act prohibited bail pending trial to a person charged with an offence under section 45 of that Act, and particularly in view of Article 80(3) of the Constitution, even the Supreme Court had no power to grant bail prohibited by the plain words of section 47(1) of the Immigrants and Emigrants Act. It is for the Parliament to amend the law, if it is too harsh." After this judgment a bench of three judges of the Supreme Court in a fundamen-

tal rights case considered whether persons charged with or accused of offences under the Immigrants and Emigrants Act could be continuously detained in the custody of remand. Petitioners in the said case alleged an infringement of their fundamental rights guaranteed by article 13 (2) of the Constitution resulting from continuous detention in custody without any recourse to a remedy under any procedure established by law. Lord Chief Justice held: "We accordingly hold that the fundamental right of the petitioners guaranteed by Article 13(2) of the Constitution have been infringed by executive and administrative action, since the petitioners have been detained in custody merely upon their being produced in Court and incarcerated without a remedy until the conclusion of their trials. On the basis of the findings stated above the respective Magistrate Courts are directed to decide on the continued detention of these persons in accordance with the procedure applicable to persons accused of non-bailable offences." *Vide V. Sumanadas Vs A.G*[2] decided on 19.6.2006.

It is therefore seen in the above case the Supreme Court directed the Magistrate to decide on bail on the basis that the fundamental rights of the petitioner have been violated. Under Article 126 of the Constitution it is the Supreme Court which has sole and exclusive jurisdiction to hear and determine any question relating to the infringement of fundamental rights. This Court has no jurisdiction to hear and determine whether the fundamental rights of the suspects have been violated or not. Considering all these matters I hold that this Court has no jurisdiction to release a suspect charged with or accused of an offence under the Antiquities Ordinance.

Learned P.C next contended that the petitioner had come under Section 7 of the Bail Act No.30 of 1997. In my view if

the Court has no jurisdiction to grant bail such application whether it comes under the Bail Act or not cannot be considered by Court. Although the learned P.C contended that the petitioner's application could be considered under Section 7 of the Bail Act, I am unable to agree with his contention for the following reasons.

Section 3(1) of the Bail Act reads as follows:

Nothing in this Act shall apply to any person accused or suspected of having committed, or convicted of, an offence under, the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, Regulation made under the Public Security Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law."

On a careful consideration of section 3 of the Bail Act it is clear that the Bail Act does not apply to any person accused or suspected of having committed or convicted of an offence under

1. The Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979.
2. Regulations made under the Public Security Ordinance.
3. Any other written law which makes express provisions in respect of the release on bail of persons accused or suspected of having committed or convicted of offences under such other written law.

Section 15C of t he Antiquities Ordinance makes express provisions in respect of the release on bail of persons charged

with or accused of offences under the said Ordinance. Therefore persons charged with or accused of offences under the Antiquities Ordinance are covered under the 3rd category above. I therefore hold that the provisions of the Bail Act do not apply to persons charged with or accused of offences under the Antiquities Ordinance,

For the aforementioned reason, I dismiss the petition of the petitioner and refuse to issue notice on the respondents.

ABEYRATHNE J. - I agree.

Petition dismissed.

FERNANDO V. GAMLATH

SUPREME COURT
J.A.N. DE SILVA, CJ.
EKANAYAKA, J. AND
SURESH CHANDRA, J.
S.C. APPEAL NO. S.C.(CHC) 04/2001
C.H.C. NO. 12/96(3)
FEBRUARY 10TH, 2011

Code of Intellectual Property Act (No. 52 of 1979) – Section 10 – The author of a protected work shall have the exclusive right to do or authorize any person to reproduce the work, make translations, adaptation, arrangement or other transformation of work or communicate the work to the public – Section 19(1) – The rights referred to in Section 10 shall be protected during the life time of the author and for fifty years after his death. – Law relating to the trademarks and passing off

The Plaintiff was the widow of the late Mr. C.T. Fernando, who had done musical compositions for the song "Pinsiduwanne" and was its singer as well. The Defendant had included the said song in a teledrama without the permission of the Plaintiff and had telecast it for commercial purpose. The Plaintiff claimed intellectual property rights to the tune of the said song and averred that the Defendant had breached the Plaintiff's intellectual property rights. The Defendant whilst denying the breach of the Plaintiff's rights had also stated that the Plaintiff did not have rights to the said song as the Defendant had taken the said song from a textbook published by the Educational Publishing Department in 1993.

After trial the learned High Court Judge held that the composition of the said song was that of late C.T. Fernando and the Plaintiff had acquired such rights of the late C.T. Fernando. But went on to hold that the Defendant had not infringed the rights of the Plaintiff and proceeded to dismiss other claims of the Plaintiff.

Held :

(1) When an Artiste has achieved a reputation, the rights acquired which according to law can be inherited and the works of such reputed Artiste, such as singers can be used by others only by obtaining permission from the original artiste or from those who inherit such rights which amounts to a recognition of the fame and reputation of the original singer.

(2) Use of the said musical composition by the Defendant without the permission from the Plaintiff was an infringement of the rights of the Plaintiff regarding the composition, by the Defendant.

APPEAL from the judgment of the Commercial High Court, of Colombo.

Cases referred to:

(1) University of London Press V. University Tutorial Press – (1916) 2 Ch 601

(2) Sawkins V. Hyperian Records (2005) EWCA Civ 565

(3) Walter V. Cane – (1900) AC 539

(4) Designer's Guild V. Russel Williams – (2000) UKHL 58

(5) Francis Day & Hunter V. Bron – (1963) Ch 587

(6) Competti Records v. Warner Music – (2003) E W C h 1274 (Ch)

Mahinda Ralapanawa with *Chandima Gamage* for the Plaintiff – Appellant

Sumedha Mahawanniarachchi for the Defendant – Respondent

Cur.adv.vult

May 06th 2011

SURESH CHANDRA J,

This is an appeal from the judgment of The Commercial High Court, Colombo in respect of an appeal filed by the Plaintiff.

The Plaintiff in her Plaint filed in the District Court of Colombo which was later transferred to the Commercial High Court, Colombo averred that her husband was the late Mr. C.T. Fernando that the said Mr. C.T. Fernando, had done a musical composition for the song "Pinsuduwanne" and was its singer as well. The Defendant had included the said song in a teledrama titled "Mal Kekulak" without the Plaintiffs permission and had telecast it for a commercial purpose. The Plaintiff claimed the intellectual property rights to the "tune" of the said song as the widow of late Mr. C.T. Fernando in terms of Section 19(1) of the Code of Intellectual Property Act No. 52 of 1979 and averred that the Defendant had breached the Plaintiffs rights under the Code of Intellectual Property. She prayed for a declaration to the effect that the tune of the said song was composed by her late husband Mr. C.T. Fernando, for an order that the Defendant had breached the Plaintiffs' rights under the said code, and had also distorted the tune of the said song and thereby breached section 11(b) of the Code of Intellectual Property Act, for damages in the sum of Rs. 25,000/= for violating the Plaintiffs rights under the said Code, for an order in the sum of Rs. 25,000/= against the Defendant for unjustly enriching himself by violating the Plaintiffs rights under the said Code. The Defendant filed answer denying the breach of the Plaintiffs rights and stated further that the Plaintiff did not have rights to the said song and that he had taken the song from the textbook published by the Educational Publishing Department in 1993.

After trial the Learned High Court Judge held that the composition of the said song was that of late Mr. C.T. Fernando and that the Plaintiff acquired the rights of the late Mr. C.T. Fernando in terms of the Code of Intellectual Property Act and further that the Defendant included the said song in the teledrama without the Plaintiffs permission. However the

Learned High Court Judge went on to hold that the Defendant had not infringed the rights of the Plaintiff and proceeded to reject the other claims of the Plaintiff.

In the Appeal filed before this Court both parties had filed written submissions but when the matter was taken up for argument on 10th February 2011 the Defendant was absent and unrepresented and the Court proceeded to hear the appeal.

R.G. McKerron Q.C., in The Law of Delict referring to the position relating to "passing off" under the Roman Dutch Law states that-

"A person may be restrained from selling his goods by the same name as that of the Plaintiff, or any colourable imitation thereof. But a restraint will not be imposed in respect of goods which are not the same kind as those of the Plaintiff. Nor will protection be afforded to a *peregrines* who is not carrying on business, or whose goods are not sold on the market, within the jurisdiction in which he seeks relief; for to entitle the plaintiff to an interdict he must show that he has 'a right of property in regard to his name or goods within the jurisdiction of the court".

A parallel could be drawn to this instant case which deals with the use of the composition of the song that the Plaintiff has complained of. It certainly would be a case comparable to a case of "passing off".

The law relating to the trademarks and passing off was governed by the Trademarks Ordinance No. 15 of 1925 which used the above principles based on the law of Delict. The law in relation to trademarks, passing off and copyright is now governed by the Code of Intellectual Property Act No 52 of 1979.

Section 19(1) of the Code of Intellectual Property Act No. 52 of 1979 states that –

"Unless expressly provided otherwise in this Part, the rights referred to in section 10 shall be protected during the life of the author and for fifty years after his death."

Section 10 of the Code of Intellectual Property Act No. 52 of 1979 states that –

"Subject to the provisions of sections 12 to 16 the author of a protected work shall have the exclusive right to do or authorize any other person to do the following acts in relation to the whole work or a part thereof-

(a) reproduce the work;

(b) make a translation, adaptation, arrangement, or other transformation of the work;

(c) communicate the work to the public by performance, broadcasting, television or any other means."

In the English Law copyright protection will only subsist for works which are considered to be 'original' works. The test to consider whether a work is original was laid down in the case of *University of London Press v University Tutorial Press* (1) where Peterson J held that

> "The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought … But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author."

He further pointed out the much used principle in English Law which is that , "what is worth copying is prima facie worth protecting".

In the case of S*awkins v Hyperion Records*[2] the claimant a musicologist had prepared performing editions based upon works of Lalande, a French composer at the courts of King Louis XIV and King Louis XV. The existing sources of Lalande's music were not in a form that could be played by an orchestra, and to make it possible to perform the music the claimant had to transpose the source material into conventional modern notation, make extensive corrections, and complete several missing sections, all of which involved a great level of skill, labour and judgment. However, the claimant did not compose a single new note of music. In the judgment of the Court of Appeal, Mummery LJ held that on the application of the principle laid down in *Walter v Lane*[3], the effort, skill and time which the claimant had spent in making the performing editions were sufficient to satisfy the requirement that they should be "original" works in the copyright sense. Jacob LJ further held that the required question that needed to be asked when considering originality was whether "what the copyist did went beyond mere servile copying?" It was held in the Hyperion Records case that there was more than mere servile copying as the Claimant's work had the practical value of making the original work playable and that the work of the Claimant had sufficient aural and musical significance to attract copyright protection.

When considering infringement of copyright the courts would need to look at the similarities between the works. In the case of *Designers' Guild v Russell Williams*[4] which considered an artistic work Lord Millett held that

"An action for infringement of artistic copyright, however, is very different. It is not concerned with the appearance of the defendant's work but with its derivation. The copyright owner does not complain that the defendant's work resembles his. His complaint is that the defendant has copied all or a substantial part of the copyright work … Even where the copying is exact the defendant may incorporate the copied features into a larger work much and perhaps most of which is original or derived from other sources. But while the copied features must be a substantial part of the copyright work, they need not form a substantial part of the defendant's work … Thus the overall appearance of the defendant's work may be very different from the copyright work. But it does not follow that the defendant's work does not infringe the plaintiff's copyright."

"The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work."

"… the inquiry is directed to the similarities rather than the differences. This is not to say that the differences are unimportant. They may indicate an independent source and so rebut any inference of copying, but differences in the overall appearance of the two works due to the presence of features of the defendant's work about which no complaint is made are not material"

In the case of *Francis Day & Hunter v Bron*[5] the Claimant who was the composer of the musical work "In a Little Spanish Town" claimed that the first eight bars of the claimant's musical work had been copied in the first eight bars of the defendant's musical work named "Why".

Willmer LJ held that the composer had used some of "the commonest tricks of composition," and which were furthermore "exactly the sort to be expected from the composer of a popular song." Willmer LJ referred to the fact that the opening bar of the claimant's work was a commonplace series found in other previous musical compositions, which had then been developed over the remainder of the first eight bars of the musical work.

When considering the moral rights such as the right to object to the derogatory treatment of a work the main issue would be to consider whether there has been evidence put forward to the court to be able to consider whether a distortion or a mutilation of the work has occurred which has caused the author dishonor or disrepute.

In the case of *Competti Records v Warner Music*[6] the third claimant composed a garage track entitled "Burnin," which consisted of an insistent instrumental beat accompanied by the vocal repetition of the word "burning" or variants of it. The defendant, a leading UK garage track, released a version of the track "Burnin" with the addition of a rap line. The claimant alleged that the rap was a derogatory treatment of his work because it allegedly included reference to drugs and violence. It was accepted by the Defendant that the addition of the rap line was a "treatment" of the work, and the issue was whether the treatment was "derogatory."

The court held that according to the Copyright Act of United Kingdom, distortion or mutilation is only derogatory if it is prejudicial to the author's honour or reputation. The judge held that the fundamental weakness in the case was that there was no evidence about the author's honour or reputation, or of any prejudice to either of them.