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DIGEST

In the instant case the Learned Judge of the Commercial High Court having considered the evidence before Court had arrived at the conclusion that the late Mr. C.T. Fernando was entitled to rights in respect of the composition in respect of the song "pinsiduwanne" in terms of the provisions of the Code of Intellectual Property Act, he had further held that the Plaintiff who is the widow of the Late Mr. C.T. Fernando had inherited such rights but went onto hold that the Defendant had not infringed such rights.

Although the Plaintiff alleged the distortion of the musical composition by the Defendant there was no proof of such distortion which was established by the Plaintiff and the Learned High Court Judge arrived at the conclusion that there was no such distortion. Considering the evidence before the Commercial High Court the Learned Judge has arrived at a correct finding on that matter.

With the advancement in technology it is very easy to copy works of original artists, composers, singers, etc. But there has to be a way of safeguarding the rights of the original artists such as the singer as in the present instance, specially when a singer has achieved a reputation which would be recognized for generations and generations. Once such recognition has been there, and rights acquired which according to law can be inherited, the works of such original reputed artists such as singers can be used by others only by obtaining permission from the original artist or from those who inherit such rights which amounts to a recognition of the fame and reputation of the original singer.

We find that the Defendant had in the case before the Commercial High Court admitted including the said song in his

teledrama without permission from the Plaintiff. Futhermore in evidence the Plaintiff stated that the Defendant had asked permission from her to use the said song of her late husband to which she had declined. The book published by the Educational Publishing Department which the Defendant claims to have been the source material used for the song in his teledrama contained only the lyrics to the said song and to which the Plaintiff claimed no such copyright as copyright was owned by a different individual who is not a party to the above action. In such an event as the Plaintiff had the rights for the musical composition under the Act it will be clear that the use of the said composition by the Defendant without permission was an infringement of the rights of the Plaintiff. The Plaintiff had claimed the sum of Rs. 25,000/= for the said infringement by the Defendant in view of the position that there has been an infringement of the Plaintiffs rights regarding the composition by the Defendant and the Plaintiff would be entitled to damages as claimed by her plaint. Therefore a sum of Rs. 25,000/= as claimed by the Plaintiff is awarded to her which is to be paid by the Defendant.

In the petition of appeal filed by the Plaintiff she had prayed for:

(a) setting aside the judgment of the High Court dated 27.11.2000;

(b) to decide the appeal in her favour;

(c) alternatively to send the case back for a fresh hearing.

As stated above the judgment of the High Court is varied in relation to the finding that there has been no infringement of the Plaintiffs rights as there has been such infringement. In the prayers mentioned above there is no specific prayer

claiming damages except for seeking a decision in favour of the Appellant which would presuppose seeking a decision as prayed for in the Plaint which includes a prayer claiming damages in the sum of Rs. 25,000/=. This is to be considered only for the purposes of granting relief to the Plaintiff as there is a finding regarding the infringement of the Plaintiffs rights which would naturally result in causing damages to the owner of such rights. However such damages are limited to the amount claimed by the Plaintiff in her plaint which is the sum of Rs. 25,000/=.

In the above circumstances the Plaintiffs appeal is allowed and she is awarded a sum of Rs. 25,000/= as damages with costs fixed at Rs. 10,500/=.

J.A.N. DE SILVA CJ - I agree.

EKANAYAKE J - I agree.

Appeal allowed. Appellant is awarded Rs. 25,000/- as damages with costs fixed at Rs. 10,500/-.

JAYANTHA GUNASEKARA VS. JAYATISSA GUNASEKARA AND OTHERS

COURT OF APPEAL
SISIRA DE ABREW. J
SALAM. J
LECAMWASAM. J
CA PHC APN 17/2006 (DB)
HC AWISSAWELLA 55/04
MC AVISSAWELLA 65720
FEBRUARY 25, 2011
MARCH 3, 4, 2011
MAY 16, 2011

Constitution Article 154 (P) 3 (b) - Primary Courts Procedure Act – Section 2, Section 66, Section 68 - Section 76 - High Court exercising revisionary jurisdiction - Appeal to Court of Appeal - Does the filing of an appeal ipse facto stay the execution of the judgment of the High Court? - Cassus omissus clause in the Primary Courts Procedure Act - Applicability of the provisions of the Civil Procedure Code - Stare decisis - Obiter dicta - Ratio decidendi - Approbation - reprobation - Principles

The petitioner sought to revise the judgment of the Provincial High Court entered in the exercise of its revisionary jurisdiction under Art 154 (3) b. The High Court set aside the order made by the Primary Court under Section 68 (3) by which order the Magistrate had determined that the petitioner had forcibly been dispossessed of the subject matter by the respondent. The respondent moved in revision, the High Court held that the respondent is entitled to possession. The petitioner preferred an appeal to the Court of Appeal. The respondent sought to enforce the judgment of the High Court.

The petitioner contended that, on the lodging of the appeal to the Court of Appeal the order of the High Court to execute the order was automatically stayed.

Held:

(1) Mere lodging of an appeal against the judgment of the High Court in the exercise of its revisionary power in terms of Section 154 P (3) (b) of the Constitution to the Court of Appeal does not automatically stay the execution of the order of the High Court.

Per Abdus Salam.J

> "In the case of Kanthilatha and Nandawathie the decision reached is on the assumption that the cassus omissus clause is applicable and therefore the approach reached by inadvertence needs to be set right. Further in Kathilatha's case obiter dictim has been given prominence ignoring the ratio decedendi; the judgment of Sillem (7) relied and referred to in Edward vs. de Silva (8) is a criminal matter arising from a statutory offence".

Per Abdus Salam.J

> "In any event to rely on the decision in Attorney General vs. Sillem for our present purpose may amount to destructive analysis of Capter VII of the Primary Courts Procedure Act than the ascertainment of the true intention of the Parliament and carry it out by filling in the gaps - obviously to put off the execution process until the appeal is heard would tantamount to prolong the agony and to let the breach of the peace to continue for a considerable length of time".

Held further:

(2) In view of the decision in Kayas vs. Nazeer (3) the cassus omissus clause (Section 78 of the Primary Courts Procedure Act) has no application to proceedings under Cap VII of the Act.

(3) The High Court set aside the order of the Magistrate solely based on the purported failure to endeavour to settle the matter prior to the inquiry. This was one of the objections taken by the respondent. The Magistrate has taken meaningful steps to settle the matter, on that aspect of the matter the learned High Court Judge has erred when he came to the conclusion that such an attempt is not in compliance with the provisions of the Primary Courts Procedure Act.

(4) The objection to jurisdiction must be taken at the earliest possible opportunity. If no objection is taken and the matter is within the plenary jurisdiction of the Court, court will have jurisdiction to proceed with the matter and make a valid order.

It is the respondent before the High Court Judge who had benefitted by that argument. He has not adverted the Magistrate to the non compliance of Section 66 (6) before the commencement of the inquiry.

APPLICATION in revision of an order of the Provincial High Court of Avissawella- on a preliminary objection taken.

Cases referred to:-

1. *R.A. Kusum Kanthilatha vs. Indrasiri* - 2005 1 Sri LR 411 (overruled)
2. *R.P. Nandawathie vs. K. Mahindasena* – CA PHC 242/06
3. *Kayas vs. Nazeer* - 2004 1 Sri LR 202
4. *Perera vs. Gunathilake* (1900) 4 NLR 181
5. *Imampu vs. Hussenbi* AIR 1960 Mysore- 203
6. *Kanagasabai vs. Mylvaganam* 78 NLR 280- 282
7. *Edward vs. de Silva* 46 NLR 343
8. *A.G. vs. Sillem* 11 Eng. LR 1208
9. *Keel vs. Asirwathan* 4 CLW 128
10. *Ragunath Das vs. Sundra Das Khelri* AIR 1914 PC 352
11. *Malkav Jun vs. Nahari* NLR 25 Bombay 338
12. *Charlotte Perera vs. Thambiah and another* - 1983 1 Sri LR 352
13. *Rustom vs. Hapangama Co. Ltd* 1978-79- 2 Sri LR 225, 1978/79/80- 1 Sri LR 353
14. *Ali vs. Abdeen* 2001- 1 Sri LR 413
15. *Mohamed Nizam vs. Justin Dias* CA PHC- 16/2007
16. *David Appuhamy vs. Yassasi Thero* 1987-1 Sri LR 253
17. *Visuwalingam and others vs. Liyanage and others* – 1983- 1 Sri LR 203
18. *Banque Des Marchands De Hoscou v. Kindersley and another* – 1950 - 2 All ER 549 at 552.
19. *Evans vs. Bartlam* 1937- 2 All ER 646 – 652
20. *Lissenden vs. Bosh Ltd* 1940 Al 412- (1940) 1 All ER 405, 412

W. Dayaratne PC with *Rangika Jayawardane, D.M. Dayaratne* and *Nadeeka Karachchi* for 1st party respondent-petitioner.

Rohan Sahabandu for 2nd party respondent.

September 30th 2011

ABDUS SALAM, J.

This is an application to revise the judgment of the Provincial High Court entered in the exercise of it's revisionary jurisdiction under Article 154 P (3) (b) of the Constitution. By the impugned judgment, the Learned High Court Judge set aside the determination made in terms of section 68 (3) of the Primary Court Procedure Act (PCPA) and ordered the unsuccessful party in the Magistrate's Court to be restored to possession of the subject matter, pending the determination of an appeal preferred to this court. (Emphasis is mine)

The important events leading up to the present revision application began with the filing of an information in the Magistrate's Court, under section 66 (a) (i) of PCPA. The dispute was over the right of possession of a land between two brothers, viz. Jayantha Wickramasingha Gunasekara[1] (1st party-respondent-petitioner) and Jayathissa Wickramasingha Gunasekara[2] (2nd party - 1st respondent-petitioner-respondent). The involvement of the other parties in the dispute is not dealt in this judgment, as they had merely acted as the agents of the two main rival disputants.

The learned Magistrate, in making his determination, held *inter alia* that the petitioner had forcibly been dispossessed of the subject matter by respondent, within a period of two months before the filing of information and accord-

ingly directed that he (the party dispossessed) be restored to possession.

Against the determination, the respondent moved in revision in the High Court which set aside the same, purportedly due to the failure to induce the parties to arrive at a settlement of the dispute under section 66(8) of the PCPA, and held that the respondent is entitled to the possession of the disputed property and directed the Magistrate to forthwith handover the same to him.

The Petitioner (Jayantha) preferred an appeal to this Court against the said judgment of the High Court. Pending the determination of the appeal, he also filed a revision application challenging the validity of the judgment of the learned High Court judge and in particular the part of the order of the judge of the High Court directing the execution of his judgment forthwith, pending the determination of the appeal. The legality of the impugned judgment of the learned High Court judge, based on the sole ground of failure to settle the dispute will be examined in this judgment at another stage.

There are two conflicting views expressed on the question as to whether the filing of an appeal against the decision of a High Court in the exercise of its revisionary powers in respect of a determination made under part VII of the PCPA would *ipso facto* stay the execution of its judgment or it operates otherwise.

In order to resolve the conflict, the present divisional bench was constituted to hear and dispose of the revision application. Being mindful of what prompted the constitution of the divisional bench, I now venture to embark upon a brief discussion on the pivotal question. It is worthwhile to briefly

refer to the two conflicting decisions. In point of time the first decision was made in *R A Kusum Kanthilatha Vs Indrasiri*[1] where it was held *inter alia* that upon proof of an appeal being preferred to the Court of Appeal against a judgment of the High Court acting in revision in respect of an order made under part VII of the PCPA, **the original court should stay its hand until the determination of the appeal.** (Emphasis added)

The second and subsequent view was expressed in the case of *R P Nandawathie Vs K Mahindasena*[2] where it was held *inter alia* that the **mere lodging of an appeal does not automatically stay the execution of the order of the High court.** (Emphasis added)

At the argument we were adverted to the position that prevailed immediately prior to the vesting of the revisionary powers in the High Court in respect of orders made under chapter VII of the Primary Courts Procedure Act. Prior to the introduction of the Constitutional provision in Article 154 P (3) (b), the revisionary jurisdiction in relation to orders of the Primary Court concerning land disputes where the breach of the peace is threatened or likely had to be invoked through the Court of Appeal. Any person dissatisfied with the order of the Court of Appeal had to seek special leave to appeal from the Supreme Court within 42 days. Under Supreme Court Rules of 1990 a party aggrieved by the judgment of the Court of Appeal in the exercise of its revisionary powers had to apply for stay of proceeding till special leave is granted. Every party aggrieved by such a judgment of the Court of Appeal had to seek the suspension of the execution of the judgment of the Court of Appeal in the Supreme Court. As has been submitted by the learned counsel this shows that by mere lodging an application for special leave to

appeal invoking the jurisdiction of the Supreme Court, does not ipso facto, stay the order of the Court of Appeal. It does not stay the execution of judgment. This shows that even prior to the recognition of the revisionary powers of the High Court in terms of Article 154 P (3) (b) of the Constitution the rule was to execute the judgment and exception was to stay proceedings.

Be that as it may, the fact remains that in both cases referred to above the question relating to the execution of orders made under part VII of the PCPA pending appeal has been decided on the premise that the provisions of the Civil Procedure Code are applicable. This is basically an incorrect approach which should stand corrected by reason of the decision *Kayas Vs Nazeer*[3]. In the circumstances, I do not propose to delve into the applicability of the *casus ommisus* clause in the Primary Courts Procedure Act, in respect of proceedings under chapter VII, in view of the decision of His Lordship T B Weerasuriya, J who held that the *casus omisus* clause (Section 78) of the Act has no application to proceedings under chapter VII. The relevant passage with omission of the inapplicable words from the judgment in the case of *Kayas (supra)* is deservedly chosen for reproduction below:

> "Section 2 of the Primary Court Procedure Act stipulates that subject to the provisions of the Act and other written law, the civil and criminal jurisdiction of the Primary Court shall be exclusive. Part III of the Act …. Provides for the mode of institution of criminal prosecutions; while part IV of the Act comprising provides for the mode of institution of civil actions. Thus, Section 78 has been designed to bring in provisions of the Criminal Procedure Code Act or the provisions of the Civil

Procedure Code Act only ..... Inquiries into disputes affecting land ..... under part VII comprising Sections 66 – 76 are neither in the nature of a criminal prosecution ..... nor in the nature of civil action. Those proceedings are of special nature since orders that are being made are of a **provisional nature to maintain status quo for the sole purpose of preventing a breach of the peace and which are to be superseded by an order or a decree of a competent Court.** Another significant feature is that Section 78 while making reference to criminal prosecutions or proceedings and civil actions or proceedings, has not made any reference to disputes affecting land. This exclusion would reveal the legislative intent that Section 78 is not intended to be made use of, for inquiries pertaining to disputes affecting land under part VII of the Act "- (Emphasis is mine)

The vital question that needs to be resolved now is whether execution of orders made under Part VII would be automatically stayed by reason of an appeal filed under 154 P (3) (b) of the Constitution or it would operate otherwise. To find an answer to this question one has to necessarily examine chapter VII of the legislation in question which deals with what is commonly known among the laymen as "section 66 cases".

Historically, there has always been a great deal of rivalry in the society stemming from disputes relating to immovable properties, where the breach of the peace is threatened or likely. In the case of *Perera Vs. Gunathilake*[4] His Lordship Bonser C.J, with an exceptional foresight, spelt out the rationale well over a century and a decade ago, underlying the principle as to why a court of law should discourage all

attempts towards the use of force in the maintenance of the rights of citizens affecting immovable property. To quote His Lordship

"In a Country like this, any attempt of parties to use force in the maintenance of their rights should be promptly discouraged. Slight brawls readily blossom into riots with grievous hurt and murder as the fruits. It is, therefore, all the more necessary that courts should be strict in discountenancing all attempts to use force in the assertion of such civil rights".

Let us now look at how the Indian court had once viewed the importance of preserving the peace. In the case of *Imambu v. Hussenbi* (5) the court emphasized the importance in this manner .....

"The mere pendency of a suit in a civil Court is wholly an irrelevant circumstance and does not take away the dispute which had necessitated a proceeding under section 145. The possibility of a breach of the peace would still continue."

In the case of *Kanagasabai Vs Mylvaganam*(6) Sharvananda, J (as His Lordship was then) whose outspokenness needs admiration stated as follows....

"The primary object of the jurisdiction so conferred on the Magistrate is the prevention of a breach of the peace arising in respect of a dispute affecting land. The section enables the Magistrate temporarily to settle the dispute between the parties before the Court and maintain the status quo until the rights of the parties are decided by a competent civil Court. **All other considerations are subordinated to the imperative necessity of preserving the peace.** .....The action taken by the Magistrate is of a purely preventive and

provisional nature in a civil dispute, pending final adjudication of the rights of the parties in a civil Court. The proceedings under this section are of a summary nature and it is essential that **they should be disposed of as expeditiously as possible** ..... Sub-sections (2) and (6) of section 63 of the Administration of Justice Law underline the fact that the order made by the Magistrate under sections 62 and 63 is intended to be effective only up to the time a competent Court is seized of the matter and passes an order of delivery of possession to the successful party before it, or makes an order depriving a person of any disputed right and prohibiting interference with the exercise of such right."

The emphasis added by me in the preceding paragraph in the process of quoting Sharvananda, J speaks volumes about the sheer determination and the commendable courage adopted by the Supreme Court as to need for prompt execution of orders made in "66 matters". To recapitulate the salient points that are in favour of expeditious execution of orders under part VII, the following points are worth being highlighted.

1. It is quite clear, that the intention of the legislature in enacting Part VII of the PCPA is to preserve the peace in the society. If an unusual length of time (sometimes more than a decade) is taken to execute a temporary order for the prevention of peace, the purpose of the legislation would definitely be defeated and the intention of the Legislature in introducing the most deserving action of the era in the nature of *sui generis* would be rendered utterly ridiculous.

2. In as much as there should be expeditious disposal of a case stemming from the breach of the peace there should correspondingly be more expeditious and much efficient

methods to give effect to the considered resolution of the dispute, with a view to arrest in some way the continued breach of the peace and to avoid justice being frustratingly delayed.

3. All other considerations being subordinate to the imperative necessity of preserving the peace, the execution mechanism also should keep pace with the Legislative commitment designed under Chapter VII of the PCPA.

The word "appeal" generally signifies legal proceedings of a Higher Court to obtain a review of a lower court decision and a reversal of it or the granting of a new trial. It is said that the wisest of the wise is also bound to err. The Judges are no exception to this rule. Justice Cardozo a well known American judge once observed that *"the inn that shelters for the night is not the journey's end" but "we are all on the journey, a journey towards .....our legal response, to the legal needs of the public. We are at various stages in this long journey have devised various structures and various solutions and they might be inadequate for the night, but they are not our journey's end"*.

This thought becomes particularly appropriate when one considers the specific prohibition imposed by the legislature in its own wisdom against appeals being preferred under Chapter VII, with the full knowledge of the fallibility of judges as human beings. It is common knowledge that an appeal is a statutory right and must be expressly created and granted. Under Chapter VII not only the Legislature did purposely refrain from creating such a right but conversely imposed an express prohibition. Presumably, as the determinations under chapter VII are categorized as of temporary nature

even with regard to the execution of them we are required to ensure a meaningful construction of the statute as shall suppress the mischief and advance the remedy.

The next question which needs to be addressed is, what then is the nature and the purpose of the right of appeal conferred under Article 154 P (3) (b) of the Constitution. Such a right is unquestionably not against the determination made under 66(8)(b), 67(3), 68(1)(2)(3)(4) 69(1)(2),70,71 or 73 by the primary court. It is quite clear on reading of section 74(2) which is nothing but a draconian measure taken in the best interest and absolute welfare of a society. However, the fact remains that such a measure is necessary to safeguard their rights until a court of competent jurisdiction is seized of the situation to find a permanent resolution.

There is no gainsaying that the revisionary powers of this court are extensive and extremely far and wide in nature. It is an absolutely discretionary remedy. Such powers are exercised only in exceptional circumstances. This reminds us of the right of appeal granted under Article 154 P (3) (b) is a right to **challenge the judgment of the High Court exercising revisionary powers** and not to impugn the primary court judge's order by way of an appeal. When section 74(2) of the Primary Court Procedure Act is closely scrutinized along with Article 154 P (3) (b), it would be seen that it makes a whale of difference as to the purpose, nature, and scope of such right of appeal. Had the right of appeal been granted under chapter VII at the very inception of its introduction, the interpretation under consideration would have been totally different. Appeals contemplated under Article 154 P (3) (b) on one hand and appeals permitted under the Civil, Criminal, Admiralty, Labour, Agrarian, Judicature

and other laws on the other hand are worth examining to find out whether an appeal under 154 P (3) (b) in fact *ipso facto* should stay proceedings in the original court.

Needless to state that in an application for revision as contemplated under Article154 P (3) (b), what is expected to be ascertained is whether there are real legal grounds for impugning the decision of the High Court in the field of law relating to revisionary powers and not whether the impugned decision is right or wrong. Hence, in such an application the question of a re-hearing or the re-evaluation of evidence in order to arrive at the right decision does not arise. The appeal in the strict sense is not one against the determination of the judge of the primary court but against the judgment of the High Court exercising revisionary powers. Therefore, it would be correct to say that the right of appeal is not unconditional as in the other cases but a qualified right provided one has the legal ground to invoke the discretionary jurisdiction of the High Court against an order under chapter VII.

In the case of *Kanthilatha(supra)* relying heavily on the decision in *Edward Vs De Silva* [7] it was observed that the ordinary rule is that once an appeal is taken from the judgment of an inferior Court, the jurisdiction of the court in respect of that case is suspended. The judgment in *Edward Vs de Silva (supra)* was based on the decision of *A.G. vs. Sillem*[8].

The judgment in *Edward Vs De Silva (supra)* relates to the question of the procedure to be followed when a judgment creditor is desirous of reaping the reward of his hard work in the District Court, pending the determination of the appeal. The provisions of the Civil Procedure Code being applicable in such an instance, it was held it is a condition

precedent for execution pending appeal to notice the judgment debtor in terms of section 763 of the CPC and also make him a party to such incidental proceedings. Commenting on the failure to take such steps, it was held that it would result in a failure of jurisdiction and none of the orders made thereafter would be of any legal consequences. Further, commenting on the effect of issuing writ pending appeal in a civil action Soertsz A.C.J opined that the ordinary rule is that once an appeal is taken from the judgment of an inferior Court, the jurisdiction of that Court is suspended except, of course, in regard the perfecting of the appeal. His Lordship then cited with approval the dictum of Lord Westbury, Lord Chancellor (1864), who observed in *Attorney-General v. Sillem (supra)* at 1208 as follows …

"The effect of a right of appeal is the limitation of the jurisdiction of one Court and the extension of the jurisdiction of another".

Having cited the above dictum, Soertsz A.C.J expressed that the right of appeal being exercised the case should be maintained in *status quo* till the appellate Court has dealt with it. His Lordship then expressed that the language of Chapter 49 of the Code makes it sufficiently clear that the Legislature was creating an exception to the ordinary rule in a limited way.

Soertsz A.C.J was greatly influenced by the decision of the Privy Council in three Indian cases *Keel Vs Asirwathan*[9], *Ragunath Das v. Sundra Das Khelri*[10] and *Malkar Jun v. Nahari*[11] when His Lordship decided Edward's case. Surprisingly, neither the three Indian cases nor the case of *Edward Vs De Silva (supra)* were either relevant or have any bearing

whatsoever in respect of the pivotal issue before us. With due respect even the dicta of Lord Parker and Lord Westbury, had no bearing upon the present revision application, especially with regard to the question of execution pending appeal under chapter VII of PCPA.

The *stare decisis* in the case of *Edward Vs De Silva (supra)* centered round the right to maintain an application for writ pending appeal without making the judgment-debtor a party and with no notice to him. Whatever pronouncement made in that judgment as to the limitation of the jurisdiction of one court, extension of the jurisdiction of another and the *status quo* to be maintained till the appellate court has given its decision when an appeal is pending is nothing but an obiter. It is in any event extremely inapposite to an application for execution of a determination/order made under chapter VII of the PCPA pending appeal.

In passing it might be useful to observe that the Legislature like in the Civil Procedure Code has not provided a mechanism for an aggrieved party to obtain an order staying the execution of the judgment, when it conferred the right of appeal under Article 154 P (3). The presumption is that when Article 154 P (3) was introduced the Legislature was not unaware of the existence of section 74(2) of the Primary Court Procedure Act, particularly chapter VII.

If such provisions are not made in the Constitution or in any other Acts including the High Court of the Provinces (Special Provisions) Act 19 of 1990, then the observations of His Lordship Chief Justice Samarakoon would be of some use, although strictly may not be relevant. Nevertheless, let me reproduce the words of His Lordship for the sake of clarity.

"Today's legal position thus appears to me to be that it is not competent for the Court to stay execution of the decree merely on the ground that the judgment-debtor has preferred appeal against it, but it is competent for the Court to stay execution of a decree against which an appeal is pending, if the judgment – debtor satisfies the Court that substantial loss may result to him unless an order for stay of execution is made and furnishes the necessary security for the due performance of such decree, as may ultimately be binding upon him". (*Charlotte Perera Vs Thambiah and Another*[12])

Hence, we are constrained to state that in the case of *Kusum Kanthilatha (supra)* and *Nandawathie (supra)* the decision reached is on the assumption that the *casus omisus* clause is applicable and therefore the approach reached by inadvertence needs to be set right. Further, in Kanthilatha's case the obiter dictum has been given prominence ignoring the *ratio decidendi*. The judgment of *Sillem* relied and referred to in *Edward Vs De Silva* is a criminal matter arising from a statutory offence namely to refuse to pay certain revenues due to Her Majesty. As was rightly observed in the case of *Attorney General vs Sillem (supra)* the creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal, nor both combined can create such a right, it being essentially one of the limitations and the extension of jurisdiction.

In any event to rely on the decision in *Attorney General vs Sillem* for our present purpose may amount to destructive analysis of Chapter VII of the PCPA than the ascertainment of the true intention of the Parliament and carry it out by filling in the gaps. Obviously, to put off the execution process until the appeal is heard would tantamount to prolong the

agony and to let the breach of the peace to continue for a considerable length of time. This in my opinion cannot be the remedy the Parliament has clearly decided upon. Hence I am confident that the construction we are mindful of placing by this judgment would definitely suppress the mischief and subtle inventions and evasions for continuance of the mischief.

In the result subject to the slight variation as to the basis of the decision, we are inclined to follow the decision in *R P Nandawathie Vs K Mahindasena (supra)* and therefore hold *inter alia* that the **mere lodging of an appeal against the judgment of the High Court in the exercise of its revisionary power in terms of Article 154 P (3) (b) of the Constitution to the Court of Appeal does not automatically stay the execution of the order of the High court.**

The petitioner has filed a petition of appeal and also a revision application. As the determination of the petition of appeal is still pending in order to avoid duplicity of work, it would be convenient to consider the merits of the revision application in this judgment itself. It is trite law that when there is alternative remedy available the existence of special circumstances need to be established necessitating the indulgence of court to exercise such revisionary powers vested in terms of the Constitution. *Vide Rustum v. Hapangama Co. Ltd.*(13)

It has already been stated that the judgment of the learned district judge setting aside the determination of the magistrate was solely based on the purported failure to endeavour to settle the matter prior to the inquiry. In order to come to this conclusion the learned High Court judge has relied heavily on the judgment of *Ali Vs. Abdeen* (14) in which it was held inter alia that the making of an endeavor by

the Court to settle amicably is a condition precedent which had to be satisfied before the function of the Primary Court under section 66(7) began to consider who had been in possession and the fact that the Primary Court had not made an endeavor to persuade parties to arrive at an amicable settlement fundamentally affects the capacity or deprives the Primary Court of competence to hold an inquiry into the question of possession.

As far as the present case is concerned admittedly the learned magistrate has endeavoured to settle the dispute among the parties. This is clearly borne out by the record maintained by the learned Magistrate. The journal entry which demonstrates the attempt made by the Magistrate had been reproduced by the learned High Court Judge at page 13 of the impugned judgment. In terms of the judgment at page 13 the learned High Court Judge has reproduced some of the proceedings of the Magistrate in the following manner.

> සවස 2.00 ට කැඳවන විට පළමු පාර්ශවයේ 1 වන වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි නීතිඥවරයා ඉදිරිපත් කල කරුණු අනුව සේවකයන් අතර සාමය කඩවීමට ආසන්න තත්ත්වයක් ඇති බවට නිගමනය කරමි
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> සමසථයක් ඇද්දැයි විමසමි. සමර්ථයක් සඳහා අවස්ථාව දෙමි. දැනට සමථයක් නැති බව පාර්ශවකරුවන් දන්වයි.

Upon perusal of the journal entries it is quite clear that the learned Magistrate has taken much interest to endeavour the parties to settle the matter. In terms of Section 66(7) it is the duty of the Primary Court to endeavour to settle the matter amicably before the matter is fixed for inquiry.

A different view has been taken by a Bench of two Judges in *Mohomed Nizam v. Justin Dias*[15] where His Lordship Sisira de Abrew, J clearly held that the delayed objection

regarding non compliance of Section 66(7) cannot be taken for the first time at the stage of the appeal. This view was totally different to the basis of the decision in *Ali v. Abdeen (supra)* on the ground of laches.

On the facts, the present case is much stronger than the case of *Ali v. Abdeen (supra)* and *Mohomed Nizam v. Justin Dias (supra)* as regards the question or laches or acquiescence or express consent.

For purpose of completeness let me reproduce the relevant part of the judgment of Sisira de Abrew, J. which reads as follows:-

> "According to the above judicial decisions, the P.C.J. does not assume jurisdiction to hear the case if he fails to act under section 66(6) of the Act. In the present case, have the parties taken up the issue of jurisdiction in the Primary Court? The answer is no. The appellant in this appeal takes up the issue of jurisdiction only in the Court of Appeal. If the appellant or the respondent wants to keep up the issue of jurisdiction it must be taken up at the earliest opportunity."

This view is supported by the judicial decision in *David Appuhamy Vs. Yassasi Thero*[16] where it was held that an objection to jurisdiction must be taken at the earliest possible opportunity. If no objection is taken and the matter is within the plenary jurisdiction of the Court, the Court will have jurisdiction to proceed with the matter and make a valid order.

By reason of the argument advanced before the learned High Court judge as to the non-compliance of section 66(6), it is the respondent before the High Court judge who had

benefited by that argument. He has not adverted the Magistrate to the non-compliance section 66 (6) before the Magistrate commenced the inquiry. In any event as has been stated above there has been meaningful steps taken by the Magistrate to settle the matter. On that aspect of the matter the learned High Court judge has erred when he came to the conclusion that such an attempt is not in compliance with the provisions of the PCPA.

In the land mark case of *Visuvalingam And Others Vs Liyanage And Others*[17] it was held that where a person by words or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or so conducts himself that another would as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that other has acted on such representation and alters his position to his prejudice, an estoppel arises against the party who has made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

"The phrase "approbating and reprobating" or "blowing hot and cold" must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and secondly, that he will not be regarded…….as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent" – Per Evershed M.R., (1950) 2 A.E.R. 549 at 552.

"The doctrine of approbation and reprobation requires for, its foundation, inconsistency of conduct, as where a man, having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which confers the benefit" – Lord Russel in *Evans v. Bartlam*[19].

"In cases where the doctrine of approbation and reprobation does apply, the person concerned has a choice of two rights either of which he is at liberty to accept, but not both. Where the doctrine does apply if the person to whom the choice belongs irrevocably and with knowledge adopts the one, he cannot afterwards assert the other," Per Lord Atkin in *Lissenden v. Bosh Ltd*[20].

Therefore it is quite clear that the petitioner who invoked the revisionary jurisdiction of the High Court having taken part in the settlement and clearly expressed his unwillingness to have the matter settled (although the settlement was tried at a premature stage) cannot be allowed to take the advantage to attack the determination on the ground.

Taking into consideration all these matters, it is my considered view that the learned High Court Judge was clearly wrong when he reversed the determination of the learned Magistrate based on the ground of non compliance of Section 66(7) of the PCPA. For the foregoing reasons, I allow the revision application and accordingly set aside the impugned judgment of the Judge of the High Court. Consequently the determination that was challenged by way of revision in the High Court will now prevail and the learned Magistrate is directed to give effect to the same. The registrar is directed to cause a copy of this judgment filed in the relevant file pertaining to appeal No CA PHC 35/2006.

There shall be no costs.

SISIRA DE ABREW, J- I agree

LECAMWASAM, J. - I agree

Application allowed.

BROWN & COMPANY PLC V. MINISTER OF LABOUR AND 6 OTHERS

SUPREME COURT
J.A.N. DE SILVA, CJ
SALEEM MARSOOF, PC., J. AND
P.A.RATNAYAKE, PC., J.
S.C.APPEAL NO. 108/2008
S.C(SPL.) LA NO. 12/2003
CA (APPLICATION) NO. 2056/2003
NOVEMBER 1ST, 2010

Industrial Disputes Act – Section 3(1)(d) – Of consent, parties to the Industrial dispute refer the dispute for settlement by Arbitration to an Arbitrator, for settlement by Arbitration. – Section 4(1) – Powers of the Minister in regard to industrial disputes – Section 17(1) – Duties and powers of Arbitrator – Section 36(4) – In the Conduct of Proceedings in respect of an industrial dispute any industrial court, Labour Tribunal, Arbitrator or the Commissioner is not bound by any provisions of the Evidence Ordinance.

The dispute that arose between the relevant employees with Brown & Co., and Browns Engineering, has been referred for settlement by arbitration in terms of Section 4(1) of the Industrial disputes Act. The Arbitrator, after considering the evidence placed before him, entered an award in favour of the relevant employees of Brown & Co., that they are entitled to receive travel expenses from 1st June 1992 up to the termination of their services with effect from 23rd November 1996. The Arbitrator also found that in addition to aforesaid amounts, 4th, 5th, 6th Respondents were entitled to receive respectively further sums of Rs. 349,095.37, Rs. 346,907.00 and Rs. 366,219.00 as total dues and directed Brown & Co. to pay the said sums.

Being aggrieved by the said Award of the Arbitrator, Brown & Co. filed the Writ application from which this appeal was filed in the Supreme Court, seeking a mandate in the nature of a Writ of Certiorari quashing

the said award and a Writ of prohibition to prevent the Commissioner of Labour from taking steps to enforce the said Award.

Held:

(1) Arbitration under the Industrial Disputes Act is intended to be even more liberal, informal and flexible than commercial Arbitration, because Section 17(1) of the Industrial Disputes Act requires the Arbitrator to make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute and thereafter make such award as may appear to him just and equitable.

(2) The function of the arbitral power in relation to industrial disputes is to ascertain and declare what in the opinion of the Arbitrator ought to be the respective rights and liabilities of the parties as they exist at the moment the proceedings are instituted.

(3) The Arbitrator's role is more inquisitorial, and he has a duty to go in search for the evidence, and he is not strictly required to follow the provisions of the Evidence Ordinance in doing so. The procedure followed by him need not be fettered by the rigidity of the law.

Per Marsoof, J. –

> "It is important not to lose the sight of the fact that this appeal arises from an application for the Writ of Certiorari to quash the award of the arbitrator in an industrial arbitration, and the Court of Appeal which refused the appeal in the circumstances of this case did so in the exercise of its supervisory jurisdiction and not in its capacity as an appellate Court."

(4) The Court of Appeal did not err in affirming the finding of the Arbitrator that although reimbursement of the cost of travelling was not expressly provided for in the letter of appointment issued to the relevant employees of the Brown & Co. it was just and equitable to award them an allowance to meet the official travelling expenses, especially considering the fact that they had been provided with a company vehicle for their official and personal travel in the past and withholding of this facility had given rise to an industrial dispute.

(5) The impunged award of the Arbitrator is just and equitable and there are no errors on the face of the record to justify intervention by way of *certiorari*.

Cases referred to -

(1) Associated Provincial Picturehouses V. Wednesbury Corporation, - (1948) 1 KB 223

(2) Council of Civil Service Unions V. Minister for the Civil Service – (1985) AC 374

(3) Thiruvanakaresu V. Siriwardene and Others – (1986) 1 SLR 185

(4) Brown & Co. Ltd. and another V. Ratnayake, Arbitrator and others (1994)3SLR 91

APPEAL from the Court of Appeal dated 30.11.2007

A.R.Surendra, PC, Nadarajar Kandeepan and *K. Tharshini* for Petitioner-Petitioner-Appellant

Yuresha de Silva, S.C., for 1st and 2nd Respondent – Respondent – Respondents

Rohan Sahabandu with *Dulani Warawewa* for 4th - 6th Respondent – Respondents.

Cur.adv.vult

March17th 2011

SALEEM MARSOOF, J.

The Petitioner-Petitioner-Appellant (hereinafter referred to as "Brown & Co."), is a Company incorporated in Sri Lanka with the corporate name Brown & Company (Pvt.) Ltd., which name has since been changed to Brown & Company PLC. The 4th to 6th Respondent-Respondent-Respondents (hereinafter referred to as the "relevant employees") were originally employed as Engineering Executives in the Engineering Division of Brown & Co. They were purportedly transferred

to the 7th Respondent-Respondent-Respondent Browns Engineering (Pvt.) Ltd. (hereinafter referred to as the Browns Engineering) with effect from 1st January 1992, and their services were subsequently terminated by the letters dated 23rd November 1994 consequent to a decision taken by the management of Browns Engineering to close its business.

Even prior to the said closure of business and termination of the services of the relevant employees, they had apprised the management of Browns Engineering as well as the Board of Directors of Brown & Co. of some of their grievances and sought redress. One of their grievances was related to the expenses they had to incur personally as a result of the withdrawal of the facility of a company maintained vehicle with fuel, made available to them for their official and personal travel by Brown & Co., prior to their transfer to Browns Engineering. This facility had been continued even thereafter, up to and inclusive of the month of May 1992. It is common ground that the official vehicles used by them while working for Brown & Co. were sold to them in May 1992, at prices determined on valuations by the Automobile Association of Sri Lanka, and the relevant employees had been provided with soft loans by Browns Engineering to finance their purchases. As a result of the decision not to continue the facility of a company maintained car after the said sale of vehicles after 1st June 1992, the relevant employees were compelled to utilize the vehicles purchased by them even for their official travel, sans the facility of a company driver or provision for fuel. They agitated for redress of this and other grievances, claiming *inter alia*, a sum of Rs. 15,000 per month in lieu of the company maintained vehicle, a sum of Rs. 3,000 per month as driver's salary and an additional allowance of Rs. 5,250 for fuel computed on the basis of 150 litres per month at