THE

Sri Lanka Law Reports

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

[2013] 1 SRI L.R. - PART 12

PAGES 309 - 336

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

Price: Rs. 25.00

D I G E S T

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Having stated the facts of this case, let me now turn to consider the appeal in terms of the questions on which leave to appeal was granted by this Court.

1. Did the High Court misdirect itself on the concept of accepting new evidence in an appeal?

Learned Counsel for the appellants submitted that the decision of the High Court to set aside the judgment of the District Court was based on the issuance of the Gazette Notification dated 25-04-2001. The appellants, as stated earlier, had relied on a Statutory Determination on which a declaration of title was given to the appellants' father under Section 19 of the Land Reform Law No. 1 of 1972. By the Gazette Notification dated 25-04-2001, the said Statutory Determination had been cancelled and this had taken place three months after the judgment of the District Court was delivered.

Learned Counsel for the respondent contended that in terms of Section 773 of the Civil Procedure Code, an Appellate Court is empowered to receive and admit new evidence in an appeal and therefore the High Court was not erroneous in considering the Gazette Notification which had come into effect on 25-04-2001.

Learned Counsel for the appellants relied on the decision in *Beatrice Dep Vs. Lalani Meemaduwa* [1] and contended that the High Court was wrong in taking into consideration the Gazette Notification of 25-04-2001, under and in terms of Section 773 of the Civil Procedure Code.

Section 773 is contained in Chapter LXI of the Civil Procedure Code, which deals with the Hearing of the Appeals. Section 773, refers in particular to the power of Court to

dismiss the appeal, affirm, vary or set aside the decree or direct new trials etc., and reads as follows:

> *"Upon hearing the appeal it shall be competent to the court of Appeal to affirm, reverse, correct or modify any judgment, decree or order therein between and as regards the parties, or to order a new trial or a further hearing upon such terms as the Court of appeal shall think fit, or, if need be, to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial."*

It is important to note that the Court of Appeal, if it thinks fit, could receive and admit new evidence additional or supplementary to the evidence already taken in the Court of first instance.

This position was considered in *Ratwatte vs. Bandara et al* [2] where the Supreme Court following the decision of Denning L J in *Ladd Vs Marshall* [3] had held that the reception of fresh evidence in a case at the stage of appeal may be justified, if the following three (3) conditions are fulfilled:

(a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive;

(c) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

A similar view had been expressed in *Rev. Kiralagama Sumanaratna Thero Vs. Aluvihare*[3] with regard to the evidence not been able to obtain with reasonable diligence at the trial. In *Beatrice Dep v Lalani Meemaduwa (supra)* reference was made to the aforementioned three conditions.

It is therefore evident that in terms of Section 773 of the Civil Procedure Code, on the grounds enumerated in the decision in *Ladd Vs. Marshall (supra)* followed by *Ratwatte Vs. Bandara (supra)* and Beatrice *Dep Vs. Lalani Meemaduwa (Supra)* an appeal Court could order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial.

As stated earlier the appellants had relied on the Statutory Determination dated 14-10-1988 (පෙ. 2) on their claim to the title of the property in question. learned District judge had also based his judgment on the said Statutory Determination in deciding in favour of the appellants. It is common ground that the said Statutory Determination was cancelled by Gazette no.1181/19 dated 25-04-2001 the said Gazette notification was in the following terms:

"Land Reform Act, No. 1 of 1972

Cancellation to the Statutory Determination No.4324 published under section 19.

The above mentioned Statutory Determination pertaining to the Declaration Unique No Ra /106 of Mr. Hatan

achchi Mohottalage Mudiyanse of Melwatta, Godakawela published in respect of Statutory Determination No 4324 related to Unique No.Ra/ 106 of the Gazette Extraordinary No 52713 of 14th October, 1988 is hereby cancelled."

It is therefore quite clear that the appellants had lost their title to the property in question by the issuance of the said Gazette Notification dated 25.04.2001 (X2).

When the District Court had decided the matter in favour of the appellants solely on the basis of the Statutory Determination of 1988, it was necessary for the High Court to have considered the changed circumstances by virtue of the second Gazette Notification of 25-04-2001, as by the latter the status *quo* of the appellants had got changed. It is not disputed that the said Gazette Notification was not available for the learned District Judge to have considered, as it had been issued four months after the delivery of the Judgment by the District Court. However, by the time the appeal was being considered by the learned Judge of the High Court, the said Statutory Determination was available and the High Court had correctly taken into consideration the said Gazette Notification as new evidence, in deciding the case in question.

The new evidence that had been taken into consideration by the Judges of the High Court is the Gazette Notification issued on 25-04-2001 (X2). It is common ground that the said Gazette Notification could not have been obtained with reasonable diligence for the use at the trial by the learned District Judge as if was issued 4 months after the delivery of the judgment by the District Court. It also of no doubt that the contents of said Gazette Notification has a clear impact on the final result of the decision and also it is the most credible piece of evidence in the case in question.

It is therefore quite clear that, the applicability of the said Gazette Notification of 25-04-2001 (X2) would clearly come within the provisions of Section 773 of the Civil Procedure Code and therefore there had not been any misdirection by the learned Judges of the High Court in accepting new evidence in that appeal.

2. Did the High Court misdirect itself by considering the Gazette Extraordinary No. 1181/19 dated 25th April 2001 as valid?

Learned Counsel for the appellants strenuously contended that the Gazette Notification dated 25-04 2001, had come into being after the Judgment of the District Court was pronounced and therefore it was not correct for the learned Judges of the High Court to have considered the said Statutory Determination.

It is not in dispute, as stated earlier, that the District Court had decided the matter solely on the basis of the Statutory Determination dated 14-10-1988 (පැ. 4). The said statutory Determination was in the following terms:

"ව්‍යවස්ථාපිත නිශ්චය අංකය : 4324

විශේෂ්‍ය අංකය : ර 106

1972 අංක 1 දරණ ඉඩම් ප්‍රතිසංස්කරණ පනතේ 19 වැනි වගන්තිය යටතේ ව්‍යවස්ථාපිත නිශ්චය

ගොඩකවෙල මල්වත්තේ පදිංචි හටන්ආච්චි මොහොට්ටාලගේ මුදියන්සේ මහතා විසින් පනතේ 18 වැනි වගන්තිය යටතේ ව්‍යවස්ථාපිත ප්‍රකාශනයක් කරන ලදින් පතේ 19 වැනි වගන්තිය යටතේ ඉඩම් ප්‍රතිසංස්කරණ කොමිෂන් සභාව විසින් ව්‍යවස්ථාපති බදු ගැනුම්කරුට අයිතිව තිබූ කෘෂිකාර්මික ඉඩම් වලින් ඔහුට තබා ගැනීමට ඉඩදිය යුතු කොටස නිශ්චය කරමින් ව්‍යවස්ථාපිත

නිශ්ටයක් කරන ලදී. එසේ ව්‍යවස්ථාපිත බදු ගැනුම්කරුට තබා ගැනීමට ඉඩ දෙන ලද කෘෂිකාර්මික ඉඩම් කොටස් මෙහි උපලේඛනයෙහි දැක්වේ"

The contention of the appellants was that the said Statutory Determination was given to their father and that they had inherited the said property in question from him. Excepting for the above, the appellants had not shown any other source of title in their favour.

It is settled law that in a vindicatory action the burden of establishing title devolves on the plaintiff. As stated quite clearly by Macdonell, C.J., in *De Silva Vs. Goonatillake*(5) that,

> "There is abundant authority that a party claiming a declaration of title must have title himself. . . .
>
> The authorities unite in holding that plaintiff must show title to the corpus in dispute and that, if he cannot, the action will not lie."

This position had been clearly endorsed in later decisions. For example in *Muthusamy vs. Seneviratne*(6), Soertsz, S. P. J. had observed that,

> ". . . . it is serious misdirection in that it overlooks the elementary rule that in an action for declaration of title, it is for the plaintiff to establish his title to the land he claims and not for the defendant to show that the plaintiff has no title to it."

The only exception to this general principle referred to earlier, is the position where the plaintiff had earlier enjoyed peaceful possession of the property in question and had alleged that he had been ousted by the defendant. In such

circumstances the plaintiff has in his favour a presumption of title, which is rebuttable. This position was considered by Burnside, C.J., in *Mudalihamy vs. Appuhamy* [7] where it was stated that,

> "Now, *prima facie*, the plaintiff having been in possession, he was entitled to keep it against all the world but the rightful owner, and if the defendant claimed to be that owner, the burden of proving his title rested on him, and plaintiff might have contended himself with proving his *de facto* possession at the time of the ouster."

It is to be noted that the appellants had not taken any steps at any stage to challenge the validity of the Gazette Notification dated 25-04-2001 (x 2). The contention of the appellants was that they became aware of the said Gazette Notification only in 2002, but assuming that the said position is correct, it must be taken into consideration that even after 2002, the appellants had not taken any steps to challenge that Gazette Notification.

Considering the aforesaid it is quite evident that the Gazette Notification dated 25-04-2001 stood unchallenged when the appeal was considered by the High Court.

In such circumstances it is apparent that the High Court had not misdirected itself by considering the said Gazette Notification as valid.

3. Did the High Court err in entering the judgment purely based on the Gazette Extraordinary No. 1191/19 dated 25th April 2001 as valid?

As stated earlier, the appellants had placed their title solely on the basis of the Statutory Determination published in the Gazette dated 14-10-1988 (වැ. 4)/ However, soon after the judgment was delivered by the District Court and well before the appeal was considered by the High Court the said Determination was cancelled by the Gazette Notification dated 25-04-2001(X2).

It is therefore quite clear that although the appellants had title to the land in question on the basis of the aforementioned Statutory Determination, that such title had ceased to exist by 25-04-2001, in terms of the second Gazette Notification marked X2.

The question as to necessity for a plaintiff to have the title not only at the time the *rei vindicatio* action is instituted, but also to retain it throughout the pendency of the action was considered, quite clearly by *Voet*. The underlying principle for the need to sustain the title to the property in question is stated by *Voet* (voet-6.1.4, Voet's Title on Vindications and Interdicta by Casie Chitty), in the following terms:

> **"But again, if he who brought this action was the dominus at the time of the institution of the suit, but lite pendente has lost the *dominum,* reason dictates that the defendant should be absolved. . . both because the suit has then fallen into that case, from which an action could not have a beginning, and in which it could not continue. . . and because the interest of the plaintiff in the subject of the suit has ceased to exist, . . . and in short because that (right of *dominum*) has been removed and become extinct, which was the only foundation of this real action."**

The said statement by Voet was considered by the Supreme Court in *Silva Vs. Jayawardene* [8] on the basis of a *rei vindicatio* action, where Keuneman, J. had observed that the action contemplated by Voet was the action *rei vindicatio* and had stated thus:

> "It is clear that the action contemplated by Voet was the action *rei vindicatio* and I think it follows that all rights in *rem* against the property are lost, when the *dominum* has been transferred pending the action to another person."

The necessity for the party claiming a declaration of title to have title himself was considered in detail by Macdonell, CJ in *De Silva Vs. Goonatillake (supra)*. In that, an action rei *vindicatio* had been instituted in respect of property which has vested for non-payment of taxes in the Municipal Council, by virtue of a vesting certificate issued in terms of Section 146 of Ordinance No.6 of 1916. In considering the said issue, it was held that the plaintiff could not maintain the action, even though the Municipal Council, on being added as party, expressed its willingness to transfer the property to the party declared entitled thereto by Court. In deciding the matter in issue. Macdonell,CJ, had stated that,

> "There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action *rei vindicatio*, plaintiff must have ownership actively vested in him." (Nathen, P. 362,S.593) "The right to possess may be taken to include the *ius vindicandi* which Grotius (2, 3, 1) puts in the forefront of his definition of ownership. . . . The action arises from the right of dominium. But it we claim specific recovery of property belonging to us but possessed by someone else (Pereira,

P. 300, ed. 1913 quoting Voet 6.1.3) **The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie"** (emphasis added).

Similar views had been expressed by our Courts in several other cases.

In *Eliashamy Vs. Punchi Banda* (9) during the pendency of an action for declaration of title, ejectment and damages consequent to the trespass and the wrongful removal of plumbago from the land in dispute, the plaintiff had sold the land in dispute to a third party. It was held that the plaintiff was not precluded from maintaining his claim for damages although he could not get a decree for declaration of title and ejectment. Similarly in *Fernando Vs. Appuhamy*(10), the plaintiff had purchased a land subject to a lease in favour of the defendant and then has sold it to one Luvina. The defendant had not delivered the possession of the property and therefore the plaintiff had instituted action for declaration of title, ejectment and damages. Ennis ACJ, and De Sampayo J, had held that after the sale of the land to Luvina, plaintiff could not maintain the action for declaration of title, although he could maintain the action for ejectment and damages.

It is therefore evident that in a vindicatory action it is necessary for the title to be present with the plaintiff not only at the beginning of the action, but until the conclusion of the case. Therefore the High Court was not in error when they entered the judgment based on the Gazette Extraordinary dated 25-04-2001 as valid.

For the reasons aforesaid the questions on which leave to appeal was granted are answered as follows:

1. The High Court did not misdirect itself on the concept of accepting new evidence in an appeal.

2. The High Court did not misdirect itself by considering the said Gazette Extraordinary No. 1181/19 dated 25-04-2001 as valid.

3. The High Court did not err in entering the judgment purely based on the Gazette Extraordinary No. 1181/19 dated 25-04-2001.

The judgment of the High Court dated 23-09-2009 is therefore affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

EKANAYAKE, J. – I agree.

IMAM, J. – I agree.

Appeal dismissed.

AMARASINGHE VS. DHARMADASA

COURT OF APPEAL
CHITRASIRI A.
CA 973/98 (F)
DC MT. LAVINIA 84/92 M
APRIL 5, 2013

Prescription Ordinance – Section 7 – Section 8 – Cause of Action on the basis of work and labour done – Institution of Action 3 years or 1 year? Time bar – Section 8, the particular enactment – Section 7, the general – General enactment should give way to the particular enactment.

The Plaintiff instituted action for the recovery of a certain sum alleging that the said sum of money was due to him for the work and labour done. The Plaintiff a building contractor has come to an oral agreement with the Defendant to provide labour for the construction of a building with the material supplied by the Defendant. The Defendant agreed to pay the Plaintiff according to work that he has completed. Action was filed on 19.5.1992 after a lapse of one year. Plaintiff contended that he is within time as action was filed within 3 years. Defendant took up the position that the time period is 1 year.

The District Court held with the Plaintiff – relying on Section 7 of the Prescription Ordinance.

On appeal,

Held:

(1) The type of the work involved shows that the contractor was paid in relation to the work done or for the labour involved in completing the work. The cause of action is on the basis of work and labour done.

(2) Circumstances of this case do not fall with the ambit of Section 7 – it clearly falls within the ambit of Section 8.

(3) In the case of an unwritten contract – Section 8 would be the particular enactment to which the general Section 7 must give away.

Per Chitrasiri, J

> "It is my opinion that the Plaintiff is not in a position to claim damages from the Defendant since Section 8 prevents him from filing an action after a lapse of a period of one year from the cause of action alleged to have accrued to him."

APPEAL from the judgment of the District Court of Mount Lavinia.

Cases Referred to:

1. *Amarasinghe Vs. Dr. Alwis* – 48 NLR 519
2. *Walker Sons & Company Ltd Vs. Kandiah* 21 NLR 317
3. *Alavapillai Vs. Sadayar* – 1 Bal 143
4. *Gunasekera Vs. Ratnaike* – 1 Cur. L.R
5. *Mack Vs. Wickramaratne* – 5 NLR 142
6. *Silva Vs. Ritchie*
7. *Barker Vs. Siman Appu*
8. *Horsfall Vs. Martin* – 4 NLR 70
9. *Assen Curry Vs. Brooke Bond Ltd* – 36 NLR 169
10. *K. P. V. Louis Vs. A. P. Don Louris* – 21 NLR 435
11. *Ceylon Insurance Co. Ltd Vs. DIMO Co. Ltd* – 79 2 NLR 5

Rohan Sahabandu P. C. with the *Hasitha Amarasinghe* for the Defendant – Appellant

Plaintiff Respondent absent and unrepresented.

June 18, 2013

CHITRASIRI, J.

When this matter was taken up for hearing on the 12th February 2013, the registered Attorney of the plaintiff-respon-

dent (hereinafter referred to as the plaintiff) had informed Court that he had not received instructions to appear for the plaintiff. The Court then fixed the matter for argument and made order to issue notice to the plaintiff directing him to appear in Court on the day the matter was fixed for argument namely 05th April 2013. When it was taken up for argument even on the 05th April 2013, the plaintiff-respondent was absent and was not represented by an Attorney-at-Law. Hence, the matter was taken up for argument in the absence of the plaintiff-respondent.

On the day of the argument, learned President's Counsel for the defendant-appellant (hereinafter referred to as the defendant) submitted that the learned District Judge is wrong when he decided to rely on Section 7 of the Prescription Ordinance and to allow the plaintiff to proceed with the action stating that his cause of action will only be prescribed after the lapse of a period of three years from the date, the cause of action was commenced. He then further contended that it is Section 8 of the Prescription Ordinance that is applicable in this instance and therefore the plaintiff should have come to Court within one year from the date on which the cause of action has arisen.

It being an issue involving a question of law the learned District Judge has decided to answer the same, as a preliminary issue. Accordingly he had allowed the parties to file their submissions in writing with the view of answering the particular issue that was raised as the issue No. 8. Journal Entry No. 20 made on 29th September 1994 also indicates that an order had been pronounced in respect of the said issue. Even though the Court had made such a minute as to the

issue No. 8, this Court could not find an order in respect of the issue 8. Mr. Rohan Sahabandu P.C. informs Court today that he too is unable to find any order made on this issue bearing No. 8. However, the learned District Judge has answered the said issue No. 8 in the impugned judgment dated 20.02.1998 against the defendant having addressed his mind to the law relevant to the prescription.

Issue No. 8 suggested by the defendant is to determine whether the cause of action of the plaintiff is prescribed or not. Decision of the learned District Judge is that it is not prescribed and has held further that the plaintiff is entitled to file action within a period of three years from the date on which the cause of action has arisen. Learned Judge, relying upon Section 7 of the Prescription Ordinance has specifically stated that the plaintiff is entitled to have and maintain this action since it had been instituted within three years as the dispute between the parties has arisen out of an unwritten agreement. Relevant decision of the learned District Judge reads thus:

"මෙම නඩුව පැමිණිලි කර තිබුණේ 1992 මැයි මස 12 වන දිනය නඩු නිමිත්ත ඇති වූයේ 1991. 1. 10 දින බවට ගණන් ගත හැකිය. මෙම නඩුව පැමිණිලි කර තිබුණේ නඩු නිමිත්ත හට ගෙන මාස 16 කින් පසුව බව පෙණුනි. මෙම නඩුවට අදාල ආරවුල නොලියූ ගිවිසුමක් මත ඇති කර ගත් ගනුදෙනුවක් සම්බන්ධයෙන් බව තීරණය කරමින් කාලාවරෝධි ආඥා පනතේ 7 වන වගන්තිය පරිදි නඩු පැවරීමේ කාල සීමාව අවුරුදු 3ක් බව තීරණය කරමි."

Contention of the learned President's Counsel is that it is Section 8 of the Prescription Ordinance that is applicable in this instance and therefore it is incorrect to rely on Section 7 of the Ordinance and to reject the defence of the defendant. Accordingly, it is necessary to consider the facts of the case to determine the issue as to the Prescription.

There is no dispute as to the date on which the cause of action arose and the date of filing action. Cause of action has arisen on the 10th January 1991 and the action was filed on the 19th May 1992. Accordingly, the action has been filed within three years but certainly after the lapse of one year from the date on which the cause of action has arisen. Now it is necessary to ascertain whether the circumstances that led to file this action fall within the ambit of Section 7 or it is the Section 8 of the Prescription Ordinance that is applicable. If the facts and circumstances fall within Section 7 then the cause of action is not prescribed but if it is governed by Section 8 then the plaintiff's action would be time barred.

Sections 7 and 8 of the Prescription Ordinance read thus:

"7. No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be commenced within three years from the time after the cause of action shall have arisen.

8. No action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due"

The plaintiff instituted this action praying inter alia for the recovery of Rs. 125,780.74 from the defendant alleging that the said sum of money was due to him for the work and labour done. Defendant has taken up the position that he has paid the dues to the plaintiff in full and therefore nothing is due to the plaintiff from him. Plaintiff being a building contractor has come to an oral agreement with the defendant to provide labour for the construction of a building with the material supplied by the defendant. The defendant has agreed to pay the plaintiff according to work that he has completed. Time to time, the plaintiff was paid accordingly. This is evident by the documents marked by the plaintiff himself. The type of the work involved also shows that those are in relation to the work done or for the labour involved in completing the work. In this regard, the learned District Judge having considered the evidence has stated thus:-

"පැමිණිලිකරු විසින් ඉදිරිපත් කරන ලද සාක්ෂි වලින් තව දුරටත් හෙලි දරව් වුන කරුණක් නම්, පැමිණිලිකරු ගොඩනැගිලි කොන්ත්‍රාත් කරුවෙකු බවයි. එනම් පැමිණිලිකරු විසින් සේවකයින් යොදවා වැඩ කරවා ගැනීමයි පැමිණිලිකරු මෙම නඩුව පැමිණිලි කර තිබුණේ පැමිණිලිකරු විසින් පුද්ගලිකව විත්තිකරුගේ ගොඩනැගිලි සෑදීමක් සම්බන්ධයෙන් නොව වැඩකරුවන් යොදා වැඩ කිරීමක් සම්බන්ධයෙන් බවට සාක්ෂි වලින් හෙලිදරව් වී ඇත."

The aforesaid findings of the learned District Judge as to the facts of the case and the evidence recorded in the case show that the cause of action of the plaintiff is on the basis of the work and labour done. Then the question arises that in such a situation can the Court decide that the claim of the plaintiff is on an oral agreement disregarding the type of the work that the plaintiff has performed and the manner in which the payments were made. The decision in the case

of *Amarasinghe Vs. De Alwis*[1] is directly on this point. For convenience and completeness, I like to reproduce the entire judgment in that case.

1947 Present: **Howard C. J.**

AMERASINGHE, Appellant, and **DE ALWIS,** Respondent.

S. C. 143-C. R. Colombo. 4,531

Prescription-Repairs to motor car- Work and labour done – Chapter 55, sections 7 and 8.

A claim for repairs effected and materials supplied to a motor car falls within section 8 of the Prescription Ordinance and is barred after one year.

Walker Sons & Co. Ltd. Vs. Kandiah (1919) 21 N.L.R. 317, followed.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

E. S. Amerasinghe, for the plaintiff appellant.

S. Canagarayer, for the defendant respondent.

Cur.adv.vult.

October 10, 1947,

HOWARD CJ.

The plaintiff appeals in this case from a decision of the Commissioner of Requests, Colombo, dismissing his action with costs. The plaintiff who carries on business at No. 128, Lauries Road, Bambalapitiya, under the name and style of British Meteors, brought this action against the defendant for a sum of Rs. 70 on account of, certain repairs effected and

materials supplied to the defendant's motor car on or about January 28, 1944. The defendant filed answer pleading, inter alia, that the cause of action was prescribed under the provisions of the Prescription Ordinance (Chapter 55). It was agreed that this issue of prescription should be tried as a preliminary issue. The Commissioner considering himself bound by the case of ***Walker Sons & Co., Ltd., Vs. Kandiah***[2] *held that the plaintiff's claim is barred by prescription under section 8 of the Prescription Ordinance.*

Section 8 of the Prescription Ordinance is worded as follows:-

"No action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due."

Counsel for the appellant contends that this section only applies to manual labour and that the question of prescription in the present case is governed by section 7 of the Ordinance. In ***Walker Sons Vs. Kandiah (supra)*** *the plaintiffs instituted an action to recover a sum. of Rs. 2,677.42 for repairs effected to a motor car. The order of the defendant requesting the plaintiffs to effect the repairs was given by a letter and the acceptance of the order by the plaintiffs was also by a letter. It was held that the contract between the parties was not a written contract within the meaning of section 6 of the Prescription Ordinance nor an unwritten contract falling under section 7, but fell under the class of unwritten contract specially provided for by section 8, Actions for work and labour done and goods sold and delivered, though these are unwritten con*tracts,

come under section 8 and not under section 7. It was also held that, as the defendant within a year from the date of action acknowledged his indebtedness and promised to pay Rs. 2,000 in full satisfaction, the plaintiffs were entitled to recover only Rs. 2,000 and not the full amount of the claim. The facts in regard to the nature of the claim are exactly the same in this case as in ***Walker Sons Vs. Kandiah*** **(supra).** *Counsel for the appellant has pointed out that the latter decision was contrary to a long line of cases which decided that section 8 referred only to manual labour or work of a menial character. It did not refer to a case where the work of repairs required a certain amount of engineering skill. In view of the fact that it is was held in* ***Walker Sons Vs. Kandiah*** **(Supra)** *that there was an acknowledgment as to Rs. 2,000 of the amount claimed Counsel for the plaintiff asked me to say that the decision in regard to the ambit of section 8 was obiter and not binding on me. I am unable to say that the decision is obiter. If it had been, the plaintiff would have had judgment for Rs. 2,677.42 the whole amount claimed.*

Counsel for the plaintiff has cited a number of cases decided before the decision in ***Walker Sons Vs. Kandiah*** *to show that previous to that case the Courts had held that section 8 referred only to manual labour or work of a menial character. The cases cited in* ***Walker Sons Vs. Kandiah*** *are* ***Alvapillai Vs. Sadayar***[3] ***Gunasekera Vs Ratnaike***[4] ***Mack Vs. Wickremaratne***[5]***, Silva Vs. Ritche***[6] *and* ***Baker Vs. Siman Appu***[7] *in spite of these decisions the Court held that the plaintiffs" claim was within the ambit of section 8 of the Ordinance and not within sections 7 or 8. Counsel for the plaintiff has also suggested that I should not follow* ***Walker Sons Vs. Kandiah*** **(supra)** *by reason of the fact that de Sampayo J. in his judgment has misinterpreted the judgment of Moncrieff J. in* ***Horsfall Vs.***

Martin[8] *In the latter case it was held that though money due for goods and delivered on three months credit may be money due upon an unwritten promise yet the action brought for its recovery falls within section 8 of the Prescription Ordinance and as such is prescribed within one year after the debt became due. In his judgment Moncrieft J. held that any action" for or in respect of goods sold and delivered" whether it be upon an unwritten or even on a written contract is excluded from the operation of sections 6 and 7 respectively by the provisions of section 8. It was to this part of the judgment of Moncrieff J. that de Sampayo J. referred in his judgment in* ***Walker Sons Vs. Kandiah*** **(supra)** *As pointed out by Garvin S.P.J. in A****ssen Cutty vs. Brooke Bond Ltd***[9] *at 139, the extent to which Moncrieff J. held that an action for or in respect of goods sold and delivered fell under section 8 to the exclusion of sectio 6 when the action was based on a written contract his judgment was in conflict with the principle of the decision in* ***K. P. V. Louis de Silva Vs. A. P. Don Louis*** [10] *which is a judgment of the Full Court/ It would appear that the judgment of Moncrieff J. went further than the law warranted so far as written contracts are concerned. But this fact does not in my opinion afford a reason for not following the judgment of de Sampayo J. in* ***Walker Sons Vs. Kandiah(supra)****. The learned Judge in that case was not relying on that part of the judgment of Moncrieff J. which Garvin J. states in* ***Assen Cutty Vs. Brooke Bond, Ltd (supra)*** *was not in accordance with the law.*

Like the Commissioner I feel I am bound by ***Walker Sons Vs. Kandiah*** **(supra)** *in reaching the decision that I have 1 do not in any way depart from the principle laid down by Lawrie A. J. in* ***Mack Vs. Wickremaratne*** **(supra)** *that work and labour contemplated by section 8 does not include the work of educated men. The work and labour done in the present case would not fall into this category. - Appeal dismissed with costs.*

Similar view had been taken in the case of *Ceylon Insurance Co. Ltd. Vs. Dimo Co. Ltd*[11] In that case it was held that in the case of an unwritten contract, Section 8 of the Prescription Ordinance would be the particular enactment to which the general Section 7 must give way.

Having looked at the facts of this instant case as well as the law relevant thereto, it is my view that the learned District Judge has misdirected himself when he decided that the circumstances of this case do not fall within the ambit of Section 8 of the Prescription Ordinance. It is my view that the facts and circumstances of this case should clearly fall within the ambit of Section 8 of the Prescription Ordinance.

In the circumstances, it is my opinion that the plaintiff is not in a position to claim damages from the defendant since Section 8 of the Prescription Ordinance prevents him to file action after lapse of a period of one year for the cause of action alleged to have accrued to him. Accordingly, I decide that it is incorrect to answer the issue No. 8 in favour of the plaintiff. Therefore, I answer the issue No. 8 in favour of the defendant and decide that the plaintiff's action is time barred. Accordingly, I allow the appeal setting aside the judgment dated 20th February 1998 of the learned District Judge of Mt. Lavinia. Having considered the circumstances of the case, I make no order as to the costs of the appeal.

Appeal allowed without costs.

Appeal allowed

RATNAYAKE VS. ADMINISTRATIVE APPEALS TRIBUNAL AND OTHERS

SUPREME COURT
SALEEM MARSOOF, PC. J.
RATNAYAKE, J.
IMAM, J.
SC SPL LA 173/2011
CA 277/2011
JUNE 20, 2012
AUGUST 18, 2012

Administrative Appeals Tribunal [A.A.T.] Act 4 of 2002, Section 8 [2] Appeal from an order of the Public Service Commission [PSC] to A.A.T. dismissed. – Jurisdiction of the Court of Appeal to hear appeals from the A.A.T. – Constitution – Article 59 [1] , 61 [A] – Article 140 – Interpretation Ordinance – Section 22.

The petitioner sought special leave to appeal from the decision of the Court of Appeal by which the Court of Appeal refused to issue notice in an application for prerogative writs, with respect to an order of the AAT. At the hearing before the Supreme Court for leave – The respondent raised a preliminary objection to the maintainability of the application on the ground that it is precluded by Article 61 A.

Held:

(1) Court of Appeal did possess jurisdiction to hear and determine the application filed before it.

(2) AAT is not a body exercising any power delegated to it by the P.S.C. and is an appellate tribunal constituted in terms of Article 59 [1] having the power, to alter, vary or resume any order or decision of the PSC.

Per Saleem Marsoof, J.

> "In arriving at the decision this Court has not given its mind fully to the legal effects of Section 8 [2] of the AAT Act 4 of 2002 and in

particular to the effect of the provisions of Section 22 – Interpretation Ordinance 21 of 1901 – as the preliminary objection was confined to Article 61 A of the Constitution".

APPLICATION for special leave to appeal from the judgment of the court of Appeal – on a preliminary objection raised.

S.N. Vijithsingh with *B.N. Thamboo* for petitioner

Suren Gnanaraj SC for 5th, 15th, 17th and 18th respondents.

February 22, 2013

SALEEM MARSOOF PC J.

When this application for special leave to appeal filed in this Court in terms of the Article 128 of the Constitution against the decision of the Court of Appeal dated 2nd August 2011 was taken up for support on 22nd June 2012, the case had to be re-fixed for support on an application by the learned Counsel for the Petitioner – Petitioner (hereinafter referred to as the Petitioner). However, learned State Counsel who appeared for the 5th – 15th, 17th and 18th Respondents indicated to Court and learned Counsel for the Petitioner that he would take up a preliminary objection to the maintainability of this application for special leave to appeal on the ground that it is precluded by the provisions of Article 61A of the Constitution, and both learned Counsel moves for time to file written submissions on that question. After the filing of the written submissions, the matter was taken up for further oral submissions before this Bench. It has to be stated at the outset that the preliminary objection taken up by learned State Counsel was confined to Article 61A of the Constitution and was not based on the ouster clause contained in Section 8 (2) of the Administrative Appeals Tribunal Act No. 4 of 2002.

This application for special leave to appeal has been filed against the decision of the Court of Appeal dated 2nd August 2011 by which that court refused to issue notice in an application for writs of *certiorari* and *mandamus* filed by the Petitioner in that court, with respect to an order of the Administrative Appeals Tribunal (sometimes hereafter referred to as AAT) dated 22nd February 2011 (P8). In paragraph 14 of the application filed by him in the Court of Appeal as well as in paragraph 21(i) of the application filed in this Court seeking special leave to appeal, the Petitioner has challenged the validity of the said order of AAT.

Article 61A of the Constitution, which was introduced by the Seventeenth Amendment to the Constitution of Sri Lanka, provides as follows:-

> *Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.*

On the face of it, the above provision of the Constitution, which constitutes a Constitutional ouster of jurisdiction, does not apply to the impugned decision of AAT, it being specifically confined in its application to the orders or decisions of the Public Services Commission, a committee or any public officer made in pursuance of any power or duty conferred or imposed on such Commission, or delegated to such

Committee or public officer under the relevant Chapter of the Constitution. There is no corresponding provision in the Constitution, which seeks to oust the jurisdiction of the Court of Appeal under Article 140 of the Constitution in regard to a decision of AAT. The Administrative Appeals Tribunal (AAT) was established in terms of Article 59 (1) of the Constitution, and its powers and procedures have been further elaborated in the Administrative Appeals Tribunal Act No. 4 of 2002, which contained in Section 8 (2) thereof an ouster clause which is quoted below:-

> *A decision made by the Tribunal shall be final and conclusive and shall not be called in question in any suit or proceedings in a court of law.*

Learned State Counsel has contended strenuously that since AAT has been constituted as contemplated by Article 59 (1) of the Constitution, the Constitutional ouster of jurisdiction contained in Article 61A of the Constitution will apply to AAT as well. He has further submitted that one cannot do indirectly what he cannot do directly, and that a challenge to any order or decision of AAT would amount to indirectly putting in question an order or decision of PSC. Learned Counsel for the Petitioner has submitted equally strenuously that what was sought to be challenged in the Court of Appeal was a decision of AAT on an appeal from PSC and therefore a decision of AAT can by no stretch of imagination be construed to be a direct or indirect challenge of a decision of the PSC. He submitted that since the vires of AAT has been challenged by the Petitioner both in his application to the Court of Appeal as well as to this Court, and as the preclusive clause contained in Section 8 (2) of the Administrative Appeals Tribunal Act does not amount to a constitutional ouster of jurisdiction, the Court of Appeal was possessed of jurisdiction to hear and determine the application of the Petitioner, and this Court

is not bereft of jurisdiction to consider this application for special leave to appeal.

This Court is mindful of the facts and circumstances of this case as set out in the application seeking special leave to appeal. The Petitioner was served with a charge sheet on or about 15th April 2003, and after a disciplinary inquiry, was found guilty of all charges. Accordingly, the Public Service Commission (PSC) by its order dated 12th January 2007, proceeded to dismiss the Petitioner from service. Being aggrieved by the said order of the PSC, the Petitioner appealed against the said decision to AAT, which affirmed the PSC decision to terminate the services of the Petitioner, and accordingly dismissed the Petitioner's appeal on 17th March 2009. However, in view of AAT not being properly constituted at the time it made this purported order, the parties agreed in the Court of Appeal in a previous application filed by the Petitioner in that court, to refer the matter back to AAT for its determination. Thereafter, AAT after re-hearing the Petitioner's appeal, by its order dated 22nd February 2011 (P8) found no basis to interfere with the decision of the PSC dated 12th January 2007, and accordingly dismissed the Petitioner's appeal. It is against this order of AAT that the Petitioner invoked the jurisdiction of the Court of Appeal under Article 140 of the Constitution.

We have carefully examined the submission of learned Counsel for the Petitioner as well as the learned State Counsel, and we are of the view that in all the circumstances of this case, the Court of Appeal did possess jurisdiction to hear and determine the application filed before it. AAT is not a body exercising any power delegated to it by PSC, and is an appellate tribunal constituted in terms of Article 59 (1) of the Constitution having the power, where appropriate, to alter,

vary or rescind any order or decision of the PSC. When refusing notice, the Court of Appeal has not held that it has no jurisdiction to hear and determine the matter in view of Article 61A of the Constitution, and probably had other reasons for refusing notice.

In these circumstances, the preliminary objection has to be overruled, as we are of the opinion that the application of the Petitioner seeking special leave to appeal from the impugned decision of the Court of Appeal has to be considered on its merits. In arriving at this decision this Court has not given its mind fully to the legal effect of Section 8 (2) of the Administrative Appeals Tribunal Act No. 4 of 2002, and in particular to the effect of the provisions of Section 22 of the Interpretation Ordinance No. 21 of 1901, as subsequently amended, as the preliminary objection raised by learned State Counsel was confined to Article 61A of the Constitution.

Accordingly, the preliminary objection is overruled, and the application will be fixed for support on a date convenient to Court. There shall be no order for costs in all the circumstances of this case.

RATNAYAKE J. – I agree

IMAM J. – I agree.

Preliminary objection overruled.

Application to be fixed for support.