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PRIYANTHI CHANDRIKA JINADASA V. PATHMA HEMAMALI AND 4 OTHERS

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, C.J.,
RATNAYAKE, P.C., J. AND
EKANAYAKE, J.
S.C. (HC) CALA NO. 99/2008
WP/HCCA/GPH NO. 62/01 (F)
D.C.GAMPAHA NO. 33465/L
NOVEMBER 8TH , 2010

Supreme Court Rules of 1990 – Rule 7 – Every application for special leave to appeal shall be made within six weeks of the order, judgment, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought – Rule 20(3) – where the Court of Appeal does not grant or refuses to grant leave to appeal, an application for special leave to appeal to the Supreme Court may be made in terms of Rule 7.

The judgment of the High Court was delivered on 15.07.2008. In terms of the Supreme Court Rules, 1990, the time limit within which leave to appeal applications are to be filed is six (06) weeks from the impugned judgment and accordingly, the application for leave to appeal should have been filed on or before 26.08.2008. However, the present application had been filed only on 01.09.2008. The Defendents – Respondents raised a preliminary objection that it had been filed out of time.

The Petitioner took up the position that since this was an application for leave to appeal from a judgment of the High Court, the Supreme Court Rules of 1990 would not be applicable to such an application. Consequently, it was contended that in the absence of Rules for this type of applications, the concept that applications must be filed within 'a reasonable time' should be applicable. It was also submitted that attention should be given to the circumstances of this application.

Held:

(1) An application for leave to appeal from the High Court (Civil Appeal) of the Provinces to the Supreme Court should be filed within 42 days from the date of the judgment.

(2) The language used in Rule 7 of the Supreme Court Rules of 1990 clearly shows that the provisions laid down in the said Rule are mandatory and that an application for leave to appeal should be made within six weeks of the order, judgment, decree or sentence of the Court below of which leave is sought from the Supreme Court. In such circumstances it is imperative that the application should be filed within the specified period of six weeks.

(3) It is not possible to consider the contended circumstances as mitigating factors when the Petitioner had failed to take all steps to ensure that the leave to appeal application is preferred within the stipulated time limit.

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

> "…I hold that the petitioner had not complied with the Supreme Court Rules of 1990. A long line of cases of this Court had decided that non compliance with Rule 8(3) as well as Rule 28(3) would result in the dismissal of an application for leave from this Court."

Cases referred to:

1. *George Stuart and Co. Ltd. V. Lankem Tea and Rubber Plantations (Pvt.) Ltd.* - --(2004) 1 Sri L.R. 246
2. *Nirmala de Mel V. Seneviratne* --- (1982) 2 Sri L.R. 569
3. *Jafferjee V. Perera* – C.L.W. Vol. 79 pg. 81
4. *L.A. Sudath Rohana V. Mohamed Zeena & others* – S.C. H.C. C.A.L.A. No. 111/2010 – S.C. Minutes of 17.3.2011
5. *K. Reaindran V. K. Velusomasundram* – S.C. (Spl.) L.A. Application No. 298/99 – S.C. Minutes of 07.02.2000
6. *N.A. Premadasa V. The Peoples' Bank* – S.C. (Spl.) L.A. Application No. 212/99 – S.C. Minutes of 24.02.2000
7. *Hameed V. Majibdeen and others – S.C. (Spl.) L.A. Application* No. 38/2001 – S.C. Minutes of 23.07. 2001

8. *K.M. Samarasinghe V. R.M.D. Ratnayake and others* – S.C. (Spl.) L.A. Application No. 51/2001 – S.C. Minutes of 27.07.2001
9. *Soong Che Foo V. Harosha K. De Silva and others* – S.C. (Spl.) L.A. Application No. 184/2003 – S.C. Minutes of 25.11.2003
10. *C.A. Haroon V. S.K. Muzoor and others* – S.C. (Spl.) L.A. Application No. 158/2006 – S.C. Minutes of 24.11.2006
11. *Samantha Niroshana V. Senerath Abeyruwan* – S.C. (Spl.) L.A. Application No. 145/2006 – S.C. Minutes of 02.08.2007
12. *A.H.M. Fowzie and two others V. Vehicles Lanka (Pvt.) Ltd. – 2008 B.L.R. 127*
13. *Woodman Exports (Pvt.) Ltd. V. Commissioner-General of Labour – S.C. (Spl.) L.A. Application No. 335/2008 – S.C. Minutes of 13.12.2010*

APPLICATION for leave to appeal to the Supreme Court from judgment of the High Court of the Western Province (Civil Appeals)

Hemasiri Withanachchi for the Petitioner

Manohara de Silva, P.C., with *Pubudini Wickramaratne* for the Defendants - Respondents - Respondents

Cur-adv.vult

July 07th 2011

DR. SHIRANI A. BANDARANAYAKE, CJ.

This is an application for leave to appeal from the judgment of the High Court of the Western Province (Civil Appeals) holden at Gampaha dated 15.07.2008. By that judgment the learned Judges of the High Court had dismissed the appeal of the plaintiff-appellant, now deceased. Thereafter the widow of the said plaintiff-appellant (hereinafter referred to as the petitioner), preferred an application before this Court for leave to appeal.

When this application for leave to appeal was taken for support, learned President's Counsel for the defendants-

respondents-respondents (hereinafter referred to as the respondents) raised a preliminary objection stating that the application for leave to appeal is out of time.

Since a preliminary objection was raised, both parties were heard on the said objection.

Learned President's Counsel for the respondents submitted that the judgment of the High Court was delivered on 15.07.2008 and in terms of the Supreme Court Rules, 1990, the time limit within which leave to appeal applications are to be filed is six (06) weeks from the impugned judgment and therefore the said application for leave to appeal should have been filed on or before 26.08.2008. Since the present application had been filed only on 01.09.2008, learned President's Counsel contended that it had been filed out of time.

Learned Counsel for the petitioner took up the position that since this is an application for leave to appeal from the judgment of the High Court, the Supreme Court Rules of 1990 would not be applicable to such an application. Accordingly, it was contended that since there are no Rules for this type of applications, the concept that applications must be filed within 'a reasonable time' should be applicable. It was also submitted that attention should be given to the circumstances of this application which warrants the indulgence of this Court.

Having stated the submissions made by the learned President's Counsel for the respondents and the learned Counsel for the petitioner, let me now turn to consider the said submissions on the basis of the preliminary objection raised by the learned President's Counsel for the respondents.

The Supreme Court Rules of 1990, deal with many matters pertaining to appeals, applications, stay of proceedings and applications under Article 126 of the Constitution.

Part 1 of the said Rules, refers to three types of applications dealing with leave, which includes special leave to appeal, leave to appeal and other appeals. Rule 7 which is under the category of applications for special leave to appeal from the judgments of the Court of Appeal clearly states that such an application should be made within six seeks (6) of the impugned judgment. The said rule is as follows:

> "Every such application shall be made within six weeks of the order, judgment, decree of sentence of the Court of Appeal in respect of which special leave to appeal is sought."

In terms of Rule 7, it is quite clear that any application for special leave to appeal should be made within six weeks from the order, judgment, decree or sentence of the Court of Appeal on which such leave is sought.

It is however to be borne in mind that the said Rule 7 deals only with applications for special leave to appeal from the judgments of the Court of Appeal and the present application for leave to appeal is from a judgment of the Civil Appellate High Court of the Western Province holden at Gampaha.

As stated earlier categories B and C of Part I of the Supreme Court Rules, 1990 deal with leave to appeal and other appeals, respectively. Whilst the category of leave to appeal deals with instances, where Court of Appeal had granted leave to appeal to the Supreme Court, other appeals refer to all other appeals to the Supreme Court

from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal. Thus, it is evident that the present application for leave to appeal from the judgment of the High Court of the Western Province (Civil Appeal) holden at Gampaha would come under the said category C. The said section 28(1), which refers to such appeals is as follows:

> "28(1) Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal" (emphasis is added).

It is therefore not correct to state that there are no rules made by the Supreme Court that would be applicable to applications for leave to appeal from the High Court of the Province to the Supreme Court.

Considering the preliminary objection raised by the learned President's Counsel for the respondent, it is also necessary to be borne in mind the nature of this application. It is not disputed that in this case the petitioner had filed action in the District Court of Gampaha seeking, *Inter alia,* a declaration that the petitioner is entitled to the land described in the schedule to the plaint and a decree evicting the respondents from the land in question and placing the petitioner in vacant possession.

Direct applications for leave to appeal from the High Court to the Supreme Court came into being only after the establishment of High Courts of the Provinces. Until such time, according to the procedure that prevailed, such applications were preferred from the order, judgment, decree or

sentence of the Court of Appeal. In such circumstances, if the Court of Appeal had not granted leave to appeal, an application could be made to the Supreme Court for special leave to appeal. Rules 19 and 20 of the Supreme Court Rules refer to this position and Rule 20(3) in particular, deals with the time frame in such applications. The said Rule 20(3) is as follows:

> "Where the Court of Appeal does not grant or refuses to grant leave to appeal, an application for special leave to appeal to the Supreme Court may be made in terms of Rule 7."

Rule 7 clearly states that every such application shall be made within six weeks of the order, judgment, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought.

Accordingly it is quite clear that a litigant, who is dissatisfied with the decree of a criminal matter, which had come before the High Courts (Civil Appellate) of the Provinces would have to prefer an application before the Supreme Court within six (6) weeks of the order, judgment, decree or sentence in question.

This position was considered by the Supreme Court in the light of the situation regarding an application made on the basis of an Arbitral Award in *George Stuart and Co. Ltd. V Lankem Tea and Rubber Plantations (Pvt.) Ltd.*[1], where it was stated that,

> "When no provision is made in the relevant Act, specifying the time frame in which an application for leave to appeal be made to the Supreme Court and simultaneously when there are Rules providing for such situations,

the appropriate procedure would be to follow the current Rules which govern the leave to appeal application to the Supreme Court. **Consequently such an application would have to be filed within 42 days from the date of the Award"** (emphasis added).

Accordingly, it is evident that an application for leave to appeal from the High Court (Civil Appeal) of the Provinces to the Supreme Court should be filed within 42 days from the date of the judgment.

It is not disputed that the judgment of the High Court was delivered on 15.07.2008. It is also not disputed that the petitioner had filed this leave to appeal application on 01.09.2008. It is therefore quite apparent that the petitioner had filed her application for leave to appeal well after 42 days and therefore the petitioner had not complied with the Supreme Court Rules 1990.

Learned Counsel for the petitioner contended that although there is a delay in filing the leave to appeal application, it was not intentional and was due to circumstances which prevailed at that time. His position was that the original plaintiff-appellant had passed away on 15.08.2008 and that considering the social and cultural background of our society it is common knowledge that during a period, where there had been a bereavement of a close relative, the matters connected therein would take precedence over litigation.

Learned Counsel for the petitioner contended that even though the Supreme Court Rules may specify a time limit in preferring an application to the Supreme Court for leave to

appeal, there could be a waiver with regard to the said time frame based on the discretion of the Court. Learned Counsel for the petitioner relied on the decisions in *Nirmala de Mel v Seneviratne*[2], and *Jafferjee v Perera*[3].

In *Nirmala de Mel v Seneviratne (supra)*, the preliminary objection raised by the respondent was on the basis that the petitioner in that case had no status to file the appeal before the order of Court to substitute her and the appeal was out of time. The Court whilst holding that it was within time since it was filed on a Monday, which was the next working day and therefore had been within time had also held that the petitioner could file the petition of appeal prior to being ordered to be substituted for the reason that there was a *lacuna* in the Supreme Court Rules and therefore the said steps taken could be regarded as regular.

It is to be noted that *Nirmala de Mel v Seneviratne (supra)* is a case decided well before the present Supreme Court Rules came into being. In the present application as clearly stated earlier, the facts are totally different to *Seneviratne's (supra)* case. As has been stated clearly, there is no *lacuna* in the Supreme Court Rules and the said Rules are quite clear on the time limit permitted for such application.

In *Jafferjee and others (supra)* it was apparent that there had been compliance with the conditions on which conditional leave was obtained long before the time limit imposed by Court for such compliance was over.

The question that arises in the context of the aforementioned decisions is that, in terms of the provisions laid down

in Rule 7 of the Supreme Court Rues, 1990 as to whether there is a discretion for the Court to ignore or vary the stipulated time period of 42 days.

As clearly stated in *L.A. Sudath Rohana v Mohamed Zeena and others*(4) Rules of the Supreme Court are made in terms of Article 136 of the Constitution, for the purpose of regulating the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure, which guides the Courts of civil jurisdiction, the Supreme Court Rules regulates the practice and procedure of the Supreme Court.

The language used in Rule 7, clearly shows that the provisions laid down in the said Rule are mandatory and that an application for leave for this Court should be made within six weeks of the order, judgment, decree or sentence of the Court below of which leave is sought from the Supreme Court. In such circumstances it is apparent that it is imperative that the application should be filed within the specified period of six (6) weeks.

The position taken up by the petitioner was that the original plaintiff had obtained a copy of the judgment of the High Court with a view to lodge an application for leave to appeal in this Court, but had been seriously taken ill and died on 15.08.2008. The petitioner submitted that she had to attend to the funeral of the original plaintiff, being her husband and the religious ceremonies and due to that she could not prefer this application within the stipulated time period.

It is to be noted that the judgment of the High Court was delivered on 15.07.2008 and the original plaintiff had died

one month later on 05.08.2008. The present petitioner, who is the widow of the original plaintiff, had stated in her petition that by the time she sought legal advice from her Attorney-at-Law, she was informed that the appealable period of time had lapsed.

It is therefore quite clear that the petitioner was fully aware that by the time she took steps to prefer an application for leave to appeal before this Court, that appealable period of time had lapsed. Further it is to be borne in mind that in any event the original plaintiff-appellant had not filed an application for leave to appeal from the judgment of the High Court before his demise.

Considering all the circumstances it is apparent that it is not possible to consider those as mitigating factors when the petitioner had failed to take all steps to ensure that the leave to appeal application is preferred within the stipulated time limit.

For the reasons aforesaid, I hold that the petitioner had not complied with the Supreme Court Rules of 1990. A long line of cases of this Court had decided that non compliance with Rule 8(3) as well as Rule 28(3) would result in the dismissal of an application for leave from this Court (*K. Reaindran v. K. Velusomasundram*[5], *N.A. Premadasa v. The People's Bank*[6], *Hameed v Majibdeen and others*[7], *K.M. Samarasinghe v R.M.D. Ratnayake and others*[8], *Soong Che Foo v. Harosha K. De Silva and others* [9] *C.A. Haroon v S.K. Muzoor and others*[10], *Samantha Niroshana v Senarath Abeyruwan*[11], *A.H.M. Fowzie and two others v Vehicles Lanka (Pvt.) Ltd.*[12], *Woodman Exports (Pvt.) Ltd. v Commissioner-General of Labour*[13], *L.A. Sudath Rohana v*

Mohamed Zeena and others (supra). It is also to be noted that in *George Stuart and Co. Ltd. (supra)*, the application for leave to appeal was rejected since it was filed out of time.

In the circumstances, for the reasons aforesaid, I uphold the preliminary objection raised by the learned President's Counsel for the respondents and dismiss the petitioner's application for leave to appeal.

I make no order as to costs.

RATNAYAKE, P.C., J. - I agree.

CHANDRA EKANAYAKE, J.- I agree.

Preliminary objection upheld. Application for Leave to Appeal dismissed.

JAYAWARDENE V. OBEYSEKERE AND 5 OTHERS

SUPREME COURT
J.A.N. DE SILVA, C.J.,
AMARATUNGA, J. AND
MARSOOF, J.
S.C. (CHC) APPEAL NO. 21/2009
H.C. (CIVIL) NO. 28/2008
S.C. (CHC) APPEAL NO. 22/2009
H.C. (CIVIL) NO. 30/2008
S.C. (CHC) APPEAL NO. 23/2009
H.C. (CIVIL) NO. 28/2008
AUGUST 31ST, 2010

Civil Procedure Code – Section 6, 7, 8, 375, 393 – If the right to sue on the cause of action survives to the surviving plaintiff/s or against the surviving defendant/s upon the death of one out of several plaintiffs or defendants, action to proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants – Summary - Regular Procedure. Companies Act 7 of 2007 - Section 224.

The 1st, 2nd and 3rd Petitioner-Respondents instituted two actions before the Commercial High Court of Colombo in terms of Section 226 of the Companies Act, No. 7 of 2007. Whilst the two cases were pending, the 3rd Petitioner - Respondent died. The learned President's Counsel for the Petitioner-Respondents took up the position that the case could proceed without effecting any substitution in place of the deceased 3rd Petitioner-Respondent. Accordingly no substitution was made in place of the deceased party. The learned President's Counsel appearing for the Appellant and the Respondent- Respondents submitted that substitution in place of the deceased party was mandatory and that the action could not proceed any further without effecting such substitution.

The learned High Court Judge permitted the Petitioner-Respondents to proceed with the action. This appeal is preferred against the said order made on 11th May 2009 by the learned High Court Judge.

HELD:

(1) Unless the operation and the application of the Civil Procedure Code is expressly prevented, the regular procedure of the civil procedure must be applied. Section 8 of the Civil Procedure Code should be understood as providing for the application of regular procedure where-

(a) the Civil Procedure Code does not provide for summary procedure

(b) any other law does not provide for summary procedure

(c) where a law does not provide for any other procedure

Per J.A.N. de Silva, C.J.-

"I am firmly of the view that the broad and inclusive definition given to the term cause of action in Section 5 as well as in innumerable cases should not be limited… The wording in Section 7 cannot restrict Section 6 and the meaning attached to the term cause of action …"

"Therefore in conclusion, I am of the opinion that the circumstances of this case attract the provisions of the Civil Procedure Code, and specifically Section 393."

(2) Per J.A.N. de Silva, C.J.,

"… I hold that the facts of the case attract Section 393 of the Civil Procedure Code and that a cause of action survived to the plaintiffs "alone". But the plaintiffs failed to satisfy the second requirement of making an application by way of summary procedure and therefore the plaintiffs are prevented fatally from proceeding any further".

Cases referred to:

1. *Duhilanomal and Others V. Mahakanda Housing Co. Ltd. 1982(2) Sri. L.R. 504*
2. *Gajanand V. Sardarmal – AIR 1961 Raj. 223*

APPEAL from an order of the Commercial High Court (Colombo)

S.A. Parathallingam, P.C., with *Rajindra Jayasinghe* and *Ranil Angunawela* for the 3rd Respondent – Appellant

Romesh de Silva, P.C., with *Aritha Wickramanayake, Chanaka de Silva, Aruna Samarajeewa, Sugath Caldera, Shanaka Cooray* and *Eraj de Silva* for the 1st and 2nd Petitioners – Respondents

D.S. Wijesinghe, P.C., with *K. Molligoda* for the 2nd Respondent – Petitioner in SC (CHC) Appeal 23/2009

Nihal Fernando, P.C., with *Rajindra Jayasinghe* for the 3rd Respondent – Petitioner in SC (CHC) Appeal 23/2009

Shanaka Amarasinghe for the 4th Respondent–Respondent *M.A. Sumanthiran* for the 1st Respondent Company

Cur.adv.vult

July 07th 2011

J.A.N. DE SILVA CJ

This is an appeal from an order of the Commercial High Court of Colombo. The 2nd Respondent - Appellant (hereinafter referred to as the Appellant) seeks to set aside the order of the learned High Court Judge dated 11th May 2009. This Order was challenged in all three cases, this court decided to amalgamate all three cases together to deliver judgment.

The facts of this case in so far as they are relevant to this application are as follows.

The 1st, 2nd and 3rd Petitioner-Respondents instituted two actions before the Commercial High Court on the same day in terms of section 226 of the Companies Act No 7 of 2007. Perusal of the trial record indicates that court was informed of the death of the 3rd Petitioner-Respondent on the 15th of October 2008, which was the date fixed for the filing of objections by the Appellant and the Respondent-Respondents.

It is at this point that controversy arose as to the direction with which the action should proceed thenceforth. The learned Counsel appearing for the 1st, 2nd and 3rd Petitioner-Respondents submitted that the case could proceed without any substitution in place of the 3rd Petitioner-Respondent, and therefore did not seek to substitute any person. The learned Counsel appearing for the Appellant and the Respondent-Respondents submitted that an application for substitution was mandatory and that the action could not proceed any further without such an application having being made.

Parties made extensive oral submissions and also tendered written submissions on the said question. By order dated 11th May 2009 the learned High Court Judge held with the Petitioner-Respondents and permitted the Petitioner-Respondents to proceed with the action. This appeal was preferred against the said order.

The Appellant contends that section 393 of the Civil Procedure Code applies to the aforesaid circumstances. The Petitioner-Respondents contend that the procedure to be followed in respect of disputes arising under the Companies Act 7 of 2007 is *sui generic* and therefore submit that the Civil Procedure Code has limited application to the circumstances of this case.

The Petitioner-Respondents advanced several arguments in this connection which deserve full and careful consideration.

The learned President's counsel for the Petitioner-Respondents drew our attention to section 520 of the Companies Act No. 7 of 2007. The said section reproduced in its entirely is as follows:

(1) Every application or reference to court under the provisions of this Act shall, unless otherwise expressly provided or unless the court otherwise directs, be by way of petition and affidavit, and every person against whom such application or reference is made, shall be named a respondent in the petition and be entitled to be given notice of the same and to object to such application or reference.

(2) Every application or reference made to the court in the course of any proceeding under this Act or incidental thereto, shall be made by motion in writing.

(3) The Registrar shall be entitled to be heard or represented in any application or reference made to the court under this Act at any stage of such application or reference.

(4) In all proceedings before court by way of application or reference under this Act, no order for costs shall be made against the Registrar.

The learned President's counsel for the Petitioner-Respondents also drew our attention to section 6 and 7 of the Civil Procedure Code. Section 6 defines as to what constitutes an action. It reads,

Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action.

Section 7 states that

The procedure of an action may be either "regular" or "summary"

It was then submitted that the procedure found in section 520 of the Companies Act No. 7 of 2007 did not fall into either category and therefore the procedure laid down in the Civil Procedure Code should not apply in respect of disputes arising out of the Companies Act.

Section 8 which was inserted into the Civil Procedure Code as an amendment in 1980 states that unless specifically provided, proceedings should be by way of "regular" procedure.

The Civil Procedure Code itself, despite the wording in section 7 paves the way for another type of proceedings i.e. found in chapter VIII to be followed in respect of liquid claims. The procedure set out therein is distinctly different to the "regular" procedure as well as the "summary" procedure already referred to.

Therefore I think it would be unwise to contend that a procedure found in a statute alien to the forms found in the Civil Procedure Code would not attract the provisions relating to the regular procedure of the Civil Procedure Code.

The legislature may have in its wisdom adopted various procedures to be followed in relation to the diverse actions which it deems appropriate.

Yet unless the operation and the application of the Civil Procedure Code is expressly prevented, I am of the opinion that the regular procedure of the civil procedure must be applied in terms of section 8.

Section 8 states,

Save and except actions in which it is by this Ordinance or any other law specially provided that proceedings may

be taken by way of summary procedure, every action shall commence and proceed by a course of regular procedure, as hereinafter prescribed.

In other words section 8 of the Civil Procedure Code should be understood as providing for the application of regular procedure where,

(a) the Civil Procedure Code does not provide for summary procedure

(b) any other law does not provide for summary procedure

(c) where a law does not provide for any other procedure

I am therefore convinced that the proceedings under scrutiny was found to be an action in which, in addition to the application to the general procedure found in the companies Act, the regular procedure found in the Civil Procedure Code must fill any procedural lacuna.

The learned counsel for the Respondent-Respondent submitted that in any event section 393 applied only to regular procedure adverting to the words found in the section, which are "plaintiff" and "defendant".

I find this submission by the learned president's counsel untenable. Section 375 of the Civil Procedure Code is clear, in that an application by way of summary procedure can be made in the course of an ongoing action whether such action be conducted by way of summary or regular procedure.

Chapter LV of the Civil Procedure Code refers to incidental proceedings. The chapter deals with circumstances ranging

from the death of a party, the assignment of interest of a party, marriage and bankruptcy. These are circumstances that affect any action irrespective of the procedure followed.

Whilst I concede that the words "plaintiff" and "defendant" are suggestive, I do not think that the wording itself should be considered as a compelling reason sufficient to deprive the effect of the statutory provision in respect of actions conducted under "non-regular" procedure.

The learned President's Counsel then attempted to advance the argument that the proceedings in question did not fall within the definition of an action, thereby attempting to take away the specific application of section 393 as well as the pervasive application of the Civil Procedure Code referred to previously.

The learned President's Counsel noted that the term "cause of action" is one which is foreign to the Companies Act, and that its inclusion in section 393 prevents the application of the said section in this instance.

The learned President's Counsel defined the term "cause of action" broadly as a wrong which may result in an action without referring to the definition given to the same in section 5 of the Civil Procedure Code. Thereafter he sought to limit the ambit of that definition with the use of section 7. It was his submission that since the procedure set out in the Companies Act did not fall into either regular or summary procedure, that this "application" would not constitute an action.

I find little merit in this submission. Section 5 defines a cause of actions as

"cause of action" is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury"

The same section defines an action as

"action" is a proceeding for the prevention or redress of a wrong

Section 6 of the Civil Procedure Code states as to what constitutes an action

Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action

Therefore simply put a cause of action is a wrong, for which a relief or redress is obtainable through the exercise of the courts power or authority. The words used in section 5 are inclusive so as to capture varied circumstances in to the fold of a cause of action.

I am firmly of the view that the broad and inclusive definition given to the term cause of action in section 5 as well as in innumerable cases should not be limited as suggested by the learned President's Counsel. The wording in section 7 cannot restrict section 6 and the meaning attached to the term cause of action. Clearly, the tail cannot be seen to wag the dog.

Therefore in conclusion, I am of the opinion that the circumstances of this case attract the provisions of the Civil Procedure Code, and specifically section 393.

I now turn to the application of section 393 of the Civil Procedure Code to the circumstances of this case.

Section 393 in its entirety is as follows.

If there be more plaintiffs or defendants than one and any of them dies, and if the right to sue on the cause of action survives to the surviving plaintiff of plaintiffs alone, or against the surviving defendant or defendants alone, the court shall, on application in the way of summary procedure, make an order to the effect that the action do proceed at the instance of the surviving plaintiff of plaintiffs, or against the surviving defendant or defendants

It appears that section 393 introduces two requirements to be fulfilled before court can issue an order for the action to proceed. Namely,

(a) the right to sue on the cause of action must survive to the surviving plaintiff or plaintiffs alone

(b) an application must be made by way of summary procedure

The Appellant contends that in the instant case neither of the requirements have been fulfilled. The learned President's Counsel for the Appellant drew our attention to section 373 which requires every application by summary procedure to be made upon a duly stamped petition.

It is common ground that no such written application was made. The language of section 373 makes it clear that the requirement is one which is imperative.

I shall first consider as to whether the right to sue on the cause of action survives to the plaintiffs.

The learned President's Counsel for the Appellant took great pains to demonstrate that section 393 had no application to the instant case and that the right to sue survived the death of the 3rd Respondent, to his heirs and therefore the Respondents should have substituted such heirs in place of the 3rd Respondent.

The Action of the 1st to 3rd Respondents have been instituted in terms of section 224 read with section 226 of the Companies Act No 7 of 2007. The petition filed by the respondents before the Commercial High Court states that they are jointly entitled to make the said application. The Appellants refer to certain other paragraphs which also lend credence to the assertion that the application was joint in nature.

The Appellant also draws our attention to the reliefs sought, specifically to prayers (D) and (E) which seek an order seeking the purchase of the collective shares of the petitioners etc.

I am inclined, in considering the said observations made by the learned President's Counsel for the Appellant, to agree with him that the Respondents instituted this action as a joint action.

The learned President's Counsel for the Appellant also sought to demonstrate that the action found in section 224 of the Companies Act No 7 of 2007 is inherently joint in nature and that it was not a personal action in nature.

Section 224 is as follows.

Subject to the provisions of section 226, any shareholder or shareholders of a company who has a complaint against

the company that the affairs of such company are being conducted in a manner oppressive to any shareholder or shareholders (including the shareholder or shareholders with such complaint) may make an application to court, for an order under the provisions of this section.

The language of the section clearly suggests that the right to institute this action is attached to the shareholding. Where a shareholder is of the view that the affairs of the company are conducted in a manner oppressive to him or other shareholders, he may make a complaint.

When such a single complainant dies, a question arises as to whether the right to sue survives and devolves on his/her heirs. Clearly the shares will devolve on the heirs. Any prospective rights attached to the shares must devolve on the heirs as well.

In such circumstances I am of the opinion that the right to sue does not survive to the heirs on the basis that the action requires a shareholder to form an opinion that the affairs are conducted in a manner oppressive to shareholders. With the demise of the complainant, his complaint loses sanctity. Clearly it is available to the heir or any other shareholder to make a fresh complaint. But as far as the original complaint is concerned, it ceases to be of effect with the death of the complainant.

What then is the application of the above principle to a joint complaint? Does it necessarily follow that the surviving complainants may continue with their action so long as they continue to hold the threshold shareholding requirement?

The learned President's Counsel for the Appellant submitted that section 393 has no application in the instant case

on the basis that the cause of action does not survive to the 1st and 2nd Respondents **alone.**

The word "alone" in section 393 has been judicially interpreted in the case of

Duhilanomal and Others v. Mahakanda Housing Co. Ltd.(1)

"Alone", in the context of section 393 of the Civil Procedure Code, means in my view that the survivors are liable to be sued independently without any others being, joined; "alone"does not mean "none else other than the survivor".

A similar view has been taken in India in *Gajanand vs Sarharmal* (2), where the Indian Civil Procedure rules have the identical provisions to our section 393. It was held in that case that,

"The test whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiffs can alone sue or the surviving defendants could alone be sued in the absence of the deceased plaintiff or defendant respectively."

On the strength of the aforesaid authorities prima facie it appears that the surviving complaints could continue the action if each of them satisfy the shareholding threshold.

But the learned President's Counsel for the Appellant contends further that in any event it is section 394 that the instant circumstances attract and not section 393.

Section 394 is as follows.

If there are more plaintiffs than one, and any of them dies, and if the right to sue does not survive to the surviving

plaintiff or plaintiffs alone, but survives to him or them and the legal representative of the deceased plaintiff jointly, the court may cause the legal representative, if any, of the of deceased plaintiff to be made a party, and shall thereupon cause an entry to that effect to be made on the record and proceed with the action.

If the right to sue survives to the heirs as submitted by the Appellant, this application would hinge on a single issue. I.e. whether the right to sue survives to the remaining complainants and the legal representatives of the deceased complainant ***jointly***?

The word "jointly" needs careful interpretation. Clearly it is used in section 394 in a sense directly opposite to the word "alone" found earlier in the same section and in section 393.

It is also relevant to note that section 393 precedes section 394, and that the circumstances envisaged in the said sections are necessarily mutually exclusive. This assertion is given added credence by the use of the words "does not" found in section 394.

Therefore I am of the view that section 394 attracts circumstances where the right to sue survives to the heirs, and where the surviving plaintiffs fail the test laid down in *Gajanand vs Sardarmal, (supra)* making future prosecution to be made jointly a necessity.

For reasons already stated, in the instant case, I am not of the view that a joint prosecution of the case by the remaining complainants and the heirs is necessary.

Therefore I hold that the facts of the case attract section 393 of the Civil Procedure Code and that a cause of action

survived to the plaintiffs "alone". But the plaintiffs failed to satisfy the second requirement of making an application by way of summary procedure and therefore the plaintiffs are prevented fatally from proceeding any further.

In the circumstances, we direct the learned High Court Judge of the Commercial High Court to terminate the proceedings in these two cases pending before him with an order for appropriate costs.

AMARATUNGA J.- I agree.

MARSOOF J.- I agree.

High Court Judge of the Commercial High Court directed to terminate the proceedings in both cases pending before him with an order for appropriate costs

ROSHAN VS. THE ATTORNEY GENERAL

COURT OF APPEAL
ROHINI MARASINGHE.J
SARATH DE ABREW.J
CA 120/2004
HC GAMPAHA 46/2004
MARCH 2, 17, 2009
JULY 9, 17, 2009

Penal Code- Section 300, Section 383 - Identification - Delay in holding - Unlawful detention in Police custody? - Evidence Ordinance Section 27, Section 54, Section 114(d) - Dock statement - Evaluation - Can a conviction be sustained under a section which does not create an offence - Best Evidence Rule - Constitution Article 13 (3)

The accused-appellant was indicted under Section 300, Section 383, Penal Code - after trial without a jury was convicted on both grounds.

In appeal it was contended that there was an improper constitution of the Identification Parade and long delay in holding the parade, that the Doctor who attended on the injuries of the complainant was not called that, the conviction cannot be sustained under a section which does not create an offence and that there was improper evaluation of the dock statement and the improper admission of inadmissible evidence with regard to bad character.

Held:

(1) The parade has been held belatedly 50 days after the event. Court has failed to consider the impact on the unreasonable delay on the ability of the complainant to make a genuine identification. The accused had not been afforded an opportunity to be represented by Counsel at the parade and the parade has been improperly and unfairly constituted.