THE

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[2013] 2 SRI L.R. - PART 3

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DIGEST

Page

2. Whether the Plaintiff Respondent is entitled to recover interest at the rate of 34% per annum as claimed?

As regards to the first question it is the position of the Defendant that the Plaintiff is only entitled to reimbursement of monies paid by the Plaintiff to the beneficiaries under the Letters of Credit and that none of the documents produced by the Plaintiff showed that the Plaintiff had in fact paid monies to the beneficiary under the said Letters of Credit. The question that arises is whether the Defendant took up this position at the trial. The Defendant in its answer did not take up this position nor raised an issue. Further the Defendant did not cross examine the Plaintiff's witness on this point. However after the recording of evidence and the conclusion of the respective cases in its written submissions for the first time the defendant raised this matter.

In its written submissions the Defendant submitted that "the Plaintiff bank has not disbursed or paid to the beneficiaries the sums for which the application for irrevocable Documentary Credit was made and Letters of Credit issued and there is no evidence whatsoever of such payment or disbursement by the Plaintiff. It is respectfully submitted that the memos are not payments or proof that the Plaintiff Bank had paid the monies to the beneficiaries under the respective Letters of Credit."

The Plaintiff's witness while giving evidence stated that when Bank pays the amount due under the Letter of Credit to the beneficiary's Bank it debits the customer's account and forwards a memo to the customer. He testified that the Bank paid the beneficiary's Bank (seller's Bank) the monies due under Letters of Credit and thereafter debited the customer's account. Memos were sent to the customer informing that the payments were made. The Defendant did not challenge this

evidence. If the Defendant raised this point at the trial stage and demanded strict proof of payment, the Plaintiff could have offered additional evidence to supplement or strengthen the evidence already led. The learned High Court Judge did not consider this matter as it was raised for the first time in the written submissions and acted solely on the evidence led at the trial.

It is appropriate at this stage to examine how payments are made under international sales of goods using Irrevocable Letters of Credit. The issuing bank at the request of the buyer undertakes to pay the beneficiary's bank (Seller's Bank) sum of money covered under the Letter of Credit upon receipt of documents relating to the Letters of Credit or on a future date agreed by the parties. Issuing Bank can withhold payment under Irrevocable Letter of Credit only if fraud was established. In this case beneficiary's bank duly submitted the documents under the Letters of Credit to the plaintiff bank. The plaintiff bank accepted the documents and handed over the documents to the Defendant who obtained the release of the goods. In the circumstances the Plaintiff's Bank is liable to pay the amount due under the Letter of Credit to the beneficiary's bank. Similarly the defendant is liable to pay the Plaintiff subject to deferred payment. If the Plaintiff bank did not pay the amount due or in other words dishonored the Letters of Credit the beneficiary's bank could claim the amount from the Plaintiff and also from the Defendant. There was no such claim by the beneficiary's Bank. This supports the Plaintiff's position that the money was duly paid to the beneficiaries Bank.

The Defendant Appellant's next ground of appeal is that there is no basis to charge 34% interest on default payment. The agreement is silent on default interest rate. In such

an instance Bank could adopt the normal default rate of interest. According to the Bank's witness, the Bank charged the rate of interest ordinarily charged from the defaulters in similar transactions. Defendant in its answer took up the position that the Plaintiff is not entitled to charge taxes, levies and interest but however failed to raise this matter as an issue. It is settled law that when issues are raised the pleadings will recede to background and the trial judge is required to decide on the issues.

The Defendant's both grounds of appeal involve questions of fact not raised as issues at the trial stage and for that reason it is precluded from raising at the appeal stage. The principle laid down in of *Candappa nee Bastian vs. Ponnambalampillai* [1] which followed the cases '*The Tasmania*'[2] and *Setha Vs. Weerakoon*[3] is relevant to the facts of this case.

'A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law.'

The questions of facts raised at the argument stage was not raised as issues at the trial stage. The learned High Court Judge correctly decided the case on the issues raised at the trial.

I hold that the judgment of the learned High Court Judge is in order and I see no reasons to interfere with the judgment. Therefore I affirm the judgment of the High Court.

AMARATUNGE, J. – I agree

EKANAYAKE, J. – I agree

Appeal dismissed.

WIMALA HERATH (DECEASED)
SARATHCHANDRA RAJAPAKSHA AND OTHERS
V. KAMALAWATHIE AND ANOTHER

SUPREME COURT
MARSOOF, PC., J.
IMAM, J. AND
WANASUNDERA, PC., J.
S. C. APPEAL NO. 119/2010
NCP/HCCA/ARP/622/2009
D.C. POLONNARUWA NO. 5414/L
NOVEMBER 7, 2012

Land Development Ordinance, No. 19 of 1935 – Permit holder – Any person to whom a permit has been issued for the occupation of State Land under Chapter 300.

The Plaintiff – Respondent – Appellant, Wimala Herath (Plaintiff) filed action in the District Court of Polonnaruwa seeking a declaration that she is the owner of the lands described in the two Schedules 'ඇ" and "ඈ" to the plaint in terms of the permit issued under the Land Development Ordinance and further sought to eject the Defendant – Appellant – Respondents from the land in Schedule "ඈ" , which is in extent of 30 perches and which is situated within the boundaries of the land in extent of 2A, 1R, 26P. referred to is Schedule 'ඇ'.

At the conclusion of the trial in the District Court, the District Judge held inter alia that the Plaintiff was the lawful owner of the lands in both Schedules to the plaint and that the other permits issued to any other person in respect of the said lands are null and void and the Defendants should be ejected from the said land. The Defendants appealed to the Civil Appellate High Court against the judgment of the District Court.

The Civil High Court of Appeal set aside the judgment of the District Court and dismissed the plaint. This appeal is against the judgment of the Civil Appellate High Court.

Held:

(1) There is no provision in the Land Development Ordinance to expunge a portion out of the land already given on a permit and grant a separate permit for the expunged portion, with or without the consent of the first permit holder.

(2) It is only after cancellation of the first permit on lawful grounds, the land could be divided and separate permits could be issued for the divided portions.

APPEAL from an order of the Civil Appellate High Court of the North Central Province holden at Anuradhapura.

Case referred to:

(1) Seenithambi V. Ahamadulebbe – 74 NLR 222

Uditha Egalahewa P.C., with *Gihan Galabadage* for Plaintiff–Respondent–Appellants

W. Dayarathna P.C., with *Shiroma Peiris* and *Nadeeka K. Arachchi* for 2nd Defendant – Appellant – Respondent.

Cur.adv. vult

February 05, 2013

WANASUNDERA, J.

The Plaintiff – Respondent-Appellant Wimala Herath filed action on 16th October 1991 in the District Court of Polonnaruwa in case No. 5414/L seeking a declaration that she is the owner of the lands described in the two schedules " ඇ" and "ඈ" to the plaint under the Permit No. 156 dated 11.8.1987 issued under the Land Development Ordinance and further sought to eject the Defendant-Appellant-Respondents from the land in schedule" " (the 2nd schedule). Schedule to the plaint "ඇ" related to an allotment on land of an extent of 2A. IR, 26P and Schedule "ඈ" referred to a land smaller in extent.

The salient point of fact to be noted in this case is that the 30 perch block of land referred to in Schedule "ඇ" is within the boundaries of the 2A. 1R, 26P. block of land referred to in Schedule "ඇ". In other words land in the 2nd Schedule "ඇ" is part and parcel of land in the 1st Schedule "ඇ". The 30P parcel of land is carved out of the 2A 1R 26P. block of a bigger land bordering the main road named "Wickremasinghe Road".

The Defendant-Appellant-Respondents' position in the District Court in the answer dated 9th March 1995 was that the 1st Defendant – Appellant – Respondent was the holder of a permit for the 30 perch block of land under the Land Development Ordinance permit No. 156A. ie. the land described in Schedule "ඈ" to the plaint which is the 2nd Schedule. Furthermore the Defendant-Appellant – Respondents moved for compensation for improvements done on the land.

At the end of the trial before the District Court the District Judge held in favour of the original Plaintiff and delivered judgment dated 15.08.2001, holding that,

(a) Plaintiff was the lawful owner of the lands in both schedules to the plaint.

(b) that other permits if any issued to any other person in respect of the said lands were null and void.

(c) that the Defendants and whoever holds under them should be ejected and

(d) ordered compensation of 2 lakhs of Rupees to be paid to the Defendants by the Plaintiffs as compensation for improvements on the land in schedule "ඈ" (i.e. Schedule No. 2)

The Defendants in the District Court case being aggrieved by the judgment of the District Judge appealed to the Civil Appellate High Court of the North Central Province holden at Anuradhapura and the appeal was heard under case No. NCP/HCCA/AR P/622/2009. Judgment of this case was delivered on 17.02.2010, setting aside the judgment of the District Court and thus the plaint was dismissed.

When the Plaintiff-Respondent-Appellants being aggrieved by the judgment of the Civil Appellate High Court sought leave to appeal from this Court, leave was granted on 15.09.2010 on three questions of law contained in paragraph 11(e),(f) and (h) of the Leave to Appeal application to this Court which I would like to enumerate as follows:-

11 (e) Did the Honourable Judges of the said Civil Appellate High Court err in law by holding that the Petitioner, though entitled to the title and the possession of the land morefully described in the Schedule "ඇ" to the plaint on permit bearing No. 156 dated 11th August 1987, that the Respondent was entitled to the land morefully described in the schedule "ඈ" to the plaint on permit bearing No 156/A, which formed part of the land morefully described in the said permit bearing No 156?

(f) Did the Honourable Judges of the said Civil Appellate High Court err in law by holding that it was unnecessary to cancel the permit bearing No. 156 prior to the issuance of permit bearing No. 156A that contained a portion of land morefully described in the permit bearing No 156?

(g) Did the Honourable Judges of the said Civil Appellate High Court err in evaluating the provisions of the Land Development Ordinance No. 19 of 1935 as amended?

The material facts in this case could be summarized as follows for better understanding of the factual background for the purpose of deciding on the contentions of law arisen to be decided by me which in turn would be finally affecting the parties to this case. The Plaintiff in the District Court was Wimala Herath whose husband was D. W. Rajapaksha alias R. A. Dharmawansha. The original permit holder No. 156 for the land of 2A 1R 26P was D. W. Rajapakse in 1946. In 1967 one N. D. Gunathilaka was given permission by D. W. Rajapaksha to run a garage on a portion of the land bordering the main road. That portion of the land was about 30P. When D. W. Rajapakshe died, his wife the Plaintiff, Wimala Herath receivd the said permit under him for lot 156. From 11.08.1987 Wimala Herath was the permit holder. The Govt. Agent granted a permit. 156 A, for the aforesaid 30P. to N. D. Gunathilake on 20.07.1973, after an inquiry and taking into consideration the alleged consent in writing given by the deceased D. W. Rajapaksha. Thereafter N. D.Gunathilaka died and his wife M. D. G. Kamalawathie in turn was issued the said permit 156A for 30P. While the case was pending in the Civil Appellate High Court the Plaintiff Wimala Herath died and the present Plaintiff-Respondent-Appellants are the three children of D. W. Rajapaksha and Wimala Herath.

On the questions of law aforementioned I have viewed the judgment of the Civil Appellate High Court. The permit No. 156 was issued for 2A, 1R, 26P. The Appellants are holding

under that permit and that fact was not an issue at any time. The permit No. 156 is admittedly legal and valid. The Govt. Agent issued permit No. 156A for 30P. which land is situated inside the land described in permit No. 156. According to the provisions of the Land Development Ordinance No. 19 of 1935 as amended, there is no way to expunge a portion out of this land already given on a permit. and grant a separate permit for that expunged portion, with or without the consent of the first permit holders. In fact no permit holder could agree to do so. according to the provisions of law. If at all, the 1st permit could be cancelled on lawful grounds and it is only thereafter that the land could be divided and separate permits be issued. The Govt. Agent at that time has issued permit 156A in the most wrongful way. He has neither considered the provisions of law nor the repercussions which could arise thereafter. In the case of *Seenithambi vs. Ahamadulebbe*[1] the Gal Oya Development Board issued one permit to A in 1954 and another to B in 1960 for the same allotments of land. The Supreme Court held that strict proof of due cancellation of the permit issued to A was necessary before his title could be defeated. The Learned Judges of the Civil Appellate High Court have interpreted the decision of this case in the wrong way and dismissed the plaint. The *ratio decidendi* of that judgment is that once a permit is given for a particular allotment of land without a cancellation of that permit, no other permit granted for the same could be legally valid. It goes without saying that no other permit granted for part of the same land could be legally valid. Therefore it is quite clear in this case that with the admission of both parties, that permit 156 is legally valid and prevailing from that time up to date, that a portion of part of the same land cannot

be expunged and be given to another person on another permit, ie. 156A. Therefore I hold that permit 156A is illegal and void.

The Respondents' argument that permit 156A was given with the consent of the original permit holders and long possession does not hold water in the light of the permit being illegal and void.

I set aside the judgment of the Civil Appellate High Court of the North Central Province holden at Anuradhapura dated 17th February 2010 and uphold the judgment of the District Court of Polonnaruwa dated 15th August 2001. However I order no costs.

MARSOOF, PC. J – I agree.

IMAM, J – I agree.

Appeal allowed.

THILANGA SUMATHIPALA VS. MAHINDANANDA ALUTHGAMAGE, MINISTER OF SPORTS AND OTHERS

COURT OF APPEAL
SRI SANDARAJAH, J., P/CA
CA WRIT APPLICATION 84/2013
APRIL 5, 2013

Sports Law No. 25 of 1973 – National Association of Sports Regulations No. 1 of 2013 – Sri Lanka Cricket – Nomination for post of President – Rejected by Minister – Ultra Vires the powers of the Minister ? – Rejection by the inquiry Committee.

Petitioner handed in his nomination for the post of President Sri Lanka Cricket (SLC). Petitioner was requested to attend a hearing before a Committee appointed by the Minister of Sports, to inquire into the objections made against him. The Petitioner attended the inquiry – gave and Oral evidence. In addition to Appellant's evidence, the Minister sought the advice of the Attorney General – and further that he interviewed the Attorney General. The nomination was cancelled by the Minister.

The Petitioner submitted that the decision of the Minister was arbitrary, capricious and ultra vires, and sought a writ of certiorari to quash that said decision. It was contended that the Minister does not have authority in case of nominations for elections to the National Association, and the authority given to a Minister under regulations 15(2) is to inquire into any objections or disqualifications after a person is elected to a post.

Held:

(1) As regards the power of the Minister under Regulation 15 (2) – it will not stand to reason as Regulations 13, 14 and 15 lay down certain disqualifications and these disqualifications are equally valid to be a nominee for election to a National Association or to be a Member of any National Association.

(2) It is the duty of the Minister and the Director – General to see that only qualified persons are nominated for election.

(3) Grounds stipulated in Regulation 15 are serious allegations that would disqualify a person, to hold a position in the National Association. As such, a person who is disqualified under this provision necessarily will be disqualified for nomination.

(4) Disqualifications mentioned in Regulations 13 and 14 are not serious when considering the disqualification mentioned in the Regulation 15.

Per S. Sriskandaraj, J. (P/CA)

"This Court is of the view that if a nominee is disqualified under regulations 13, 14 or 15 after due consideration of the disqualification, his nomination could be rejected by the Minister.

(5) In a judicial review proceeding this Court cannot consider whether the decision of the Committee/Minister is right or wrong, but this Court can only look into whether the decision arrived at by the Committee/ Minister is legal or illegal.

In the instant case, there is no illegality or ultra vires in the Minister's order.

APPLICATION for a Writ of Certiorari.

Faiz Musthapa, PC with *Navin Marapana* for the Petitioner.

Janak de Silva Deputy Solicitor General, for the 1st, to 5th Respondents

Romesh de Silve, PC with *Shan Gunawardhene* and *Vasantha Kumara* for 6th, 9th and 11th Respondents.

Palitha Kumarasinghe, PC with *Mushid Maharoof* and *R. Silva* for the 7th, 8th and 10th Respondent.

Sanjeewa Jayawardene, PC with *Lakmini Warusavithane* for the 27th, 28th and 29th Respondents.

Gamini Marapana, PC with *V. Wickramasinghe* for the 32nd and 36th Respondents.

Ronald Perera, PC with *B. Chandana Perera* for the 35th, 38th and 39th Respondents.

M.U.M. Ali Sabry, PC with *Sumith Fernando* for the 33nd, 34th and 37th Respondents

Harsha Amarasekare, PC with *H.C. de Silva* for the 30th Respondent.

April 05, 2013

SRISKANDARAJAH, J. (P/CA)

The Petitioner is a Member of Parliament, and he submitted that he was elected as the Vice President of the Board of Control for Cricked in Sri Lanka in the years 1994 and 1997, and the Petitioner was elected as the President of the Board of Control for Cricket in Sri Lanka in the years 1998, 1999, 2000, 2003 and 2005. The Petitioner was a Member of the Organizing Committee for the Wills World Cup and was the President of the Asian Cricket Council in the year 1998.

The Petitioner on 26th of February 2013, handed in his nomination papers for the post of President of Sri Lanka Cricked, to the Director-General of Sports (5th Respondent) with copies sent to the Secretary to the Ministry of Sports (2nd Respondent), to the Secretary, Sri Lanka Cricket (9th Respondent) and filed an affidavit confirming his eligibility to stand for the said election. On the 4th of March 2013, the Petitioner was requested to attend a hearing on 11th March 2013 before a Committee appointed by the Minister of Sports, to inquire into the objections made against the Petitioner by the 27th, 28th and 29th Respondents, and on a request made by the Petitioner, the Petitioner was informed the names of the Members of the Committee, and the Committee was appointed under the Sports Law No. 25 of 1973 read with Regulations framed thereunder. The Petitioner attended the said inquiry and submitted an affidavit and also has given oral evidence.

The Petitioner also submitted that he came to know that the Honourable Minister had referred the Report of the

Inquiring Committee to the Honourable Attorney-General. He further submitted that his Attorney-at-Law sought an interview with the Hon. Attorney-General and interviewed the Attorney-General on the 25th of March 2013 at his Chambers.

The Petitioner contended that the decision of the Minister of Sports to cancel his nomination, which is reflected in the letter dated 25th March 2013, addressed to the Secretary to Sri Lanka Cricket is unlawful, arbitrary, capricious and ultra vires and it ought to be quashed by an issue of writ of certiorari.

The nomination for Sri Lanka Cricket is governed by National Association of Sports Regulation No. 1 of 2013. Regulation 12 provides that the office-bearers and Committee Members of National Association shall be elected at the Annual General Meeting for a term which shall consist of a period of 2 years. Any vacancy occurring for the offices of President, Secretary or Treasurer may be filled at a special General Meeting; any other vacancy may be filled at a Committee Meeting, subject to the regulations, at the Annual General Meeting.

Regulation 13(1) provides: No person who has served a term of office as President, Secretary, Treasurer, Vice-President, Assistant Secretary, Assistant Treasurer of any National Association or Federation for one term shall be eligible for re-election for any of the above posts: provided the the above restriction shall not apply if the written permission of the Minister to whom the subject of Sports has been assigned is obtained for such re-election of office bearers.

Regulation 14 provides that "No person shall be nominated for election as officer-bearer or Committee Member in any National Association other than the Treasurer or Assistant Treasurer of that Association, unless he has represented Sri Lanka in the respective sports or in a Major Tournament, meet or competition registered, promoted, conducted or approved by that Association, in more than two occasions for a team sports and at least on one occasion for an individual event or sport. Any other person may be nominated for election with a prior written approval of the Minister.

Regulation 15(1) provides that "A person shall be disqualified from being elected or otherwise to hold or continue to hold any paid or unpaid office or to hold any paid or unpaid post or to be a member of a Committee of any National Association or to be nominee of an affiliated club or organization in a National Association, if:-

(a) He is or has been adjudged by a competent court to be of unsound mind;

(b) He is or has been adjudged by a competent court to be insolvent;

(c) he is or has been convicted in a court of law for any offence and imprisonment for not less than six months.

(d) He is a professional journalist in electronic or print media or an owner of such network;

(e) He is a parent or sibling of a competitor in that particular Sports in National Pool or National Team;

(f) He is currently a coach or referee of a team or an individual competitor but if there is no other eligible

competitor from that Association, such person should obtain permission of the Minister;

(g) He is a player, agent or manager of a Sports personnel;

(h) He is a non-national of Sri Lanka;

(i) He is directly or indirectly involved in the manufacture, assembly, production, sale or distribution of sports goods, gear any item or equipment relating or such Sport.

(j) He is directly or indirectly involved in carrying out the business of gaming;

(k) He is employed in the Ministry of Sports unless the written approval of the Minister has been obtained.

(l) He is a member of the Armed Forces who has been deprived of his Commission.

(m) He is convicted for the offence of money laundering under the provisions of the Prevention of Money Laundering Act No. 5 of 2006; or

(n) A person who represented the country with the approval of the Minister of Sports for an activity related to sport and had not returned on time.

(2) The Minister shall upon being satisfied after due inquiry, that a person is disqualified from being elected or otherwise, to hold or continue to hold any paid or unpaid post or to be a member of a committee of any National Association or to be the nominee of an affiliated club or organization in a National Association, under paragraph (1) of this regulation, forthwith direct that such person be removed from the said office, post, Committee or be removed from his position of nominee.

Regulation 16 provides: "All nominations for elections as office-bearers and Committee Member of a National Association shall be proposed by the President or Secretary of any member club or organization eligible to vote and seconded by the President or Secretary of any other member club or organization eligible to vote. Such nomination together with their Bio-Data shall be handed in or posted to reach the Director-General at least thirty days before the date fixed for the Annual General Meeting. Thereafter the Director-General or Director-General's representative shall open the nominations at a special Committee Meeting of such Association. A copy of nomination papers with applicants Bio-Data shall be sent to the Ministry at least thirty days before the Annual General Meeting."

From the above scheme of accepting nomination, it could be seen that Regulation 13, Regulation 14 and Regulation 15 lay down certain disqualifications for a person to be a Member of a Committee of any National Association. It also could be seen that when the nominations for election of office-bearers are submitted, it is mandatory to submit a Bio-Data of the Applicant and the nomination paper with the Bio-Data has to be sent to the Director-General and to the Ministry at least 30 days before the Annual General Meeting.

The above provisions show that there is a time period of one month given for the relevant authorities to consider the nomination, and also to consider whether these nomination papers are duly submitted and whether the applicants are qualified to be elected as provided by the Regulations and, if the Minister or the Director-General found that there is any disqualification of an applicant or, if an objection is raised

against the nomination of the Applicant, the Minister is empowered to reject the said nomination if he is satisfied that the applicant is disqualified to contest in the said election.

The learned Counsel for the Petitioner submitted that the Minister does not have such an authority, in case of nominations, for election to the National Association, and the authority given to the Minister under Regulation 15(2) is to inquire into any objections or disqualifications after a person is elected to a post. The above submissions will not stand to reason as Regulations 13, 14 and 15 lay down certain disqualifications and these disqualifications are equally valid to be a nominee for election to a National Association or to be a Member of any National Association. It is the duty of the Minister and the Director-General to see that only qualified persons are nominated for election and, if the Minister or the Director-General, after receiving the nomination, or after perusing the Bio-Data, sent by the nominee or, if he receives any objection, the Minister is entitled to inquire into the matter to see whether the nomination could be accepted in the given circumstances.

In this instance, the Minister, after receiving the nomination of the Petitioner, had received objections that the Petitioner is not qualified to be a nominee to a National Association. In these circumstances the Minister has appointed a Committee to inquire into that matter, and the Petitioner was given an opportunity to present his case before the Committee, and the Petitioner has submitted an affidavit to the objections raised against him, and he has also given oral evidence and documents in support of his contention. The Committee, after considering the submissions of the Petitioner, has submitted

a report to the Minister and the Minister, before taking any decision, has sought the advice of the Attorney-General, and the Petitioner was also given an opportunity by the Attorney-General to interview the Attorney-General on the request of the Petitioner. Thereafter the Minister has decided that the Petitioner is disqualified to be nominated and he has cancelled the nomination.

A perusal of the Committee Report shows that the Committee has considered the objections raised and, in particular, the objection that the Petitioner is directly or indirectly involved in carrying out the business of gaming, and the Committee has given its report, with its reasons to the Minister. The Minister, after considering this report, had arrived at the conclusion that the Petitioner's nomination for the post of President of Sri Lanka Cricket should be rejected. This was communicated by the Minister by his letter dated 25th March 2013 to the Secretary to the Sri Lanka Cricket, and the Secretary to the Sri Lanka Cricket, by its letter dated 29th March 2013, had informed the Petitioner, that in view of the directive issued by the Honourable Minister of Sports dated 25th March 2013, the Executive Committee of Sri Lanka Cricket, at its meeting held on 28th March 2013, rejected the Petitioner's nomination.

The learned Counsel for the Petitioner submitted that the said order of the Minister and the Secretary to the Sri Lanka Cricket is ultra vires the powers of the Minister and the Sri Lanka Cricket, for the reason that there is no provisions under the Regulations that a nomination should be rejected on the grounds stipulated in Regulation 15. The learned Counsel's submission is that the grounds stipulated in

Regulation 15 can only be considered after a candidate is being elected. The grounds stipulated in Regulation 15 are serious allegations that would disqualify a person, to hold a position in the National Association. As such, a person who is disqualified under this provision necessarily will be disqualified for nomination. The disqualification mentioned in Regulations 13 and 14 are not serious when considering the disqualification mentioned in Regulation 15. Therefore, it cannot be heard to say that a nomination can only be cancelled if a nominee is disqualified under Regulation 13 or 14, but not under Regulation 15. Therefore, this Court is of the view that if a nominee is disqualified under Regulations 13, 14 or 15, after due consideration of the disqualification, his nominations could be rejected by the Minister. Calling for Bio-Data and a period of 30 days is to consider the nomination before an Annual General Meeting, by the Director General and the Ministry of Sports to the eligibility of the nominee to contest the said election.

The objection raised against the Petitioner was brought to the notice of the Petitioner and he was given a fair hearing to meet the objections raised against him and, after consideration, the Committee has submitted a Report to the Minister. The said Report was submitted to Court by the Deputy Solicitor General. The said Report has reasons for its decision. The Committee has taken relevant matters into consideration in arriving at recommendation. In a judicial review proceedings this Court cannot consider whether the decision of the Committee/Minister is right or wrong, but this Court can only look into whether the decision arrived at by the Committee/Minister is legal or illegal. The Minister is empowered to appoint a Committee to look into the allegations. The

Committee, after giving a fair hearing, has submitted a Report with reasons to the Minister, and the Minister, after considering the said Report, had arrived at the conclusion that the Petitioner's nomination should be rejected as he is disqualified under Regulation 15. In these circumstances there is no illegality or ultra vires in the Minister's order and, therefore, this court refuses to issue notice on the Respondents.

Application dismissed.

SUMANAPALA AND OTHERS VS. MAITHRIPALA

SUPREME COURT
SARATH SILVA, PC, CJ.
SALEEM MARSOOF, PC, J AND
SOMAWANSA, J.
SC 63/2005
SC SPL LA 329/2003
CA 318/95 [F]
DC BANDARAWELA 360/L
MARCH 6, AND 20, 2007
SEPTEMBER 11, 2008

Admissibility of oral evident to prove contract – Section 91, Section 92 – Evidence Ordinance – Rent Act No. 7 of 1972 – Section 22 – Is it open to a party to show that a contract was a sham?

The plaintiff – respondent sought to eject the defendant - appellant from the premises in question on the basis that the period of 5 years for which the appellant had purported to sell to the defendant – appellant his ongoing business has expired. The defendant appellant in his answer stated that, the agreement though couched as a sale of an ongoing business was in fact an agreement to let out a defined portion of the said premises at a rent of Rs. 150/- per month and it was formulated to circumvent the provisions of the Rent Act and sought the dismissal of the action.

The trial Court held with the defendant – the Court of Appeal affirmed the finding of the trial Judge. The trial Judge came to the conclusion that at the time of executing the agreement, the plaintiff did not carry on the stated business in the relevant portion of the premises and that the agreement was a sham intended to circumvent the provisions of the Rent Act.

On appeal to the Supreme Court,

Held:

(1) Section 92 of the Evidence Ordinance would not preclude the parties from showing that the agreement was a fictitious or colorable device which was not intended to create mutual legal objections.

(2) It is clear that the oral evidence referred to in Section 91 and Section 92 is to be excluded only upon the proof of a contract, grant or other disposition of property.

(3) Evidence which is intended to show that there was in fact no contract, grant or other disposition of property would not offend against Section 91 and Section 92.

Per Saleem Marsoof, PC, J.

> "I am therefore of the view that neither Section 91 nor Section 92 can have any application unless there has been in the first instance a contract, grant or disposition of any other property. It is open to a party to a contract to show that the contract was a sham or devoid of genuine agreement".

Per Saleem Marsoof, PC, J.

> "It is clear that the Rent Act applies to even part of the premises – Section 48. It is common ground that the property is situated in an area to which the Rent Act applies. I have no reasons to disagree with the findings of the lower Court, that this agreement was intended to circumvent the provisions of the Rent Act".

APPEAL from the judgment of the Court of Appeal.

Cases referred to:-

1. *Wickremaratne vs. Thavendararajah* – (1982) 2 Sri LR 479 [SC]
2. *Wickremaratne vs. Thavendararajah* – (1982) – 1 Sri LR 21 [CA]

Gamini Marapana, PC with *Kirthi Sri Gunawardene* and *Navin Marapana* for plaintiff – appeallant – appellant.

Rohan Sahabandu for defendant – respondent – respondent.

September 11, 2008

SALEEM MARSOOF, J.

The original Plaintiff-Appellant – Appellant (hereinafter referred to as the Appellant) instituted this action in the District Court of Bandarawela in 1981 against the Defendant – Respondent – Respondent (hereinafter referred to as the Respondent) seeking *inter alia* to eject the Respondent and all those claiming under him from the premises described in the schedule to the plaint on the basis that the period of five years for which the Appellant had purported to sell to the Respondent his on – going business at No. 51, Main Street, Bandarawela, has expired. It is common ground that by a non –notarial Agreement dated 2nd April 1976, produced marked "P1", the Appellant had purported to hand over the business of "Oilman Stores and Sundry Goods" said to have been carried on in a portion of premises No. 51 Main Street, Bandarawela, in extent 14 – ½' long and 5 ½' wide with road frontage to Main Street, Bandarawela.

In the answer filed by the Respondent in the District Court, he states that the said agreement though couched as a sale of an on-going business. was in fact an Agreement to let out a defined portion of the said premises at a rent of Rs. 150 per month and that it was so formulated to circumvent the provisions of the Rent Act No. 7 of 1972, at the instance of the appellant who was in fact the tenant of one Fred Perera, who admittedly owns the building.

The learned District Judge after hearing evidence came to the conclusion that at the time of executing the Agreement marked "P1", the Appellant did not carry on the business of

"Oilman Stores and Sundry Goods" in the relevant portion of the premises and that the Agreement "P1" was a sham intended to circumvent the provisions of the Rent Act. On Appeal, the Court of Appeal has affirmed the findings of the Learned District Judge, and this Court has granted special leave to appeal against the said decision of the Court of Appeal only on the following question of law:-

"(a) Whether the Court of Appeal has correctly interpreted the document marked "P(1)" dated 2nd April 1976."

Learned President's Counsel for the Appellant emphasized that although the Respondent entered into occupation of the premises in suit under the Agreement marked "P1" on 2nd April 1976, and the period for which the business was sold expired on 1st April 1981, the Respondent has been in continuous occupation of the premises in which the business was carried out for more than 26 years without making any payment whatsoever to the Appellant. He has strongly relied on the language of "P1" to show that it was what it purports to be, namely an agreement to sell an on –going business and the learned District Judge had erred in permitting the Respondent to lead parol evidence regarding the said Agreement in violation of Section 92 of the Evidence Ordinance. Learned President's Counsel also emphasised that the portion of premises No. 51, Main Street, Bandarawela, which was handed over to the Respondent to carry on the business was not a specific area which was permanently demarcated and that the provisions of the Rent Act would therefore not apply.

It is relevant to note that the Agreement "P1" has been entered into on the basis that the Appellant was carrying on the business of "Oilman Stores and Sunday Goods" in the

very portion of premises No. 51, Main Street, Bandarawela, described in the schedule to the plaint.

However, the Appellant has failed to discharge the burden placed on him by law to show that he in fact carried on in 1976 such a business in the said portion of the building at the time of entering into the said Agreement. The overwhelming evidence led at the hearing, shows that the business carried on by the Appellant at the relevant time was that of a hotel and a bakery, which had been carried on in the other portions of the same building bearing assessment Nos. 53 and 55, Main Street, Bandarawela and that portions of premises No. 51 had been rented out by the Appellant to various persons to carry on various types of business. The evidence also shows that previously the father of the respondent had carried on business on another portion of premises No. 51 and paid a rent of Rs. 100 per month to the Appellant. Although the Appellant had denied this position, the Respondent was able to produce in Court receipts issued by the Appellant to his father which clearly show that he had been the tenant of a different portion of the same premises. It is evident that after the father's death the Respondent had agreed to take on rent a larger and different portion of the same premises at the higher rent of Rs. 150 per month, but had been pressurised to pay Re. 9,000 being the rent for five years upfront, which made the Respondent to insist on a formal Agreement through a notary. The Agreement marked "P1" was prepared by Mr. Gnanapala Korele Liyange, Attorney-at-Law and Notary Public, on the instructions of the Appellant, but the said agreement was not notarially executed.

I have no reasons to disagree with the findings of the original Court as well as the Court of Appeal that the Agreement

marked "P1" contains clauses which are totally inconsistent with the sale of a business and which clearly show that it was in essence an agreement to let out a portion of a building. In particular, the Agreement describes the Appellant as the 'Principal' and the Respondent as the 'Agent', and states in Clause 3 thereof that "the Principal, having received the said sum of Rupees Nine Thousand, which he acknowledges hereby, has this day delivered over *possession of the said portion* to the said Agent, who shall be entitled to carry on the said business without any hindrance or obstruction from the Principal or any person claiming under the through him for the full term of five years . . . Absent in the Agreement are the usual provisions found in Agreements for the sale or letting out of a business, such as clauses relating to stock in trade, fixtures and goodwill of the business. In Clause 5 of the Agreement, it is stated that "at the termination of this agreement, the Principal shall extend the term of this Agreement to the Agent and to no one else, unless the Principal requires *the said portion* for his own use only and shall use same at least for two years thereafter." The Agreement also does not provide for any additional payment to be made to obtain an extension of the Agreement. Clause 7 of the Agreement provides that on the expiry of the term of the Agreement, "the Agent shall deliver *vacant possession of the said portion* to the Principal and shall not be entitled to claim any compensation. . . . ." By no stretch of imagination can this be regarded as an Agreement to sell a business.

This case is on all fours with the decision of this Court in *Wickramaratne V. Thavendrarajah*[1]. The Supreme Court in that case affirmed with a minor variation the decision of the Court of Appeal in that case [2], that in circumstances similar

to the facts of the instant case. Section 92 of the Evidence Ordinance would not preclude the parties from showing that the Agreement was a fictitious or colourable device which was not intended to create mutual legal obligations. It is important to note that Section 91 of the Evidence Ordinance precludes the admission of oral evidence to prove the terms of a contract, grant or of any other disposition of property which have been reduced into writing, and Section 92 enacts that when the terms are proved by the document no evidence of any oral agreement or statement shall be admitted as between the parties thereto or their representatives in interest to contradict or vary them. It is thus clear that the oral evidence referred to in the two sections is to be excluded only upon the proof of a contract, grant or other disposition of property. Evidence which is intended to show that there was in fact no contract, grant or other disposition of property, would not, in my view, offend against the provisions of these sections. I am therefore of the opinion that neither Section 92 nor Section 91 can have any application unless there has been in the first instance a contract or a grant or any other disposition of property. It is open to a party to a contract to show that the contract was a sham, or devoid of genuine Agreement.

It is clear that the Rent Act applies to even the part of a building as in Section 48 of the said Act the term 'premises' has been defined to mean "any building or part of a building together with the land appertaining thereto." It is common ground that the property in question is situated in an area in which the Rent Act applies, and I have no reasons to disagree with the findings of the lower Courts that this Agreement was intended to circumvent the provisions of the Rent Act.

In this background, to deal with the submissions made by the learned President's Counsel for the Appellant it is