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[2011] 2 SRI L.R. - PART 5

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I also set aside the sentence of 1 year rigorous imprisonment imposed on the 1st Respondent in respect of counts 1, 3, 5, 6, 8 and 10 which has been suspended for 5 years in respect of each count. I note that the 1st Respondent is the key person of the crime who had received major share of the profit gained from the crime that is 3.5 million which has been deposited in to his account. Thus I sentence the 1st Respondent to a term of 3 years rigorous imprisonment in respect of each count of 1, 3, 6, 8 and 10 and to pay a fine of Rs. 1,00,000/- in default 01 year simple imprisonment in respect of each count and 07 years rigorous imprisonment in respect of count 5 and to pay a fine of Rs. 3 million in default 05 years simple imprisonment. The terms of imprisonment imposed on the 1st, 3rd, 5th, 6th, 8th and 10th counts should run concurrently. Therefore the total term of imprisonment that the 1st Respondent should serve is 7 years rigorous imprisonment. This is in addition to the default sentence. The sentence imposed on the 1st and 2nd Respondent shall be implemented from the date on which the Respondents are brought before the High Court.

For the reasons stated above the appeal of the Appellant is allowed, and the sentence is varied.

Learned High Court Judge is directed to issue a fresh committal indicating the sentences against the 1st and 2nd Respondents.

SISIRA DE ABREW, J.- I agree.

Appeal allowed.

Sentence Varied.

SRI LANKA INSURANCE CORPORATION LTD. V. JATHIKA SEWAKA SANGAMAYA

SUPREME COURT
GAMINI AMARATUNAGA, J.
RATNAYAKE, J. AND
IMAM, J.
S.C. APPEAL NO. 14/2009
S.C. (H.C.) LA APPLICATION NO. 49/2008
L.T./MH/33/154/2004
JULY 7TH , 2010

Industrial Dispute – Transfer of employee as a punishment – Failure to report at the place to which he was transferred – Constructive termination of services – Vacation of post.

The workman (Appellant) was employed by the Sri Lanka Insurance Corporation as a minor employee in 1978 and in 2003 he held the post of Senior Document Assistant. From about 1987 he became a habitual late comer for work. He was warned for his late attendance but there was no improvement in his attendance. His explanation for coming late for work was that due to a head injury sustained in an accident he found it difficult to rise early to come for work.

He was directed by the Management to go before a Medical Board, but he neglected to comply with those directions. The workman was interdicted and a domestic inquiry was held on five charges. He was found guilty of all charges. Consequently, the punishments meted out were deferment of increments, immediate transfer to Batticaloa Branch and reinstatement without back wages as an alternative to dismissal. The workman was informed of the punishment imposed and that his new station was the Batticaloa Branch.

On receipt of the letter, the workman wrote to the Senior Manager, Personal Department that he did not agree with the punishment imposed on him. In that letter he had stated that the deprivation of back wages, deferment of increments and immediate transfer to the Batticaloa Branch constituted a constructive termination of his services

and he would be appealing against the order made against him. In that letter he had further requested that he should be reinstated in the same place where he worked. There was no reply from the employer to his letter. The workman did not report to the Batticaloa Branch for duty. He was informed by the Management that he was deemed to have vacated his post by failing to report for work at the Batticaloa Depot.

Thereafter the Appellant made an application to the Labour Tribunal in respect of the termination of his services. After inquiry the Labour Tribunal allowed the application filed on behalf of the workman and ordered to reinstate the workman with back wages limited only to three months.

The employer appealed against the order of the Labour Tribunal to the High Court. The High Court dismissed the appeal on the basis that there was no question of law involved in the Appeal. The employer appealed against the order of the High Court to the Supreme Court.

Held:

(1) An employee who is transferred as a punishment, consequent to the finding at a domestic inquiry, has to first obey it and comply with the transfer order and then complain against it by way of an appeal. The failure to report at the place to which he is transferred and keeping away from work, without obtaining leave to cover his absence from work, is a calculated act of disobedience and by his own conduct, secures his own discharge from the contract of employment with his employer.

(2) The failure of the learned President of the Labour Tribunal to approach the question of vacation of post in the proper legal perspective applicable to the facts of this case and the finding of constructive termination based on an unsupported assumption had raised questions of law which should have been considered by the High Court.

(3) The President of the Labour Tribunal had failed to look at the question of vacation of post in accordance with the legal position applicable to a situation where there is a total refusal by a workman to comply with a transfer order made by way of a punishment after a disciplinary inquiry.

(4) The High Court had failed to consider the legal result of the workman's total refusal to comply with a disciplinary order made after

a disciplinary inquiry regarding which the workman had no cause to complain.

(5) On the facts of this case, the workman, by his own conduct, had got himself discharged from his contract of employment after a period of service during which his continued attitude had been to have his own way in defiance of lawful orders, warnings and directions given by the management.

Cases referred to:

1. *Ceylon Estate Staff's Union Vs. The Superintendent, Meddecombra Estate, Watagoda* – 73 NLR 278
2. *Nandasena V. The Uva Regional Transport Board* – (1993) 1 Sri L.R. 318
3. *Ruban Wickramaratne V. The Ceylon Petroleum Corporation* – C.A. Minutes of 15.10.1993 (unreported)

APPEAL from the judgment of the High Court

Uditha Egalahewa for the Appellant

Wijedasa Rajapakse, P.C., with *Gamini Hettiarachchi* for the Respondent

Cur.adv.vult

September 22nd 2011

GAMINI AMARATUNGA J.

This is an appeal, with leave to appeal granted by this Court, against the judgment of the High Court dismissing the employer appellant's (hereinafter referred to as the employer) appeal against the Order of the Labour Tribunal directing the reinstatement of the workman (the workman) concerned in this appeal, with back wages limited to three months.

The factual background to the application filed before the Labour Tribunal on behalf of the workman concerned is briefly as follows. The workman joined the Insurance Corporation

(the employer) in 1978 as a minor employee. In 2003 he held the post of Senior Documents Assistant. In 1986 he suffered a head injury due to a road traffic accident. From about 1987 he became a habitual late comer for work. On several occasions he was warned for his late attendance but there was no improvement in his attendance for work. Then the employer annually computed the total number of working hours lost in each year due to his late attendance and placed him on no pay leave for the total number of working days lost in each year due to his late attendance. His explanation for habitually coming late to work was that due to supervening illness following the head injury he found it difficult to rise early to come to work on time.

In 2001 he was directed by the Management to go before a Medical Board to check his health condition but he failed to present himself before the Medical Board. In 2002 when he was directed again to go before a Medical Board, he again neglected to comply with that direction. In 2003, the Management called for his explanation for his habitual late attendance and for his failure to go before a Medical Board. As his explanation was not satisfactory, he was placed under interdiction and a domestic inquiry was held on five charges set out in the charge sheet issued to him.

The first charge was for habitual late attendance, the second charge was for his failure to appear before a Medical Board and the third charge was for giving a false excuse for his failure to go before the Medical Board. The other two charges were consequential charges arising from the first three charges. After the domestic inquiry, the Management by letter dated 15.3.2004, signed by the Senior Manager of the employer's Personal Department, informed him that he

has been found guilty of all five charges framed against him. The punishment imposed on him was reinstatement without back wages as an alternative to dismissal, deferment of increments and immediate transfer to Batticaloa Branch.

On receipt of that letter, the workman had addressed a letter dated 19.3.2004 to the Senior Manager, Personal Department. In that letter he had stated that he did not accept that all five charges against him had been proved and that he did not agree with the punishments imposed him and that he considered the punishments imposed on him as constructive termination of his services. In that letter he had stated that his transfer to Batticaloa would aggravate his illness and that it would also adversely affect his children's education and his economic condition. The letter was concluded with the request that he should be reinstated in the same place where he worked (Nugegoda) without any punishment.

There was no response from the employer to this letter. The workman did not report to Batticaloa for duty. He never obtained or asked for leave to cover his absence from work. By letter dated 29.3.2004 he was informed by the Management that he had vacated his post with effect from 17.3.2004.

The workman went before the Labour Tribunal alleging constructive termination of his services. The employer took up the position of vacation of post. After inquiry the Labour Tribunal allowed the application filed on behalf of the workman on the basis that the physical fact and the mental element necessary to constitute vacation of post has not been established and that the employer had constructively terminated the services of the workman by the punishments imposed on him. Accordingly it was ordered to reinstate the workman with back wages limited only to three months.

The employer's appeal to the High Court against the order of the Labour Tribunal had been dismissed by the High Court on the basis that the appeal did not raise any question of law. This Court has granted leave to the employer on the following questions of law.

(a) Did the Honorable High Court Judge fail to consider "just and equitable jurisdiction" vested in the Labour Tribunal?

(b) Did the Honorable High Court Judge fail to consider the issues relating to mixed fact and law relating to vacation of post?

(c) Did the Honorable High Court Judge fail to consider that long absence from work or refusal to report to work is deemed that the workman had no intention of assuming duties?

(d) Did the Honorable High Court Judge fail to consider the relevant decisions of the Supreme Court with regard to vacation of post more particularly to the fact that the respondent failed to "comply and complain"?

At the hearing of this appeal both learned counsel made their submissions on the above questions of law to supplement the written submissions they have already filed. Since questions B and D set out above are interconnected those questions can be considered together. In considering the question of vacation of post in the context of the facts of this case, it is necessary to consider the legal consequences of the refusal of a workman to comply with a transfer given as a punishment on the findings of a domestic inquiry held in the exercise of the disciplinary powers available to an employer in respect of a workman in a transferable service.

The employer's right to transfer a workman in his service is not an unfettered absolute right. There are recognized exceptions to it. A transfer which is mala fide or for an ulterior purpose or which involves a demotion or a reduction of the salary or other emoluments (except as a punishment imposed consequent to the appropriate disciplinary process) are some of the instances in which an employee may justifiably contest the validity of a transfer given to him by the employer.

In *Ceylon Estate Staff's Union vs. The Superintendent, Meddecombra Estate, Watagoda*[1], Weeramantry J. explicitly referred to the employee's right to contest the validity of a transfer order and the limitations of that right in the following terms.

> **"No doubt the employee is entitled to contest the right of the management to make his transfer and the employee is entitled to take the necessary steps towards bringing this dispute to adjudication in the manner provided by law. The employee is not entitled however to set the employer at defiance by flatly refusing to carry out orders. (emphasis added)**

The rule comply and complain is implicit in the above statement. In the same case Weeramantry J referred to an exceptional situation where an employee may refuse to comply with an order even under protest and pointed out at the same time the adverse effects of such a course of conduct as follows:

> "There is of course no general principle that an employee in all cases bound to accept such a transfer order under protest, for there may be cases where the mala fides

prompting such an Order is so self evident or the circumstances of the transfer so humiliating that the employee may well refuse to act upon it even under protest ..... One can well visualize the enormous practical difficulties and the indiscipline that would result from the view that pending any dispute as to transfer the employee can refuse to act in the position to which he has been transferred." *Ceylon Estate Staff's Union (supra).*

In *Nandasena vs The Uva Regional Transport Board*[2] the workman concerned was transferred to a different work place of the Board after he was found guilty of certain charges at a domestic inquiry held against him. He preferred an appeal against the disciplinary order and repeatedly refused to comply with the transfer order pending the decision of his appeal. S.B. Goonewardene J in his judgment cited with approval the views expressed by Weeramantry J. cited above and held that the workman of his own volition had secured his own discharge from employment under the employer by vacating his post, which according to the disciplinary rules binding on him and to be the result of his being absent from work without having obtained leave and failing to show justification for such absence.

In the course of his judgment Goonawardene J. has made the observation that an employee could not be permitted to have the liberty of considering himself to be the arbiter to decide whether what was inflicted upon him by way of punishment was unjust and unlawful.

In *Ruban Wickramaratne Vs. The Ceylon Petroleum Corporation*[3], after a domestic inquiry against an employee who was placed on interdiction, the management decided

to reinstate him without back wages and transfer him from Kolonnawa to Batticaloa. The workman totally refused to serve in Batticaloa. In view of his refusal he was not reinstated in service and was deemed to have vacated his post. He was denied relief by the Labour Tribunal on the basis that he had vacated his post and the Order of the Tribunal was upheld by the Court of Appeal.

The present established legal position is that an employee who is transferred as a punishment consequent to the findings at a domestic inquiry has to first comply with the transfer order and then complain against it by way of an appeal or other procedure through which he may contest the validity of the order. If he fails to comply with the order by reporting to that place to which he is transferred and keeps away from work without obtaining leave to cover his absence from work, he, by his own conduct, secures his own discharge from the contract of employment with his employer.

In the present case the response of the workman to the disciplinary order was a total refusal to accept the findings of the disciplinary inquiry and the punishments including the transfer. In his letter dated 19.3.2004 he had stated that he considered the punishments imposed on him as constructive termination of his services. In that letter there was no request for the management to reconsider the punishments imposed on him or to give him a transfer to any place other than Batticaloa. His sole request conveyed by the letter was reinstatement without any punishment at the same place (Nugegoda) where he worked at the time of his interdiction. The tenor of his letter was not that of an appeal. It was an uncompromising refusal to accept any punishment coupled

with a demand for reinstatement on his own terms at the place of his choice. His resolve not to return to work except on his own terms was manifestly clear from his letter.

The learned President had stated that the letter of the workman was his appeal against the disciplinary order. Even if it was regarded as an appeal, still the workman had failed to comply with the transfer order pending the determination of his appeal. He had not obtained or at least applied for leave to cover his absence from work after he received the disciplinary order. The learned President had completely failed to look at the question of vacation of post in accordance with the legal position applicable to a situation where there is a total refusal by a workman to comply with a transfer order made by way of a punishment after a disciplinary inquiry.

Although the workman in his letter of 19.3.2004 had stated that he did not accept that the charges against him had been proved, in that letter or at the inquiry before the Tribunal he had not made any allegation affecting the propriety of the disciplinary inquiry. The main charges against him at the disciplinary inquiry were his habitual late attendance and his failure, without a reasonable excuse, to go before a Medical Board on the two occasions he was directed to do so by the management. On both those matters there was sufficient evidence before the Tribunal and the learned President on that evidence had held that the workman did not have a clean record with regard to attendance during his entire period of service and that despite repeated warnings, pay cuts and deferments of increments, the workman had continued his late attendance as a habit. With regard to his failure to go before a Medical Board, the learned President had found that the workman had neglected to go

before a Medical Board on the two occasions he was directed to do so. Despite those findings the learned President had held that the transfer to Batticaloa was unreasonable and as such it amounted to constructive termination of his services. The reasoning of the learned President was that the transfer had the effect of making it more difficult for the workman to report to work on time when his repeated reason for his late attendance was the illness resulting from his head injury. Apart from the assertion of the workman that he suffered from an illness arising from his head injury, there was no medical evidence at least by way of a medical certificate to show that he suffered from an illness arising as a supervening condition of his head injury or from any other cause. When the management in order to verify his claim of an illness directed him on two occasions to appear before a Medical Board, he had neglected, without any reasonable excuse, to go before the Medical Board. At the inquiry before the Tribunal when the workman was asked whether he submitted any medical certificates to cover his absence from work after the receipt of the disciplinary order, his specific reply was that he did not have any illness to submit medical certificates! Thus, despite the absence of any evidence to show that the workman had an illness which made it difficult for him to report to work on time and notwithstanding the workman's own statement that he had no illness, the learned President had come to the conclusion that the transfer of this workman, who claimed that his late attendance was due to an illness, to Batticaloa, had the effect of making it more difficult for him to report to work on time and accordingly the transfer was unreasonable. This conclusion not supported by any evidence (and contradicted by the workman's own assertion that he had no illness) vitiates the finding that the transfer was unreasonable

and amounted to constructive termination of the workman's services. The failure of the learned President to approach the question of vacation of post in the proper legal perspective applicable to the facts of this case and the finding of constructive termination based on an unsupported assumption had raised questions of law which should have been considered by the High Court. The High Court had failed to consider the legal result of the workman's total refusal to comply with a disciplinary order made after a disciplinary inquiry regarding which he had no cause to complain. On the facts of this case, the workman, by his own conduct, had got himself discharged from his contract of employment after a period of service during which his continued attitude had been to have his own way in defiance of lawful orders, warnings and directions given by the management. I accordingly answer the questions of law B and D in the affirmative. In view of the above finding it is not necessary for me to consider the question of law A and C. I accordingly allow the appeal, set aside the judgment of the High Court dated 21.11.2008 and the Order of the Labour Tribunal dated 20.11.2008 and dismiss the application made to the Labour Tribunal on behalf of the workman P. Nelson Ranasinghe. I make no order for costs.

RATNAYAKE J.- I agree.

IMAM J.- I agree.

Appeal allowed.

KIRMALI FERNANDO V. STANDARD CHARTERED BANK

SUPREME COURT
J.A.N. DE .SILVA , CJ
RATNAYAKE , J AND
IMAM , J.
S.C. APPEAL NO. 100/2009
SP/HCCA/COL/LA/50/09
D.C. COLOMBO NO. 2439/08/MR
NOVEMBER 23RD, 2010

Industrial Disputes Act – Section 31 B(1)(a) – Application to a Labour tribunal by a workman or a trade union on behalf of a workman for relief or redress in respect of the termination of service of the workman by the employer – Section 31 B(5) – Employee who complains of unlawful termination, where an application is entertained by a Labour Tribunal, the workman to whom the application relates is he entitled to any other legal remedy in respect of the matter to which that application relates? – Civil Procedure Code Section 9, Section 46(2)

The Plaintiff instituted action in the District Court seeking *interalia* a declaration that her resignation from the Defendant – Bank was procured wrongfully and unlawfully by undue influence over her and a declaration that the constructive termination of employment with the Defendant bank was wrongful and unlawful and hence null and void and for damages.

The learned District Judge by his order dated 5th June 2009 returned the plaint for amendment in view of the fact that –

(1) there was non compliance with Section 45 of the Civil Procedure Code.

(2) the claim was prolix and contained the particulars other than those required to be therein.

The Plaintiff being aggrieved by the order of the District Judge filed an application for leave to appeal to the High Court and the High Court

refused to grant leave on the said application. The Plaintiff filed an application for leave to the Supreme Court from the said order of the High Court.

Held:

(1) In terms of Section 31B(5) of the Industrial Disputes Act No. 43 of 1950, an employee who complains of unlawful termination can seek relief from a forum other than the Labour Tribunal as well and if such person has sought relief from more than one forum only one application can be pursued.

Per J.A.N. de Silva, CJ –

> "The reasoning of the District Judge that the jurisdiction to grant relief in respect of termination of services was vested in the Labour Tribunal by Section 31 B(1)(a) of the Industrial Disputes Act is erroneous and is therefore a misdirection of Law. The High Court too fell into the same error by affirming the reasoning of the District Judge".

(2) An objection can be raised by way of a motion under Section 46(2) of the Civil Procedure Code. Hence there was no misdirection in considering objections brought before Court by way of a motion.

(3) When a foreign organization engages in business and operates from a place of business in Sri Lanka, the principle place of business would come within the meaning of residence in Section 9 of the Civil Procedure Code.

(4) Objection to Jurisdiction can be raised by way of a Motion Unite Section 46(2)

APPEAL from judgment of the High Court of the Western Province.

Cases referred to :

(1) *Blue Diamonds Ltd.v. Amsterdam – Rotterdam – Bank M.V. and Another* – (1993) 2 SLR 249

(2) *Actalina Fonseka V. Dharshanie Fonseka* – (1989) I SLR 95

K. Kang-Isvaran PC with *Shivaan Kanag – Iswaran* for Plaintiff – Petitioner – Appellant

S.L. Gunasekara with *Avinda Rodrigo* and *M. de Silva f*or Defendant – Respondent – Respondent

Cur.adv.vult.

May 12th 2011

J.A.N. DE SILVA CJ.,

This is an appeal from the judgment of the High Court of the Western Province where the Plaintiff Appellants leave to appeal application was refused.

The Plaintiff instituted action in the District Court of Colombo on 16th May 2008 seeking,

(a) a declaration that her resignation from the Defendant Bank was procured wrongfully and unlawfully by undue influence over her;

(b) a declaration that the letter of disclaimer dated 25th February 2008 was null and void;

(c) a declaration that the constructive termination of employment with the Defendant bank was wrongful and unlawful and hence null and void and for damages in the sum of Rs. 170,000,000.

The District Court after accepting the Plaint issued summons on the Defendant and the Defendant filed the answer on 17th October 2008. However prior to filing answer the Defendant by a motion dated 6th October 2008 sought the rejection of the Plaint *in limine* and or the return of the Plaint and the Plaintiff countered several matters raised in the said motion of the Defendant and prayed for the rejection of the said motion. Both parties were directed to file written submissions on the said motion of the Defendant and submissions were tendered by the parties. The Learned District Judge by his order dated 5th June 2009 returned the Plaint for amendment in view of the fact that,

1. there was non compliance with Section 45 of the Civil Procedure Code
2. the Claim was prolix and contained the particulars other than those required to be therein

The Plaintiff claiming to be aggrieved by the said order of the Learned District Judge filed an application for leave to appeal for the Civil Appellate High Court and the High Court refused to grant leave on the said application. The Plaintiff filed an application for leave to appeal to this Court from the said order of the High Court and when the said application was supported on 1st September 2009 this Court granted leave on the following questions of law as set out in paragraph 17 :

17(a) – The failure to give a reasoned order as to why leave was refused has occasioned a grave miscarriage of justice and vitiates the order refusing leave

17(c) – the Forum to seek relief is the Labour Tribunal and not the District Court is a grievous misdirection in law

17(d) – By reason thereof that the Plaint does not disclose a prima facie cause of action is a grievous misdirection at law

17(e)- The defendant cannot be said to be resident within the jurisdiction of the District Court within the meaning of Section 9 of the Civil Procedure Code, notwithstanding, admittedly that it does have a place of business at No. 37, York Street Colombo 1 and carries on business from the said address is a grievous misdirection at law

17(f) – an objection to jurisdiction of court can be raised by way of motion under Section 46(2) is a grievous misdirection at law.

17(g) – The holding that the Plaint is within, teeming with unnecessary and lengthy descriptions and therefore it should be amended is not tenable at law and is a grievous misdirection at law.

Although the Plaintiff initially asserted that at the time of filing the leave to appeal application there was no reasoned order of the High Court when it refused leave there has been an order made by the High Court setting out its reasons for refusing such leave a copy of which had been obtained by the Plaintiff after filing her application in Court and subsequently filed by motion dated 9th October 2009. Therefore there is no necessity to deal with question 17(a) set out above.

Regarding question 17(c) a consideration of the provisions of the Industrial Disputes Act No. 43 of 1950 specifically S.31B (5) would be necessary. S. 31B (5) states that

"Where an application under subsection (1) is entertained by a Labour Tribunal and proceedings thereon are taken and concluded, the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which that application relates, and where he has first resorted to any other legal remedy, he shall not thereafter be entitled to the remedy under subsection 1."

According to the above section it is quite clear that an employee who complains of unlawful termination can seek relief from a forum other than the Labour Tribunal as well and where such person has sought relief from more than one forum, only one application can be pursued. The Plaintiff in the present case has chosen to seek relief from the District Court which she is entitled to. Therefore the reasoning of the District Judge that the jurisdiction to grant relief in respect

of termination of services was vested in the Labour Tribunal by s.31B(1)(a) of the Industrial Disputes Act is erroneous and is therefore a misdirection of law. The High Court fell into the same error by affirming the reasoning of the District Court.

Regarding question 17(d) on the matter of whether the plaint discloses a causes of action, a perusal of the averments in the plaint do disclose a cause of action. The plaintiff complains of a termination of her services by the Respondent and states that such termination was a constructive termination of services and that the said termination was wrongful and that she was claiming various reliefs.

Regarding question 17(e) objection has been taken regarding the application of S.9 of the Civil Procedure Code in respect of the question whether the Respondent is resident within the jurisdiction of the District Court. The caption of the plaint describes the Respondent as a legal person having its "Principal Office and Principal place of business" in Colombo and paragraph 2 of the plaint also described the Respondent in that way.

The learned District Judge concluded that the Respondent's place of business cannot be considered as the residence relying on the judgment in *Blue Diamonds Limited v Amsterdam-Rotterdam Bank M.V. and another*[1], In that case the Defendant did not have a place of business in Sri Lanka whereas in the present instance the Respondent has a place of business and it is not in dispute that the Principal Office and Principal Place of business is at No. 37, York Street, Colombo 1 which is the jurisdiction of the District Court of Colombo. The Respondent has submitted that the place of business of a juristic person can-

not be considered as the residence of such legal entity and that if such were the case every place of business of such entity would have to be described as the residence of such entity. There is much substance in this submission but however when a foreign organization engaged in business matters in Sri Lanka and operates from a place of business, special consideration will have to given in determining the residence of such organizations in relation to Section 9 of the Civil Procedure Code which may result in placing them at an advantage when actions have to be taken against them. In the presence instance the Respondent does not dispute that its Principal Office and Principal place of business is at the address given in the plaint. Therefore it is our view that the principal place of business of the Respondent would come within the meaning of residence in section 9 of the Civil Procedure Code.

In respect of question 17(f) it is our view that an objection can be raised by way of a motion under section 46(2) of the Civil Procedure Code, as has been submitted by the respondent which was the view of this court in *Actalina Fonseka v. Dharshanie Fonseka*[2] and therefore, We are of the view that these was no misdirection in considering the objections brought before Court by way of a motion under section 46 (2) of the Civil Procedure Code.

Regarding question 17(g), a perusal of the plaint shows that the plaintiff has put down in detail her position in life, the circumstances that she faced during her tenure of employment, her achievements and thereby has given a full disclosure of her case, which in a way facilitates the defendant to prepare its case. This is not the manner in which a plaint is presented to Court normally and would give the impression

that such a plaint is prolix. The learned District judge and the Civil Appellate High Court cannot be faulted for having concluded that the plaint has been prolix. In such a situation it would be the ordinary course of action to return such plaint for amendment, but in the present case the Respondent has filed answer adverting to all the averments in the plaint. If the plaint is to be returned for amendment, it would result in the Respondent having got to file answer again, which process would result in further delaying the adjudication of this case. Though we are of the view that the plaint filed by the petitioner is not the most suitable way in which a plaint should be filed, in the circumstances of this case specially since the respondent has filed answer we do not consider that returning the plaint for amendment would be appropriate.

In the above circumstances, we are of the view that the ends of justice would be met if the case is proceeded with from the stage where the answer was filed. The Judgment of the Civil Appellate High Court and the order of the District Court is set aside and we direct the District Court to proceed with the case expeditiously from the stage of the acceptance of the answer of the Respondent. The appeal of the Petitioner is allowed without costs.

RATNAYAKE J. - I agree.

IMAM J. - I agree.

Appeal allowed. District Court directed to proceed with the case from the stage of the acceptance of the answer of the Respondent.

SUDATH ROHANA AND ANOTHER V. MOHAMED ZEENA AND ANOTHER

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, CJ.
EKANAYAKE, J. AND
IMAM, J.
S.C.H. C. CA LA. NO 111/2010
H.C. (Southern Province) NO. SP/HCCA/GA/LA/0030/2009
D.C. GALLE NO. 1417/L
JULY 14, 2010, SEPTEMBER 03, 2010, AUGUST 31, 2010

Supreme Court Rules – Leave to appeal – Failure to comply with Rules – Rules 8(3), 27(3) and 27(8) – To ensure that all necessary parties are properly notified on the matter which is before the Supreme Court – Rule 8 – To ensure that all parties are notified in order to give a hearing – Do the Supreme Court Rules 1990 apply to appeals from the High Courts (Civil Appeal).

When this application was taken for support for leave to appeal, the Plaintiff – Judgment Creditor – Respondent (Respondent) took up a preliminary objection stating that the Petitioners had not complied with Rule 8(3) of the Supreme Court Rules, 1990 and hence the Petitioner's application should be rejected *in limine.*

The objection raised by the Respondent was that the Petitioners had not given notice to the Respondents as required by the Supreme Court Rules.

Held:

(1) Rule 28 deals with the procedure that has to be followed when filing an application against the judgment of a High Court of the Provinces. Similar to Rule 8(3), Rule 28 (3) refers to the necessity of tendering notice to the Registrar.

(2) The purpose of the Rule 8(3) as well as Rule 27 (3) of the S.C. Rules 1990 is to ensure that all necessary parties are properly notified on a matter coming up before the Supreme Court, for all the parties to participate at the hearing.

(3) The Rules 28(3) and 27(3) are mandatory rules that should be followed and objections raised on non-compliance with such rules, cannot be taken as mere technical objections. As the said Rules are mandatory, the notice has to be served through the Registry of the Supreme Court.

Per Dr. Shirani A. Bandaranayake, CJ.-

"When it is stated that the substantive law and procedural law are complementary, it signifies the importance of procedural law in a legal system. Whilst the substantive law lays down the rights, duties, powers and liberties, the procedural law refers to the enforcement of such rights and duties. In other words the procedural law breathes life into substantive law, sets it in motion and functions side by side with substantive law."

(4) The provisions in Rule 28(3) are similar to that of Rule 8(3); the only difference being that Rule 8(3) applies to application for special leave to appeal and Rule 28(3) for 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.

Cases referred to:

(1) *A.H.M. Fowzie and 2 others v. Vehicles Lanka (Pvt) Ltd* - (2008) Sri L.R. 23.

(2) *Fernando v. Sybil Fernando and Others* – (1997) 3 Sri L.R. 1

(3) *Dulfer Umma v. U.DC. Matale* – (1939) 40 NLR 474

(4) *Samantha Niroshana v. Senerath Abeyruwan* – SC (Spl.) LA No. 145/2006 – S. C. Minutes, 28.2007

(5) *Wickramatillake v. Marikar* – (1894) 2 NLR 9

(6) *Re Chenwell* – (8 Ch. D 2506)

(7) *K. Reaindran v. JJ. Velusomasundram* – SC (Spl.) L.A. Application No. 298/99 – S. C. (Spl.) Minutes of 7.2.2000

(8) *N.A. Premadasa v. The People's Bank* – S.C. (Spl.) L.A. Application No. 212/99 – (S.C. Minutes of 24.2.2000)

(9) *Hameed v. Majibdeen and others* – S.C. (Spl.) L.A. Application No. 38/2001 – S.C. Minutes of 23.07.2001

(10) *K. M. Samarasinghe V. R. M. D. Ratnayake and Others* – S.C. (Special) L.A. Application No. 51/2001 – S.C. Minutes of 27.07.2001.

(11) *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

(12) *C.A. Haroon v. S.K. Muzoor and others* – S.C. (Spl.) LA Application No. 158/2006 – S.C. Minutes of 24.11.2006

(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 from an order of the Provincial High Court, Southern Province.

M. Farook Thahir with *N. M. Reyaz* for – Respondents – Petitioners - Petitioners

N. Sirimanne for Plaintiff – Judgment Creditor – Respondent – Respondent

Cur.adv.vult

March 17th 2011

DR. SHIRANI A. BANDARANAYAKE, J.

This is an application for leave to appeal from the order of the Provincial High Court of the Southern Province Holden in Galle, dated 24.03.2010. By that order the learned Judges of the High Court dismissed the application made by the respondents - petitioners-petitioners (hereinafter referred to as the petitioners). The petitioners had thereafter preferred an application for leave to appeal to this Court.

When this application was taken for support for leave to appeal, learned Counsel for the plaintiff – judgment creditor – respondent – respondent (hereinafter referred to as the

respondent) took up a preliminary objection stating that the petitioners had not complied with rule 8(3) of the Supreme Court Rules 1990 and therefore the leave to appeal application filed by the petitioners should be dismissed *in limine*.

The facts relevant to the preliminary objection raised by the learned Counsel for the respondent, as submitted by him, *albeit* brief, are as follows:

On 23.04.2010, the petitioners had filed an application seeking leave to appeal before this Court. Thereafter with an undated motion the petitioners had sent a copy of the petition, affidavit and the annexures referred to in the petition to the respondent. In that motion, the registered attorney-at-Law for the petitioners had sought three (3) dates for the learned Counsel for the petitioners to support the said application. Learned Counsel for the respondent contended that although a motion was filed by the learned Instructing Attorney–at-Law for the petitioners, that no notice was sent to the respondent directly or through the Registry of the Supreme Court. Upon receipt of the motion filed by the learned Instructing Attorney-at-Law for the petitioner, learned Counsel for the respondent had filed a motion dated 21.05.2010 raising a preliminary objection stating that the petitioners had not complied with the mandatory requirements of Rule 8(3) of the Supreme Court Rules of 1990 and therefore to reject the petitioners' application filed in the Supreme Court, *in limine*.

Learned Counsel for the petitioners submitted that, if there is a procedure laid down with regard to the filing of applications before the Supreme Court, that such procedure should be followed. However, learned Counsel contended that

since the application in question is for an appeal from the High Court of the Provinces, and only appeals from the Court of Appeal to the Supreme Court are governed by the Supreme Court Rules of 1990, that there is no requirement for the petitioners to follow the procedure contemplated in terms of Rules 8(3) of the Supreme Court Rules of 1990.

Having stated the submissions of the learned Counsel for the respondent and the learned Counsel for the petitioners let me now turn to consider the preliminary objection raised by the learned Counsel for the respondent on the basis of the Supreme Court Rules, 1990.

The objection of the learned Counsel for the respondent is based on the fact that the petitioners had not given notice to the respondent, as required by the Supreme Court Rules.

The Original Record of this application clearly shows that on 23.04.2010, the learned Instructing Attorney-at-Law for the petitioners had filed a proxy 'together with petition, affidavit and documents." However there was no reference with regard to notice being handed over to the Registry of the Supreme Court.

Thereafter the respondent had filed a motion dated 17.05.2010 and had filed a caveat on behalf of the respondent. On 20.05.2010 the learned Instructing Attorney–at-Law for the petitioner had filed a motion along with the documents marked P1, P2, P4, P5 and P6. Soon after, on 21.05.2010 the learned Instructing Attorney-at-Law for the respondent had filed a motion stating that the respondent had not received notice in terms of Supreme Court Rules and had only received a motion including petition, affidavit and annexures

and therefore had moved this Court to dismiss the petitioners' application *in limine*. That motion was to be supported in open Court on 14.07.2010 on which date both parties were heard on the preliminary objection.

A perusal of the Original Record of this application clearly shows that the learned Instructing Attorney – at – Law for the petitioner had not filed notices and what has been filed on 23.04.2010 was the petition, affidavit and documents marked P1 to P18. The said motion is as follows:

> "I tender herewith my appointment as the Attorney-at-Law for the petitioners together with the petition and the affidavit and documents marked P1 to P18 with copies of same and respectfully move that Your Lordships Court be pleased to accept same.
>
> I further move that Your Lordships Court be pleased to accept copies of the said documents as I am unable to submit certified copies of same and I undertake to submit the said copies as soon as I receive them from the Registry of the Provincial High Court.
>
> I further move that Your Lordships Court be pleased to call this application on any one of the following dates for Counsel to support the said application.

6th May	24th May	2nd June

> **Notice of this motion has been served on the respondent together with copies of the petition, affidavit and documents marked P1 to P18 by registered post and the receipts are tendered herewith"** (emphasis added).

It is therefore evident that, the learned Instructing Attorney-at-Law for the petitioner had not tendered notices to the Registry of the Supreme Court along with his application, but had served the motion, which was filed in the Registry directly to the respondent.

The contention of the learned Counsel for the petitioners was that the present application is an appeal from the judgment of the High Court of the Southern Province and was filed in terms of section 5c of the High Court of the Provinces (Special Provisions) Act, No. 54 of 2006. Learned Counsel for the Petitioners further contended that, although express provision was made under section 6 of the High Court of the Provinces Act, No. 10 of 1996 regarding the procedure to be followed when making applications for leave to appeal to the Supreme Court, no such provision was made regarding appeals from the High Court of the Provinces under and in terms of the Act, No. 54 of 2006.

In the circumstances, learned Counsel for the petitioners submitted that as there are no provisions either in the Act under which the relevant application is filed or in the Supreme Court Rules of 1990, the preliminary objection raised by the learned Counsel for the respondent that no notices were served on him and therefore the petitioners had not complied with the Supreme Court Rules cannot be accepted.

It is not disputed that the present application is an appeal from the High Court of the Province to the Supreme Court.

Part I of the Supreme Court Rules 1990, refers to three types of appeals which are dealt with by the Supreme Court, viz., special leave to appeal, leave to appeal and other