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appeals. Whilst applications for special leave to appeal are from the judgments of the Court of Appeal, the leave to appeal applications referred to in the Supreme Court Rules are instances, where the Court of Appeal had granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal, where the Court had decided that it involves a substantial question of law. The other appeals referred to in section C of Part I of the Supreme Court Rules are described In Rule 28(1), which is as follows:

> *"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 added).*

The High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 and High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006 do not contain any provisions contrary to Rule 28(1) of the Supreme Court Rules, 1990 thus establishing the fact that section C of Part I of the Supreme Court Rules, which deals with other appeals to the Supreme Court, should apply to the appeals from the High Courts of the Provinces.

Rule 28 accordingly deals with the procedure that has to be followed when filing an application against the judgment of a High Court of the Provinces established under and in terms of Article 154P of the Constitution. Similar to Rule 8(3), Rule 28(3) refers to the necessity of tendering notices to the Registrar. The said Rule 28(3) reads as follows:

> *"The appellant shall tender with his petition of appeal a notice of appeal in the prescribed form, together with*

such number of copies of the petition of appeal and the notice of appeal as is required for service on the respondents and himself, and three additional copies, and shall also tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post."

It is important to note that Rule 28(7) provides for the applicability of Rule 27 of the Supreme Court Rules, which are applicable under the category of leave to appeal to appeals which come within the category of other appeals and similar to Rule 8(5), Rule 27(3) requires the petitioner to attend at the Registry in order to verify that notice has not been returned undelivered and in the event if such notice has been returned the steps that should be taken by him. The said Rule 27(3) is as follows:

"The appellant shall not less than two weeks and not more than three weeks after the notice of appeal has been lodged, attend at the Registry in order to verify that such notice has not been returned undelivered, the appellant shall furnish the correct address for the service of notice on such respondent. The Registrar shall there upon dispatch a fresh notice by registered post and may in addition dispatch another notice, by ordinary post; he may, if he thinks fit, and after consulting the appellant substitute a fresh date for the attendance of parties at the Registry. . . ."

The purpose of the Rule 8(3) as well as Rule 27(3) is to ensure that all necessary parties are properly notified on the matter which is before this Court, so that all parties could participate at the hearing. Referring to the provision in Rule

8 of the Supreme Court Rules 1990, in *A.H.M. Fowzie and 2 others v. Vehices Lanka (Pvt.) Ltd.*[1], I had stated that,

> ". . . . the purpose and the objective of Rule 8 of the Supreme Court Rules of 1990, is to ensure that all parties are properly notified in order to give a hearing to all parties. The procedure laid down in Rule 8 of the Supreme Court Rules, 1990 clearly stipulates the process in which action be taken by the Registrar from the time an application is lodged at the Registry of the Supreme Court. It is in order to follow the said procedure that it is imperative for a petitioner to comply with Rule 8 of the Supreme Court Rules 1990 and in the event that there is a need for a vacation or a extension of time, the petitioner could make an application in terms of Rule 40 of the Supreme Court Rules of 1990."

The same position applies to Rules 28(3) and 27(3) as both Rules contain provisions similar to that of Rule 8 of Supreme Court Rules 1990.

Accordingly it is quite clear that, in terms of the Supreme Court Rules, the petitioner should have tendered notices along with his petition of appeal and the other required documents to the Registrar of the Supreme Court for the service of notice on the respondents by registered post. Thereafter in terms of Rule 27(3), he should have verified from the Registry that such notice has not been returned undelivered and if the said notice had been returned undelivered, steps should have been taken according to the said Rule 27(3) to dispatch a fresh notice to be respondent.

The Original Record of this application clearly reveals that none of the aforementioned steps had been followed by

the learned Instructing Attorney-at-Law for the petitioners. Instead of following the procedure laid down in terms of the Rules, learned Instructing Attorney-at-Law for the petitioners had, as stated earlier, filed a motion on 23.04.2010 moving that the case be called on any one of the dates specified by the learned Instructing Attorney-at-Law for the petitioners and the notice of the said motion was sent by the learned Instructing Attorney-at-Law for the petitioners by registered post. Admittedly there was no service of notice through the Registrar in terms of the Supreme Court Rules, 1990.

Considering the aforementioned there are two important issues that needs examination. Firstly, as the respondent had received the motion of 23.04.2010 sent by the learned Instructing Attorney-at-Law for the petitioners, whether that could be taken as sufficient notice being given to that party. Secondly, since the learned Instructing Attorney-at-Law for the petitioners has not followed the procedure laid down in Supreme Court Rules, whether it is possible to accept such motion as due compliance with the Supreme Court Rules.

Undoubtedly, the said questions are based on as to the necessity to follow the procedure referred to in the Supreme Court Rules of 1990. The legal system of the country consists of substantive law as well as procedural law, As clearly and accurately stated by Dr. Amerasinghe, J., in *Fernando v. Sybil Fernando and others*[(2)], procedural law is not secondary; the two branches are complementary.

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.

Rules of the Supreme Court are made in terms of Article 136 of the Constitution, to regulate 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 thus regulates the practice and procedure of the Supreme Court.

Learned Counsel for the petitioners referring to the decision in *Fernando v. Sybil Fernando and others (supra)* and *Dulfer Umma v. U.D.C., Matale* [3] stated that an application for leave to appeal cannot be dismissed on a mere technicality taken up by the respondents.

It is not disputed that the aforementioned decisions have referred to technicalities and had stated that merely on the basis of a technical objection a party should not be deprived of his case being heard by Court.

As I had stated in *Samantha Niroshana v. Senarat Abeyruwan*[4] and *A.H.M. Fowzie v. Vehicles Lanka (Pvt). Ltd. (supra)*, I am quite mindful of the fact that mere technicalities should not be thrown in the way of the administration of justice and accordingly I am in respectful agreement with the observations made by Bonser, C.J., in *Wickramatillake v. Marikar* [5] referring to Jessel, M.R. in *Re Chenwell* [6] that,

> "It is not the duty of a Judge to throw technical difficulties in the way of the administration of justice, but

when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

Be that as it may, it is also of importance to bear in mind that the procedure laid down by way of Rules, made under and in terms of the provisions of the Constitution, cannot be easily disregarded. Such Rules have been made with purpose and that purpose is to ensure the smooth functioning of the legal machinery through the accepted procedural guidelines. In such circumstance, when there are mandatory Rules that should be followed and objections raised on non-compliance with such Rules such objections, cannot be taken as mere technical objections. When such objections are considered favorably, it is not that a judge would use the Rules as a juggernaut car which throws the petitioner out and then runs over him leaving him maimed and broken on the road (per Abraham C.J., in *Dulfer Umma v. U.D.C., Matale (supra)*). As correctly pointed out by Dr. Amerasinghe, J. in *Fernando v. Sybil Fernando and others (supra)*, 'Judges, do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly.'

Rules 28(3) and 27(3) quite clearly give specific instructions as to the method in tendering notices to parties. The language used in both Rules clearly shows that the said provisions are mandatory and the notice has to be served through the Registry of the Supreme Court. In such circumstances, it is apparent that the motion, which was sent by the learned Instructing Attorney-at-Law for the petitioners

to the respondent is not sufficient to satisfy the provisions laid down in Rule 28(3) and therefore this has to be taken as non-compliance with Rule 28(3) of the Supreme Court Rules, 1990.

When there has been non-compliance with a mandatory Rule such as Rule 28(3), there is no doubt that this would lead to serious erosion of well established Court procedures maintained by our Courts, throughout several decades and therefore the failure to comply with Rule 28(3) of the Supreme Court Rules would necessarily be fatal.

As pointed out earlier the provisions in Rule 28(3) is similar to that of Rule 8(3); the only difference being that Rule 8(3) applies to applications 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.

A long line of cases of this Court had decided that non-compliance with Rule 8(3) would result in the dismissal of the application (*K. Reaindran v. K. Velusomasundram* [7] *N.A. Premadasa v. The People's Bank* [8], *Hameed v. Majibdeen and others*[9] *K.M. Samarasinghe v. R.M.D. Ratnayake and others*[10] *Soong Che Foo v. Harosha K. De Silva and others* [11] *C.A. Haroon v. S.K. Muzoor and others*[12] *Samantha Niroshana v. Senarath Abeyruwan (supra), A.H.M. Fowzie and two others v. Vehicles Lanka (Pvt.) Ltd. (supra), Woodman Exports (Pvt.) Ltd. v. Commissioner–General of Labour*[13].

Since Rule 28(3) has been framed on the lines of Rule 8(3) and both Rules are dealing with the same matter that governs the service of notice to the parties, the

decisions taken in the matters referred to above should apply to instances where there is non-compliance with Rule 28(3) of the Supreme Court Rules of 1990.

In the circumstances, for the reasons aforementioned, I uphold the preliminary objection raised by the learned Counsel for the respondent and dismiss the petitioners' application for leave to appeal for non-compliance with the Supreme Court Rules, 1990.

I make no order as to costs.

EKANAYAKE, J. – I agree.

IMAM, J. - agree.

Preliminary objection upheld. Application dismissed.

INDIAN BANK V. ACUITY STOCK BROKERS (PVT) LIMITED

SUPREME COURT
TILAKAWARDANE, J.
AMARATUNGA J. AND
SURESH CHANDRA, J.
S.C. APPEAL NO. 11/2011 (CHC)
CASE NO. 181/97(1)
AUGUST 4TH, 2010

Civil Law Ordinance No. 5 of 1865 – Laws of England to be observed in commercial matters and with regard to Banks and Banking transactions – "justa causa" – a requirement for contracts to be valid under Roman – Dutch Law – What is a Banking transaction?

Sivasubramaniam, was a customer of the Claimant – Bank (Appellant), who maintained a current account with the Bank. He was also a customer of there respondent, who carried on business as a stock broker. The Respondent bought and sold shares on behalf of the said M. Sivasubramaniam. On or about 21st January 1994, the said Sivasubramaniam requested the Bank to provide him an overdraft facility to buy shares. By the promise and/or contract and/or agreement in writing dated 21st January 1994 the Respondent had held out and assured the Appellant that (a) the Respondent held the shares listed therein and (b) that the Respondent shall credit all the sale proceeds of these shares to the current account of Sivasubramaniam held with the appellant Bank. The Bank accordingly provided an overdraft facility to the said Sivasubramaniam but he had failed and neglected to repay a sum of Rs. 6,385,077/42 which was due and owing to the Appellant.

As a result of the Respondent's wrongful and unlawful breach of the agreement, it had caused the Appellant to suffer loss and damage in a sum of Rs. 5,558,841.

After trial the Commercial High Court dismissed the Appellant's action and assumed that it is the English Law that apples, stating that

'consideration' is a requisite of a contract and concluded that a perusal of the letter dated 21st January 1994 shows that there is total lack of consideration and hence the said document was not enforceable.

Held:

(1) The Civil Law Ordinance No. 5 of 1865 introduced the English Law relating to Banks and Banking. But there are many transactions, where the Banks are parties, which do not come within the realm of Banking transactions and regarding which the Roman Dutch law applies.

(2) Under the Roman Dutch Law there should be *justa causa* for a contract to be valid.

Per R.K.S. Suresh Chandra, J. –

> "In the present case the undertaking given by the Respondent would satisfy the requirement for a valid contract as it was an undertaking given with all seriousness."

APPEAL from the judgment of the Commercial High Court.

Cases referred to:

(1) Lipton v. Buchanan – 8 NLR 49

(2) Jayawickrame v. Amarasuriya – 20 NLR 289

(3) Edward Silva v. De Silva – 46 NLR 510

Prasanna Jayawardene with *A. Siriwardane* for Plaintiff – Appellant.

Kushan De Alwis with *Hiran Jayasuraiy* and *Chamath Fernando* for Defendant-Respondent.

Cur.adv.vult

February 18th 2011

SURESH CHANDRA J.

This is an appeal from the judgment of the Commercial High Court whereby the action of the Plaintiff-Appellant was dismissed.

The Plaintiff-Appellant instituted action in the Commercial High Court against the Defendant Respondent to recover a sum of Re. 5,558,841/- with legal interest thereon.

In it's plaint the Appellant stated inter alia that one M. Sivasubramaniam was a customer of the Bank and maintained a current account and that he was also a customer of the Respondent who carried on business as a stockbroker, that the Respondent bought and sold shares on behalf of the said M. Sivasubramaniam and the Respondent held such shares on behalf of and for the account of the said Sivasubramaniam. On or about the 21st of January 1994 the said Sivasubramaniam had requested the Appellant to lend and advance monies to him by way of an Overdraft facility granted on his current account. That by the promise and/ or contract and/or agreement in writing dated 21st January 1994 the Respondent had held out and assured the Appellant that (a) the Respondent held the shares listed therein and (b) that the Respondent shall credit at the sale proceeds of these shares to the current account of M. Sivasubramniam with the Appellant Bank.

Upon the basis of this assurance given by the Respondent, the Appellant had lent and advanced monies to the said Sivasubramaniam by way of an Overdraft Facility granted upon the said current account. That the said Sivasubramaniam had failed and neglected to repay a sum of Rs. 6,385,077/42 which was due and owing to the Appellant upon the said overdraft facility, that the Appellant requested the Respondent to ensure that the sale proceeds of the shares were credited to the aforesaid current account. On or about the 21st of December 1994, the Appellant had become aware that the Respondent had acted in breach of the agreement and

undertaking given by them and that the respondent had failed and neglected and was unable to credit the sale proceeds of the shares to the aforesaid current account. The monies remained due and owing to the Appellant. Had the Respondent acted in accordance with the undertaking given by them, the Appellant would have received a sum of Rs. 5,558,841/- being the market value of the shares in reduction of the monies which remained due and owing and unpaid to the Appellant. That the Respondent's wrongful and unlawful breach of the agreement and undertaking had caused the Appellant to suffer loss and damage in a sum of Rs. 5,558,841 and that the Respondent was liable to pay the said sum.

The Respondent took up the position in its answer that the letter dated 21st January 1994 was issued on the specific instructions of the said Sivasubramaniam, that on or about 25th March 1994 they received instructions from the said Sivasubramaniam that the shares held in his favour with the Respondent be sold and the monies be remitted to Seylan Merchant Bank, consequent upon which a tripartite agreement was entered into between Seylan Merchant Bank, M. Sivasubramaniam and the Respondent. That the instructions given by the said M. Sivasubramaniam to the Respondent to credit the said account maintained at the Appellant Bank by the said Sivasubramaniam with all sales proceeds of the said shares and/or stocks was countermanded and/or revoked with effect from 25th March 1994, that the purported promise and/or agreement and/or contract relied on by the Appellant was unenforceable against the Respondent and that the said writing was not a promise and/or agreement and/or contract.

After trial the Commercial High Court by its judgment dated 11th May 2001 dismissed the action of the Appellant

on the ground that the Respondent was bound to act on the instructions of M. Sivasubramaniam, that the letter dated 21st January 1994 (P3) cannot be considered as a legally enforceable document as there was an absence of consideration and that the Respondent credited monies being the sales proceeds of shares held by M.Sivasubramaniam to his account held at the Appellant Bank until M. Sivasubramaniam countermanded such instructions. The learned High Court Judge has assumed that it is the English Law that applies by stating that 'consideration' is a requisite of a contract and concluded that a perusal of document P3 shows that there is a total lack of consideration and hence unenforceable.

The main argument of learned Counsel for the Appellant was based on the legality of the document dated 21st January 1994 (P3). His contention was that the Roman Dutch Law applied and that the said document P3 was enforceable against the Respondent and that even under the English Law as developed in later times it would be so. The argument of the learned Counsel for the Respondent was that the said agreement was unenforceable as according to English Law there had to be consideration and since that element was lacking the said agreement was not enforceable.

The Agreement (P3) on which the Appellant rests its case was an undertaking given by the Respondent to the Appellant on the basis of instructions given to them by M. Sivasubramaniam. The said undertaking had been given with all seriousness as was seen from the fact that when they had quoted the Account number of the client erroneously they acknowledged the corrected number of the account subsequently. The Respondent was a stockbroker and held the they had been given specific instructions regarding the sale and the acts to be performed on the sale of such shares.

The Respondent having undertaken to remit the proceeds of the sale of shares to the Appellant had subsequently entered into a tripartite agreement with the said Sivasubramaniam and Seylan Bank which had the effect of not being able to proceed with the undertaking given to the Appellant Bank. Although this agreement had been entered into by the Respondent, they did not take steps to inform the Appellant Bank that their client Sivasubramaniam had countermanded the said agreement with the Appellant by giving new instruction. Without informing the Appellant Bank of the new agreement, they had sold the shares and remitted the monies to Seylan Bank. The Respondent had informed the Appellant Bank about the countermanding of the agreement only after the Appellant Bank had sent letter dated 17th December 1994 (P8) requesting the Respondent to sell the shares and remit the proceeds to the Appellant Bank as agreed in P3. In reply to this request in P8 the Respondent had for the first time informed the Appellant Bank by letter dated 21st December 1994 (P9) that their client Sivasubramaniam had entered into a tripartite agreement with another Bank and that action had been taken according to the said agreement and that there were no shares held by Sivasubramaniam in his share trading accounts. The Respondent had therefore failed to inform the Appellant Bank about the position taken up in P9 although they knew about in on 26th March 1994 as they were one of the parties to the said tri-partite agreement. It is thereafter that the Appellant sought to take steps to recover the monies due to them by sending a letter of demand on 11th January 1995 (P10) and instituting action thereafter. The aforesaid conduct on the part of the Respondent was definitely a breach on the part of the Respondent of the undertaking given to the Appellant Bank in P3. This breach

was confirmed by the Respondent was definitely a breach on the part of the Respondent of the undertaking given to the Appellant Bank in P3. This breach was confirmed by the Respondent by the aforesaid letter P9 when the Respondent stated very clearly and assertively that the earlier instruction were **countermanded and/or revoked.** Countermanding means cancelling or reversing a previously issued command, instruction or order. The *Legal Thesaurus defines* countermand as a contrary command cancelling or reversing a previous command. Even though the said letter was sent by the Respondent's Lawyers it was a situation of conveying the instructions given to them by their client. Even if the Lawyers choose to use language which had serious overtones the client (the Respondent) had to take the responsibility for same. Not only does the said document state about countermanding, it goes further to state. . and/or revoking the earlier instructions which to my mind had a double cancellation effect or a very strong assertion of such cancellation. Therefore there is no doubt that the Respondent is in breach of the undertaking given in P3.

The question then arises as to whether the Appellant could recover the monies it claimed on the basis of the breach of the said undertaking in P3. Although the Respondent had transacted with the Appellant Bank, does the said transaction become a banking transaction merely because the Appellant was a Bank. What is a Banking transaction? There is no clear cut demarcation of the transactions that one has with a Bank being classified as Banking Transactions. It is usual to consider lodging money into a bank account, withdrawing money, adding interest to an account, direct debits, deducting bank charges, basically any sort of activity involving a change of money in an account is a banking transac-

tion which are usually listed in a bank account statement. The transaction embedded in the agreement P3 is a pure and simple contractual undertaking given by the Respondent.

The Civil Law Ordinance No. 05 of 1865 introduced the English Law relating to Banks and Banking. But there are many transactions where the Banks are parties which do not come within the realm of Banking Transactions and regarding which the Roman Dutch Law applies. In my view it is the Roman Dutch Law that would apply to the transaction engulfed in the document P3. Would the said transaction amount to an enforceable contract? Under the Roman Dutch Law there should be justa causa for a contract to be valid. In the present case the undertaking given by the Respondent would satisfy the requirement for a valid contract as it was an undertaking given with all seriousness.

In *Lipton v. Buchanan*(1) Wendt J stated that "Causa denotes the ground, reason, or object of a promise giving such promise a binding effect in law. It also has a much wider meaning than the English term "consideration" and comprises the motive or reason for a promise and also pure moral consideration." Further "Nude pacts made in earnest and with a deliberate mind/give rise to actions, equally with contracts."

In *Jayawickreme v. Amarasuriya*(2) Lord Atkinson observed that under the Roman Dutch Law a promise deliberately made to discharge a moral duty or to do an act of generosity or benevolence can be enforced at law, the *justa causa debendi* sufficient according to the Roman Dutch Law to sustain a promise being something far wider than what the English Law treats as good consideration for a promise.

In *Edward Silva v. De Silva* [3] Soertsz J. stated that for all that appears to be required to support a promise and to make it enforceable is that "the agreement must be a deliberate, serious act, not one that is irrational or motiveless."

Therefore on a consideration of these authorities it is my view that P3 was an enforceable contract and that the Respondent had breached same and that the learned High Court Judge was in error in assuming that English Law applied without considering the nature of the transaction between the parties and dismissing the action of the Appellant.

Learned Counsel for the Appellant in his written submission has adverted to the fact that even in the developed English Law there have been instances where the English Courts have been flexible in dealing with the concept of consideration rigidly and that if there is evidence that the parties had acted upon the faith of a written document that the Courts would prefer to assume that the documents embodies a definite intention to be bound and will strive to implement its terms. I consider it not necessary to delve into the development of the concept of consideration in English Law as I have stated above that the Roman Dutch Law would apply to the transaction in question.

A further matter that transpired according to the evidence led in the case and which was sought to be used by the Respondent was that after giving the undertaking in P3, that they had honoured the undertaking to some extent by remitting certain monies by cheques V2 to V5 as being the sale proceeds of the shares held by the Respondent during the period 21st January 1994 to 25th March 1994. These cheques

had been received by the Appellant from Sivasubramaniam and not from the Respondent, and the Respondent was unable to establish that these were monies from the sale proceeds which were given to Sivasubramniam to deposit in terms of the undertaking in P3. This brings to light two aspects, firstly it is an acceptance of the obligation undertaken by them in P3 and secondly that they had acted in furtherance of that obligation. If that was the objective of the Respondent, then their argument that P3 was not an enforceable contract has necessarily to fail. It is to be observed that the learned High Court Judge too fell into this error by recognizing that the Respondent had credited monies with the Appellant Bank.

This action had commenced in December 1997 and the High Court had concluded same in May 2001. Since then, almost ten years had lapsed before it was taken up for final hearing. In these circumstances it would be reasonable to limit the legal interest that would otherwise accrue to the benefit of the Appellant. In the above circumstances the judgment of the Commercial High Court is set aside and judgment is entered in favour of the Plaintiff-Appellant in a sum of Rs. 5,558,841/- together with a flat rate of interest at 6% per annum until payment in full and the Plaintiff will also be entitled to Rs. 21,000/- as costs.

TILAKAWARDANE J. – I agree.

AMARATUNGA J. – I agree.

Appeal allowed. Judgment of the Commercial High Court set aside.

KAHAGALAGE AND 5 OTHERS V. WIJESEKERA AND 5 OTHERS

SUPREME COURT
J.A.N. DE SILVA, CJ.,
AMARATUNGA, J. AND
EKANAYAKE, J.
S.C. (FR) APPLICATION NO. 18/2009
JUNE 11TH 2010

Army Act – Navy Act – Air Force Act – Police order – Constitution – Fundamental Rights – Article 12(1) – Right to equality – Article 14(1) (d) – Freedom to form and join a trade union – Article 15(8) – Restriction of fundamental rights recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law? Force contemplated in Article 15 (8) Nature of service provided ? Active server.

The Petitioners who were guards attached to the Railway Protection Force (RPF) alleged that their fundamental rights, guaranteed by Articles 12(1) and 14(1)(d) of the Constitution had been violated by the Respondents. The main complaint was that the members of the 'RPF' were not allowed to form or to become members of any Trade Union. The position taken up by the 1st Respondent was that the 'RPF' is also a force contemplated by Article 15(8) of the Constitution and accordingly, the restriction of the right of the members of 'RPF' to join or to form a trade union is in accordance with the law.

The functions of the Railway Protection Force are limited to the protection of railway property and its workers and commuters who use the railway as their mode of conveyance. Its functions are limited to the activities of the Railway Department including the protection of the commuters.

Held:

(1) The service operating within the Railway Department under the name "Railway Protection Force" is not a 'Force" within the meaning

of Article 15(8) of the Constitution and as such the Standing Order No. 47 which prohibits the members of the Railway Protection Force from forming or joining a trade union is contrary to Article 14(1) (d) of the Constitution.

(2) The Petitioners and other members of the Railway Protection Force are entitled to the freedom to form an join a trade union as declared and recognized in Article 14(1) (d) of the Constitution.

(3) The failure and/or the refusal of the Railway authorities to pay overtime to the members of the Railway Protection Force is a violation of the fundamental rights guaranteed to the Petitioners by Article 12(1) of the Constitution.

(4) The normal period of duty of a member of the Railway Protection Force is eight hours per day and if they have to work for more than eight hours per day due to exigencies of service, they are entitled to be paid overtime. If overtime payment is denied to them it amounts to forced labour.

Per Gamini Amaratunga, J. –

". . . . . It is the responsibility of the 1st Respondent to seek budgetary allocations for the payment of overtime to the members of the RPF. . . . . ."

APPLICATION under Articles 17 and 126 of the Constitution for infringement of the fundamental right of equality.

Uditha Egalahewa with *Hemantha Gardihewa* for the Petitioners.

Indika Demuni de Silva, Deputy Solicitor General for the Respondents.

Cur.adv.vult.

May 13th 2010

GAMINI AMARATUNGA, J.

This is an application filed under and in terms of Articles 17 and 126 of the Constitution by six petitioners who are security guards attached to the Railway Protection Force

(hereinafter referred to as the RPF) alleging infringement of their fundamental rights guaranteed by Articles 12(1) and 14(1)(d) of the Constitution by the respondents. This court has granted leave to proceed for the alleged violation of the petitioners' fundamental rights guaranteed by the aforementioned Article of the Constitution.

There are two complaints addressed to us by the petitioners in their application. The first and the major complaint of the petitioners is that the members of the RPF are not allowed to form or to be members of any Trade Union in view of Standing Order No. 47 marked and produced by the petitioners as P27 with their application. The General Manager of Railways who is the 1st respondent to this application, in paragraph 24 of his affidavit of 2nd March 2010 filed in this Court has specifically admitted the existence of the said Standing Order which prohibits the members of RPF from becoming a member of any trade union or to form a trade union. This is a clear admission that the members of RFP are not entitled in view of the said Standing Order No. 47 to form or join a trade union.

The petitioners allege that this is a violation of their fundamental right guaranteed by Article 14(1) (d) of the Constitution which reads as follows.

14(1) Every citizen is entitled to –

(d) the freedom to form and join a trade union;

Fundamental rights guaranteed by Article 14 are subject to the limitation set out in Article 15(8) of the Constitution which reads as follows.

"The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14

shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interest of proper discharge of their duties and the maintenance of discipline among them."

The position taken up by the 1st respondent and the learned Deputy Solicitor General who appeared for the respondents is that the Railway Protection Force is also a Force contemplated by the aforementioned Article 15(8) of the Constitution and accordingly the restriction of the right of the members of RPF to join or to form a trade union is in accordance with the law.

The 1st respondent in paragraph 24 of his affidavit referring to Standing Order No. 47 has stated that "having regard to the duties, functions and responsibilities of the Railway Protection Force and the reasons which compelled the Government to raise, train and equip this new Force, that it had been decided to have the said Force function in the same manner as any other Force in Sri Lanka and to enforce the said Standing Orders in like manner."

In view of the position taken up by the 1st respondent it is necessary to consider the manner in which the body known as the Railway Protection Force was formed and its functions. The Railway Protection Force was established consequent to a decision taken by the Cabinet of Ministers on 01.4.1987. The Cabinet Memorandum dated 27.02.1987 presented to the Cabinet of Ministers by the then Minister of Transport has been made available to this Court by the 1st respondent as annexure 1R2A to his affidavit. That Cabinet Memoran-

dum carries the heading "Restructuring the Railway Security Service". In that Cabinet Memorandum the Minister has stated that, in view of severe damage to Railway property during the past three years due to escalation of terrorist activities in the North and East it had become necessary to provide para-military training to the members of the Railway Security Service. However due to a judgment given by the Supreme Court in a fundamental rights application filed by some members of the Railway Security Service against the proposed training it had become difficult to press Railway Security Service personnel to perform duties qualitatively different from their normal duties for which they had been recruited.

In his Cabinet Memorandum the Minister had pointed out that in the same case the Supreme Court had made the observation that the Government had sufficient authority if is so desired to raise, train and equip a new Railway Security Force to meet the greater demands made on the authorities.

Relying on the aforementioned observation of the Supreme Court, the Minister had proposed to abolish the existing Railway Security Service and to create a new service to be known as the Railway Protection Force.

After considering the proposal contained in the Minister's Memorandum the Cabinet of Ministers on 01.04.1987 granted its approval to form a new service known as the "Sri Lanka Railway Protection Force." That was the manner in which the service now known as the "Railway Protection Force" came to be established within the Railway Department.

At the hearing before us the learned Deputy Solicitor General who appeared for the respondents stated that the

Railway Protection Force is also a Force contemplated in Article 15(8) of the Constitution. The learned Deputy Solicitor General laid much emphasis on the fact that the Cabinet of Ministers had approved the creation of a new service known as the Railway Protection Force and the Railway Protection Force is therefore a Force which falls within Article 15(8) of the Constitution and as such Standing Order No. 47 which prohibits the members of RPF from joining or forming a trade union is a law by which the fundamental right declared and recognized by Article 14(1)(d) can be legitimately restricted.

The learned Counsel for the petitioners countered this argument by pointing out that although the English version of the Cabinet Memorandum of the Minister and the Cabinet decision thereon used the term Railway Security Force, the Sinhala version of the Cabinet Memorandum and the Cabinet decision have used the words

Which means that it is not a Force but a service.

Nomenclature itself is not a decisive factor. Let me now examine the words used in the Cabinet Memorandum. The proposal of the Minister in his Cabinet Memorandum was to "form a new Service to be known as the Railway Protection Force." The approval granted by the Cabinet was also to form a new service to be known as the Railway Protection Force. In the Cabinet Memorandum the Minister never sought the approval of the Cabinet to create a new force similar to the Armed Forces and the Police Force.

In the circumstances set out above it is necessary to examine the nature of the service the Railway Protection Force is expected to perform. According to paragraph 7 of the 1st respondent's affidavit, the officers of the Railway Protec-

tion Force are required to protect the commuters, workers and the property of the Railway Department and also to ensure uninterrupted operation of rail services and to protect booked consignments of goods, wagons and goods sheds. Thus the functions of the Railway Protection Force are limited to the Protection of railway property and its workers and the commuters who use the railway as their mode of conveyance. Its functions are limited to the activities of the Railway Department including the protection of the commuters.

In terms of Standing Order 312(3) issued by the General Manager of Railways (Document P3) each officer is required to work eight hours per day. A day is divided into three shifts of eight hours duration and the officers are deployed for duty on the basis of a roster which allows three officers to serve in the three shifts of the day. However in the event of the failure of an officer to report for work to take over the duty from an officer who has completed his duty shift of 8 hours, the person who has completed his eight hours duty turn has to remain on duty until another person comes to take over duties from him. Such situations are exceptions to the normal eight hour duty period. Such arrangements are usual methods of continuing an uninterrupted service during the twenty four hours of the day despite the absence of one person to take over duties from the person who has completed his roster duty period of eight hours.

Let me now turn to the duty periods set out in the Army Act. (Cap 357 of the CLE, 1956 Revision) Section 18 of the Army Act provides that the Regular Force shall at all time be liable to be employed on active service. Section 15 of the Navy Act (cap. 358, CLE, 1956 Revision) also provides that "The Regular Naval Force shall at all times be liable to be employed

on active service". Section 19(2) of the Air Force Act (Cap 359, CLE, 1956 Revision) provides that "All officers and airmen of any such part of the Air Force as is called out in active service. . . . shall be deemed to be on such service until the Governor General terminates such service by Proclamation."

Thus it is clear that when personnel of the Army, Navy and the Air Force are called upon to be on active service there is no provision for specific duty hours and that they have to be on duty during twenty four hours of the day and perhaps for more than one day.

The provision of the Police Ordinance (Cap 53 C.L.E. 1956 Revision) is more specific. Section 56 of the Police Ordinance provides that "Every police officer shall for all purposes in this Ordinance contained be considered to be always on duty. . . ."

The provisions of law I have quoted above show that when the members of the Armed Forces are employed on active duty they have no set duty hours. A Police officer is on duty for 24 hours of the day and 365 days for an year. A member of the Railway Protection Force has a set duty period of eight hours. On that basis alone I can conclude that the service operating within the Railway Department under the name "Railway Protection Force" is not a "Force" within the meaning of Article 15(8) of the Constitution.

However I base my decision on an analysis of Article 15(8) itself. I have already quoted that Article in the earlier part of this judgment. I again quote the same article below for convenience of reference.

"The exercise and operation of the fundamental rights declared and recognized by Article 12(1), 13 and 14 shall,

in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order be subject to such restrictions as may be prescribed by law. . . . . .. " (emphasis added)

According to this Constitutional provision the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, be subject to such restrictions as may be prescribed by law in their application to the members of the Armed Forces, the Police Force and the other Forces charged with the maintenance of public order.

The question is whether the service known as the Railway Protection Force is a Force charged with the maintenance of public order? In view of the functions of the Railway Protection Force I have set out in the earlier part of this judgment, my answer to the above question is in the negative. The Railway Protection Force has no role to play with the maintenance of public order. Accordingly I hold that the service designated by the name Railway Protection Force is not a "Force" within the meaning of Article 15(8) of the Constitution and as such the Standing Order No. 47 which prohibits the members of the Railway Protection Force from forming or joining a trade union is contrary to Article 14(1)(d) of the Constitution. The said Standing Order No. 47 which stands valid even today constitutes a continuing violation of the petitioner's fundamental rights guaranteed by Articles 12(1) and 14(1)(d) of the Constitution. Accordingly I grant the relief prayed for by the petitioners in paragraph (C) of the petition dated 6.1.2009 and declare that the said Standing Order No. 47 is null and void. The petitioners and the other members of the Railway Protection Force are entitled to the freedom to form and join a trade union as declared and recognized in Article 14(1)(d) of the Constitution.

The next grievance placed before this Court by the petitioners is that the Railway Department does not pay their overtime claims for duties performed outside their normal duty hours for a day. It appears that the Railway Department in its annual estimates of expenditure had not sought funds necessary for paying overtime to the members of the Railway Protection Force. The failure to seek annual budgetary allocation of funds for the payment of overtime to members of the RPF appears to be the result of the mistaken view of the Railway authorities that the RPF is a Force like the Armed Forces and the Police Force. This view is no longer valid. It is an admitted fact that the normal period of duty of a member of RPF is eight hours per day. If they have to work for more than eight hours per day due to exigencies of service, they are entitled to be paid overtime. If overtime payment is denied to them it amounts to forced labour. A former General Manager of Railways had recommended payment of overtime to members of the RPF for work done outside their normal duty hours and during Sundays and public holidays. (Vide document P12). Documents P14, 15, 20 and 21 clearly establish their entitlement to be paid overtime for duties performed outside their normal duty hours and on Sundays and public holidays. Paragraphs 19, 20 and 21 of the 1st respondent's affidavit clearly indicate the recognition of the right of the members of the RPF to be paid overtime for work done outside their normal working hours due to exigencies of service. I therefore hold that the failure and/or refusal of the Railway authorities to pay overtime to the members of the RPF is violative of the petitioner' fundamental right guaranteed by Article 12(1) of the Constitution.

It appears to me that the failure and/or refusal of the Railway Department to pay overtime to the members of the