THE

Sri Lanka Law Reports

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

[2011] 1 SRI L.R. - PART 6

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In *De Silva and Others Vs. L.B.Finance Ltd (supra)* the impugned affidavit at the commencement or in the recital contained the following words “being a Buddhist do hereby solemnly sincerely and truly declare and affirm”. The jurat of the said affidavit contained the words “within named affirment” instead of the transitive verb ‘affirmed’. Thus the word affirms was wanting only in the jurat but was present in the recital. In that case His Lordship Justice G.P.S. De Silva held that the fair meaning that could be given to those words is that the deponent had affirmed to the contents of the affidavit, before the Justice of the peace.

In other words his Lordship held that it was not necessary to mention the word affirms in the jurat if that word was found in the body of the affidavit such as the recital to the affidavit. His Lordship endeavoured in that case to give a constructive meaning to the words contained in the affidavit even in the absence of the precise word affirm in the jurat. It is true that in that case the word affirms was at least found in the recital of the affidavit. In the instant case the word affirm is found nowhere neither in the recital nor in the jurat.

I find that there is no magic in the word affirm. It means according to the Oxford Advanced Learner’s Dictionary “ to state firmly or publicly that sth is true or that you support sth strongly.” The impugned affidavit at the commencement and in its recital states බෞද්ධාගමිකයකු වශයෙන් අවංකවත්, සත්‍ය ලෙසත්, ගාම්භීරතා පූර්වකවත් - ප්‍රතිඥා දී ප්‍රකාශ කර සිටින වගනම්

Translated into English it means “being a Buddhist I solemnly sincerely and truly declare and state.” Neither the Jurat nor the body of the affidavit contains the word affirm. The Jurat of the impugned affidavit contained the date and the place of attestation and the fact that the deponent is

signing the same having read and understood the contents of the affidavit. What is wanting in the affidavit is the precise word 'affirm'."

On a consideration of the impugned affidavit I find that the provisions of section 438 of the Civil Procedure Code have been complied with. The Jurat expressly sets out the place and the date on which the affidavit was signed. The affidavit has been signed before a Justice of the Peace. There is specific reference in the jurat that the affidavit was duly signed by the deponent after having read and understood the contents. The contention that the affidavit is invalid is based on the absence of the word affirm in the jurat or in the body of the affidavit.

On the other hand if a Catholic does not swear an affidavit that might be a different kettle of fish altogether because swearing becomes very important and most significant to a Catholic who believes in Almighty God. i.e. I swear by the Almighty God that I will tell the truth. A mere assertion statement or affirmation may not suffice for the purpose of executing a valid affidavit as far as a Catholic, Christian or a Jew is concerned. *(Edussuriya, J. in Clifford Ratwatte V Thilanga Sumathipala and Others)(supra)* But in the case of a deponent being a Buddhist this question does not arise.

I cannot understand why a Buddhist cannot believe in God or Gods. Perera, J. in *Rustomjee Vs Khan*[6] at 123 held that the use of the word "may" in the Oaths Ordinance of 1895, instead of "shall", must be regarded as deliberate; with the consequences, non-Christians who believe in God would have the option to swear or to affirm.

Buddhism is a philosophy and a religion. In any case where a deponent solemnly sincerely and truly state some-

thing in his affidavit with responsibility, a particular word should not be allowed to play tricks or stand in the way of justice and fair play. A particular word should not be allowed to vitiate or invalidate an affidavit which is otherwise regular on the face of it. The words solemnly sincerely and truly connotes that the deponent is publicly admitting the truth of the contents in the most responsible manner. The absence of a particular word namely the word 'affirm' referred to in the statute cannot and should not be allowed to stand in the way of justice. The words must be given a purposive and meaningful construction instead of trying to split hairs on technicalities. (*Mohamed Vs Jayaratne and Others*(7))

The rationale in the above quoted judgments is that the fundamental obligation of a deponent is to tell the truth and the purpose of an oath or affirmation is to enforce that obligation. Therefore the substitution of an oath for an affirmation or vice versa will not invalidate an affidavit or on the other hand by reading the affidavit as a whole if a fair meaning could be given to the words used in the affidavit that the deponent has affirmed to the contents of the affidavit before the Justice of the Peace then it could be construed that there is sufficient compliance with the requirement of an affidavit. (*H/L Hon. S. Srikandarajah, J. in Kalutanthrige Don John Patric vs Kaluthanthrige Dona Mercy*(8))

For the reasons stated I hold that there is no merit in the first ground of Appeal taken by the 2nd Respondent Appellant, namely that there was no valid Writ application before the Provincial High Court, accordingly the first ground of appeal is hereby rejected.

With regard to the third and fourth grounds of appeal I find that there is no substance or merit in those arguments.

In addition the submissions did not sound convincing and those two grounds were not prosecuted with much conviction or vehemence.

Second ground of appeal - undue delay

The counsel for the appellant contended that there was undue delay in presenting the writ application to the High Court. He cited the following authorities in support of his case. (*Issadeen V The Commissioner of National Housing and others*[9] *Lanka Diamond (Pvt) Ltd V Wilfred Vanells and Two Others*[10])

In order to decide whether there was undue delay in presenting the application for writ it becomes necessary to deal with the facts pertaining to the case. The Petitioner Respondent joined the first Respondent society on 04 of February 1971 as a general manager. The Petitioner was appointed as a curator of the stores on 26 of June 1973. Due to a leakage of goods to the value of Rs. 8146.76, the Petitioner was dismissed from service without any enquiry whatsoever. The Petitioner states that by letter dated 13 of August 1976, he was dismissed from service with immediate effect without following any procedure. The Petitioner further states that the dismissal was totally and completely against the principles of natural justice, that thereafter the Petitioner submitted several appeals to the Respondents including the Respondent Appellant and after four years that is on 8 of August 1979 a charge sheet was issued on the Petitioner containing three charges but a disciplinary inquiry was not held to go into the charges framed against him based on that charge sheet. Thereafter nearly 21 years later another charge sheet was issued against the Petitioner. The second charge sheet was issued on 15th of November 1997. At the time of

issuing the second charge sheet the dismissal made on 13th of August 1976, prior to the issuance of the two charge sheets, was not cancelled and was in existence.

The inquiry that followed the second charge sheet commenced on 25th of February 1998 and was completed on the sixth of April 1998. It is alleged by the Petitioner that the disciplinary inquiry was concluded without granting the Petitioner the opportunity to meet his case properly and effectively.

It was submitted on behalf of the petitioner that the 1st Respondent informed the petitioner that he had been convicted of all the charges leveled against him and that he appealed to the 1st Respondent but was informed that the 1st Respondent cannot intervene in the matter. The Petitioner had thereafter submitted a second appeal dated 15th of July 1999, to the, 1st Respondent by stating his grievance but once again, by the letter dated 30th of August 1999 the 1st Respondent informed the Petitioner that there was no reason to interfere with the decision. Thereafter the Petitioner had submitted two more appeals to the 1st Respondent but was informed that his request cannot be considered. On 5th of January 2001 the Petitioner submitted a further appeal to the 1st Respondent. As a result of that appeal the Petitioner was asked to appear before the 1st Respondent but was informed that there was no reason to change the decision and it was thereafter that the Petitioner filed the writ application in the High Court of Anuradhapura on 18 December 2002.

On the facts it is crystal clear that there had been untoward and inexcusable delay on the part of the Appellant in holding a proper disciplinary inquiry against the

Petitioner. He had been dismissed summarily without holding any inquiry or even serving a charge sheet on him. Thereafter it took several years to frame charges against the Petitioner and there too the authorities failed to prosecute or to hold an inquiry on the charge sheet issued against him and subsequently after 21 years a second charge sheet was served on him. It is only thereafter a purported inquiry was held and even at that inquiry, on the evidence it is clear that the Petitioner was not afforded a fair inquiry. He was not permitted to lead evidence at the inquiry held and thus was deprived of a fair inquiry. Delay / laches of a party does not bestow a right or privilege on the other to indulge in delay / laches but is it ethical, proper, just or fair to allow the Appellant to rely on the delay on the part of the Petitioner in filing the writ application, when they themselves delayed long years, for more than 21 years, in framing charges and proceeding against the Petitioner. On the other hand in view of the brazen facts I am of the opinion that even if there was a delay in filing the application for writ that delay is certainly excusable and pardonable in the light of and in the face of the glaring injustice, the glaring prejudice that has been caused to the Petitioner by the conduct of the first 1st respondent and the 2nd Respondent Appellant.

Tenability of the Learned High Court Judges order

The Appellant has questioned the capacity of the Petitioner to maintain or invoke the writ jurisdiction of the High Court. The Appellant was a statutory body vested with statutory rights and obligations created by statute. The Petitioner was an employee but it was not a simple and pure master and servant contract there was a lot of rights and obligations governed by and emanating from statutes, especially so when

it comes to disciplinary matters, dismissal, inquiry, appeals etc.

The remedy of judicial review is available where an issue of public law is involved. The expression public law and private law whilst convenient for descriptive purposes must be used with caution. It is not correct to assume that there is no public law element in an ordinary relationship of master and servant and that accordingly in such a case judicial review would not be available. Even in a master and servant relationship where conditions of employment or disciplinary matters are regulated to some degree by statutory provisions or a statutory scheme, such actions attract public law remedies.

Employment by public authorities does not per se inject any elements of public law nor does the fact that the employees in the higher grade or is an officer. This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment. It is this underpinning and not the seniority which injects any element of public law. The ordinary employer is free to act in breach of its contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee public law rights and at least making him a potential candidate for administrative law remedies. (Vide. *Malloch V. Aberdeen Corporation*[11] Per Sriskandarajah, J.

With regard to the dismissal of the Petitioner I find that it had been done haphazardly without serving a charge sheet or without holding a proper inquiry. A charge sheet had been served on the Petitioner after a couple of years and thereafter a second charge sheet was filed after 21 years and it is only thereafter that any form of an investigation has been held. On top of this brazen violation of fundamental norms and the rights of the Petitioner, even at the investigations held on the second charge sheet the Petitioner had not been afforded a fair hearing. The Appellant has not observed the principles of natural justice. In fact P 13 reveals that the Petitioner was not allowed to place his case properly, effectively and to the best of his ability. The investigation team determined that it was not necessary for the Petitioner to lead evidence and thereafter had prevented him from leading any evidence, in fact has ruled that they really would not permit the Petitioner to lead evidence. This is a blatant violation of the Petitioner's right to a fair hearing. The Appellant has not followed a fair procedure in keeping with the rule *audi alteram partem* in conducting their investigations against the Petitioner. (vide. *Koralagamage Vs The Commander of the Army*(12), *Ratnayake Vs Ekanayake Commissioner General of Excise and others*(13) *Lanka Loha Holdings (Pvt) Ltd Vs The Attorney General*(14).

For the reasons adumbrated on the facts and the law I am of the view that there is no merit in this appeal and accordingly I dismiss this appeal with costs fixed at Rs. 5000/= to be paid to the petitioner Respondent by the 2nd Respondent appellant.

LECAMWASAM, J. - I agree.

Appeal dismissed.

SAMARAKOON V. GUNASEKERA AND ANOTHER

SUPREME COURT
AMARATUNGA, J.,
RATNAYAKE, J. AND
EKANAYAKE, J.
S. C. APPEAL NO. 84/2010
S.C. (H.C) CALA APPLICATION NO. 75/2010
NCP/HCCA/ARP 303/2007
D. C. ANURADHAPURA 17234/L
MAY 26TH, 2011

Evidence Ordinance – Section 68 – Proof of execution of documents required by law to be attested – Manner of proving such documents – Prevention of Frauds Ordinance – Section 2 and Section 4 – Deeds affecting immovable property to be executed before a notary and two witnesses.

In order to prove the Plaintiff's title to the property which is the subject matter of the action, he produced at the trial the notarially executed deeds marked P3 to P6 which were marked subject to proof. No witnesses were called at the trial on behalf of the Plaintiff to prove the said deeds. At the end of the Plaintiff's case, when the Plaintiff's Counsel read in evidence the deeds produced in evidence marked P3 to P6, the defence had made an application to Court to exclude those documents which were not properly proved. The learned District Judge held that the documents P3 to P6 had not been properly proved and accordingly, that the Plaintiff had failed to prove his title to the land in question.

The Plaintiff appealed against the decision of the District Judge to the High Court. The High Court reversed the District Judge's finding on the basis that when a deed had been duly signed and executed it must be presumed that it had been properly executed.

Held:

(1) The High Court in total disregard of the specific and stringent provisions of Section 68 of the Evidence Ordinance had relied on

an *obiter dictum* made in a case where due execution was challenged, to reverse the decision of the District Judge.

(2) In terms of Section 2 of the Prevention of Frauds Ordinance a sale or transfer of land has to be in writing signed by two or more witnesses before a notary, duly attested by the notary and the witnesses. If this is not done the document and its contents cannot be used in evidence.

Per Amaratunga, J.

(3) "When a document is admitted subject to proof, the party tendering it in evidence is obliged to formally prove it by calling the evidence necessary to prove the document according to law. If such evidence is not called and if No objection is taken to the document when it is read in evidence at the time of closing the case of the party who tendered the document it becomes evidence in the case.

(4) On the other hand if the document is objected to at the time when it is read in evidence before closing the case of the party who tendered the document in evidence, the document cannot be used as evidence for the party tendering it."

Per Gamini Amaratunga, J. –

"This Court is not inclined to order a re-trial in the absence of any miscarriage of justice resulting from a wrong decision made by a Court. The Plaintiff's plight is due to the failure of his Attorney-at-Law to adduce evidence necessary to prove the Plaintiff's title. This Court is not inclined to order a re-trial to facilitate an Attorney–at –Law to rectify the mistake he had made in handling his client's case."

Cases referred to:

Sangarakkita Thero v. Buddarakkita Thero – (1951) 53 NLR 457

APPEAL against the judgment of the High Court of the North Central Province (exercising Civil Appellate jurisdiction)

M. Yoosuf Nassar for the Appellant

K. G. Jinasena for the Respondent.

Septembe 22nd 2011

GAMINI AMARATUNGA J.

This is an appeal, with leave to appeal granted by this Court, against the judgment of the High Court of the North Central Province exercising Civil Appellate jurisdiction, allowing the appeal filed by the plaintiff-respondent (hereinafter called the plaintiff) in that Court against the judgment of the District Court of Anuradhapura, dated 24.6.2005, dismissing the plaintiff's action.

The facts relevant to this appeal are briefly as follows: The plaintiff filed action in the District Court praying for a declaration of his title to the land described in the schedule to his plaint, an order for ejectment of the 1st to 3rd defendants (hereinafter called the appellant and the 2nd and 3rd respondents) and for damages for their unlawful occupation of the land in suit. The defendants filed answer denying the plaintiff's claim that they were in occupation of his land and claiming a declaration of title in their favour, on the basis of long continued prescriptive possession, of the land described in the schedule to the answer. The case proceeded to trial on 24 issues based on the respective claims of the parties.

The land described in the schedule to the plaint was lot No. 16 of the final plan No. 437 in partition action No. P 66 of the District Court of Anuradhapura. The said lot No. 16 had been allotted in common to the plaintiff and four others. The plaintiff's position was that he had bought the shares of the others and had become the sole owner of the entire lot No.16. In order to prove his title he produced at the trial the notarially executed deeds marked P3, P4, P5 and P6 subject to proof. However no witnesses were called at the trial on behalf of the plaintiff to prove those deeds in accordance with

the provisions of section 68 of the Evidence Ordinance. At the end of the plaintiff's case, when the plaintiff's counsel read in evidence the deeds marked P3 to P6 the defence had made an application to Court to exclude those documents which were not properly proved. The defendants have then adduced evidence in support of their prescriptive title.

The learned trial Judge had held that documents P3, P5 and P6 had not been properly proved and accordingly the plaintiff had failed to properly prove his title to the land in question. On that basis he had dismissed the plaintiff's action. The counter claim of the defendants was also dismissed for want of evidence to establish their prescriptive title.

The plaintiff appealed to the Civil Appellate High Court against the dismissal of his action. The learned High Court Judges have reversed the finding of the learned trial Judge that documents P3, P5 and P6 had not been properly proved. Their reasoning was that the deeds marked P3, P5 and P6 were originals which had been referred to in the plaint; that the defendants had not contested the genuineness of those deeds or had raised any issue relating to their genuineness and as such when a deed had been duly executed and signed it must be presumed that it had been properly executed. On that basis the learned High Court Judge had set aside the learned District Judge's finding that in view of the failure of the plaintiff to duly prove the deeds P3, P5 and P6 the plaintiff had not properly proved his title. Accordingly the High Court allowed the appeal of the plaintiff in relation to the declaration of his title. For their conclusion that when a deed had been duly signed and executed it must be presumed that it had been properly executed, the learned Judges have relied on the decision in *Sangarakkita Thero vs. Buddarakkita Thero*

On an application by the 1st defendant respondent, this Court has granted leave to appeal against the judgment of the Civil Appellate High Court on the following question of law:

(a) Whether the plaintiff-respondent discharged his burden as required in a vindication action (sic.)

(b) Did the honourable judge of the High Court of Civil Appeal err in law by holding that the plaintiff-respondent had identified the land in question in the circumstances of the case?

(c) Whether the plaintiff respondent has proved his claim on a balance of probability?

At the hearing of the appeal both parties made submissions on the correctness of the reasoning of the Civil Appellate High Court on the issue whether document P3, P5 and P6 had been properly proved.

Documents P3, P5 and P6 are notarially executed deeds. The plaintiff by producing those deeds in evidence sought to prove that the rights of the others who become co-owners of lot No. 16 in plan No. 437 of the partition action P66 had lawfully transferred their title to Lot No. 16 to him, making him the lawful owner of their shares.

In terms of section 2 of the Prevention of Frauds Ordinance a sale or transfer of land has to be in writing signed by two or more witnesses before a notary and duly attested by the notary and the witnesses. Thus the deeds marked P3, P5 and P6 being documents for the sale and transfer of an interest in the land are documents required by law to be attested. When such a document is to be used in evidence, the manner of proving it is set out in section 68 of the Evidence Ordinance which reads as follows:

> *"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of court and capable of giving evidence."*

In the course of giving evidence, if a witness refers to a document which he proposes to use as evidence, it shall be marked in evidence. If the party against whom such document is sought to be used as evidence, does not object to it being received in evidence, and if the document is not one forbidden by law to be received in evidence, the document and its contents become evidence in the case, On the other hand if the opposing party objects to the document being used as evidence, it is to be admitted subject to proof. When a document is admitted subject to proof, the party tendering it in evidence is obliged to formally prove it by calling the evidence necessary to prove the document according to law. If such evidence is not called and if no objection is taken to the document when it is read in evidence at the time of closing the case of the party who tendered the document it becomes evidence in the case. On the other hand if the document is objected to at the time when it is read in evidence before closing the case of the party who tendered the document in evidence, the document cannot be used as evidence for the party tendering it.

A deed for the sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in section 68 of the Evidence Ordinance by proof that the maker (the vendor) of that document signed it in the presence of witnesses and the notary. If this is not done the document and its contents cannot be used in

evidence. The plaintiff in this case had not called the witnesses necessary to prove deeds P3, P5 and P6 in accordance with section 68 of the Evidence Ordinance.

The learned High Court Judges in their judgment have not referred to section 68 at all. Instead, they have based their conclusion on the obiter dictum contained in the judgment in *Sangarakkita Thero vs. Buddharakkita Thero (supra)*. That was a case where a deed, executed when the executant was warded in a hospital, appointing an incumbent of a temple, was challenged on the ground that it had not been executed in accordance with the provisions of section 4 of the Prevention of Frauds Ordinance relating to the executions of wills. The ground of challenge was that the deed had not been executed in accordance with the manner provided in section 4. On the evidence available the Supreme Court had held that the will had been duly executed in conformity with the requirements of section 4 of the Prevention of Frauds Ordinance.

Having come to that conclusion, Rose C.J. by way of obiter had made the following statement.

> "But even if that were not so, and if the correct view is that there is some small omission in the chain of evidence, I would not be disposed to say in the light of the emphasis which was placed on the various issues in the Court below that such small omission was fatal to the respondent's position. There is of course, a presumption that a deed which on its face appears to be in order has been duly executed, and it seems to me that the mere framing of an issue as to due execution of the deed followed in due course by a perfunctory question or two on the matter of execution without specifying in detail the omissions and illegalities which are relied upon, is insufficient to rebut that presumption" (at 459)

What the learned Chief Justice said in the above passage was that although there are small omissions in the chain of evidence in a situation where due execution according to law is being challenged, a small omission in the chain of evidence may be cured by the presumption that a deed which on its face appears to be in order has been duly executed. The framing of an issue as to due execution and a perfunctory question or two on the general matter of execution, without specifying in detail the omissions or illegalities regarding execution, would be insufficient to rebut the presumption of due execution despite small omissions in the chain of evidence regarding due execution.

In the present case, the defendants had not challenged the due execution of deeds P3, P5 and P6. When they objected to those documents at the time the same were marked in evidence what they did was to challenge the plaintiff to prove those documents in the proper way in which a document required by law to be attested has to be proved if it is to be used as evidence. The plaintiff thus had notice that he had to prove P3, P5 and P6 in the manner provided in section 68 of the Evidence Ordinance. He had failed to lead the evidence necessary to prove those documents in accordance with the provisions of section 68. At the close of the plaintiff's case when the documents marked were read in evidence the defendants have stated that documents not proved should be excluded. This was a reference to documents marked subject to proof and proved in accordance with the law. In view of the failure of the plaintiff to prove documents P3, P5 and P6 on which the title claimed by him depended, the learned trial Judge had rightly excluded those documents and had held that the plaintiff had failed to prove his title.

The learned High Court Judge in total disregard of the specific and stringent provisions of section 68 of the Evidence

Ordinance have relied on an obiter dictum made in a case where due execution itself was challenged, to reverse the decision of the learned trial judge. The basis upon which they reversed the trial judge's conclusion was totally erroneous. If the view taken by the learned High Court Judges was correct it would make the provisions of section 68 of the Evidence Ordinance a dead letter. The erroneous legal basis on which the trial Judge's decision was reversed vitiates the judgment of the High Court entered in favour of the plaintiff. I therefore answer the question of law set out in question No. (a) and (c) in the negative and allow the appeal and set aside the judgment of the High Court dated 11.2.2010 and affirm the judgment of the learned trial judge dismissing the plaintiff's action.

The learned counsel for the plaintiff respondent invited this court to send the case back to the District Court for re-trial. This Court is not inclined to order a re-trial in the absence of any miscarriage of justice resulting from a wrong decision made by a court. The plaintiff's plight is due to the failure of his attorney at law to adduce the evidence necessary to prove the plaintiff's title. This Court is not inclined to order a re-trial to facilitate an attorney-at-law to rectify the mistakes he had made in handling his client's case. I make no order for costs.

RATNAYAKE J - I agree.

EKANAYAKE J. – I agree.

Appeal allowed. Judgment of High Court dated 11.2.2010 set aside and the judgment of the District Judge dismissing the Plaintiffs action affirmed.

GEETHIKA AND TWO OTHERS V. DISSANAYAKA AND FIVE OTHERS

SUPREME COURT
MARSOOF.J,
EKANAYAKA, J .
SURESH CHANDRA J.
S.C.F.R. APPLICATION NO. 35/2011
MAY 31ST , 2011

Constitution – Infringement of fundamental rights - Article 12[1] – Right to equality – Article 126 – Fundamental rights jurisdiction and its exercise

The Petitioners made an application in terms of Article 126 of the Constitution for the alleged violation of their fundamental rights guaranteed under Article 12(1) of the Constitution as a consequence of the 3rd Petitioner not being selected for admission to Grade 1 of D. S. Senanayake College.

The application for admission for the year 2011 had been submitted under the category of 'children of the residents at close proximity to the school.' The main thrust of the Petitioners' application was that on the basis of residence, they are entitled to have their child (3rd Petitioner) admitted to the school.

Held:

1. A consideration of Clause 6.1 of the Circular No. 2010/21 dated 31.5.2010 shows that the main consideration for selection of children under the category of "children of those who are residing close to the school" would be the Applicant's place of residence.

Per Suresh Chandra, J.

> " . . . interview panels should consider all the documents that are submitted by a prospective applicant and assess them carefully and see whether the cumulative effect of such documents would establish the genuine residence of such applicant."

2. The interview panel failed to evaluate the documents that were submitted by the Petitioners in support of their application to admit the child to the school and appear to have acted arbitrarily. The panel appears to have considered the concept of residence in a very abstract manner and has failed to consider the totality of the documents that were submitted which clearly establish the residence of the Petitioners.

3. Petitioners have established the fact of violation of their fundamental rights in terms of Article 12(1) of the Constitution.

Cases referred to –

Haputhantirige and others v. Attorney General – (2007) 1 Sri L.R. 101

APPLICATION made in terms of Article 126 of the Constitution

Kanishka Witharana for Petitioners

Ms. Barrie, State Counsel for the Attorney General

Cur.adv.vult.

July 12th 2011

SURESH CHANDRA J.

The Petitioners made an application in terms of Article 126 of the Constitution for the alleged violation of their fundamental rights guaranteed under Article 12(1) of the Constitution as a consequence of the 3rd Petitioner not being selected for admission to Grade 1 of D. S. Senanayake College.

The Petitioners in their application have stated that the 1st and 2nd Petitioners are the parents of the 3rd Petitioner for whose admission to D. S. Senanayake College they made an application for the year 2011. The application had been

submitted under the category of "Children of the residents at close proximity to the School" which category is dealt with under Clauses 6.1 (I-IV) of the circular No. 2010/21 dated 31.5.2010 issued by the Ministry of Education regarding admission of children to Grade 1 of Government Schools marked P5. The Petitioners stated that they submitted documents P8 to P17 along with their application and tendered documents marked P19A to P19T at the interview held on 7th September 2010 and that they were informed by the Panel who held the interview that they had received 57 marks. They were surprised to see that the name of the 3rd Petitioner was not in the list of children selected for admission which was displayed by the school. The 1st Petitioner had submitted an appeal in terms of the said circular and had given further grounds to substantiate her entitlement to have her child selected to the said School. Thereafter the 1st Petitioner had been required to attend an inquiry before the Appeals Board and she had submitted a further document (P22) from the National Housing Development Authority regarding the house that they were residing. According to the matters indicated by the 2nd Respondent at the appeal inquiry, the 1st Petitioner had been given the impression that she would be given a further 25 marks on distance and 4 marks for title documents by treating same as a lease, entitling them to earn 86 marks. However, when the final list was displayed in the School the name of the 3rd Petitioner was not included in the list either among those who were selected or those who were on the waiting list. The waiting list consisted of those who had received between 55 and 60 marks. The Petitioners had thereafter made the present application to this Court.

The Respondents filed objections by filing an affidavit from the 1st Respondent, who stated that the petitioner's

assertion that they had earned 57 marks at the interview was false and that they had been awarded only 37 marks as per document marked R2, and that there was no alteration of the said marks at the Appeals Board, and that the 3rd Petitioner did not qualify for selection on the marks obtained by the Petitioners. The 1st Respondent has further stated that the Petitioners could not be awarded any marks under Clause 6.1 (II) as they had not produced any of the documents set out in the circular, and that no marks could be allocated under Clause 6.1 (IV) as the Petitioners could not be considered to have established the requirement of residence. The 1st Respondent further stated that the cut off mark for selection was 61 marks and that those who had obtained over 55 marks had been placed in the waiting list. The 1st Respondent in the said circumstances denied violating the fundamental rights of the Petitioners as alleged.

The application requires a consideration of the provisions of the circular P5(R1) which lays down the criteria for admission to Grade 1 of Government Schools specially regarding the matters pertaining to residence. The main thrust of the Petitioners application is that on the basis of residence they are entitled to have the 3rd Petitioner admitted to the school.

Clause 6.1 sets out that 50% would be admitted on the basis of "Children of residents in Close Proximity to the School". The said Clause 6.1 comprises four sub-clauses I, II, III and IV. Under I – "Titled residence", the electoral lists are taken into account and a maximum of 35 marks is allocated on the basis of 7 marks per year from the year prior to admission and the previous continuous five years.

Under Sub-Clause II – "Documents establishing residence" a maximum of 10 marks is given if the Ownership Deed is in

the name of the Applicant or the spouse and within brackets it is stated as Transfer/Gift. If the Deed (Transfer/Gift) is in the name of the Applicant's or spouses father or mother, 6 marks are allotted.

It also stated that documents under the Buddhist Temporalities Ordinance can be accepted according to the area, and further that Folios and Duplicates can also be considered.

Registered lease deeds and Government Official Quarters Documents would be allotted 4 marks and unregistered lease deeds would be allotted 2 marks.

Under Sub - Clause III – " Other Documents establishing residence" – A maximum of 5 marks is allotted on the basis of 1 mark for each document for documents such as National Identity card, Electricity bills, Water bills, Telephone bills, Marriage certificates, etc.

Under Sub-Clause IV – "Proximity to School from Residence" – Under this a maximum of 50 marks is allotted on the basis that if there are no other government schools having primary sections between the residence and the school that the child is sought to be admitted. If there are other schools in between where the child could be admitted, 5 marks to be deducted for each school.

The Respondents have produced document R2 along with their objections, which is a copy of the document which had been used by the School at the Interview which sets out the manner in which marks have been allotted. The said document is divided into four cages according to Clause 6.1 I to IV of the aforesaid Circular.

According to the said document R2, 35 marks have been allocated under Clause 6.1 – I for the electoral Lists that had been produced as the names of the Petitioners have been registered at the address given by them as their residence for the years 2005 to 2009 continuously. It is also significant to note that the names of the 1st and 2nd Petitioners as well as the name of "Kariyawasam Uluwita Gamage Kusumalatha" the mother of the 1st Respondent is also included as being at the same address.

No marks have been allocated under 6.1 – II regarding documents relating to the residence. In this cage, the necessary documents are listed as 1,2, 3 and 4. In the category 2, which is "In the name of the Applicant's mother or father" for which 6 marks can be given, in the column set apart for "maximum marks" a "?" mark has been put, and the word "mother" has been underlined.

Under Sub-Clause 6.1 – III, 02 marks have been given on the basis of other documents establishing the residence. It is not quite clear as to the documents for which the 02 marks have been allocated, and it appears that out of the five documents stated in R2, namely, National Identity card, Telephone bills, Water bills, Marriage certificate, driving license or other, only water bills have been ticked off.

Under Sub-Clause 6.1 – IV, regarding proximity to school from the residence, the figures "06" have been put within the cage stating this category and under the marks allotted column the figures "20" within brackets have been written and struck off with an oblique stroke of a pen and on the side it is written in Sinhala as follows:" Since there is no deed no marks can be given regarding schools."

An examination of the said document shows that below the cage setting out the above mentioned particulars regarding the residence and marks, there is a legend "Full marks obtained:" and alongside that the following "........ (in words). There is no entry alongside "Full marks Obtained" nor is there anything written in words. However, at the right edge of the document which is below the cage set out for marks the figures "37" is written.

A further observation regarding Document R2 is that on the left hand margin of the document the word "Kusumalatha" is written in Sinhala in ink, which is the name of the Applicant's mother as has been revealed in the petition and the documents produced. Further it is also stated in Sinhala in that margin in Sinhala that "there is no deed" and also the words "National" and "Documents" in Sinhala.

A consideration of Clause 6.1 of the Circular (R1) shows that the main consideration for selection of children under the category of "Children of those who are residing close to the School". Would be the Applicant's place of residence. The relevant indices or criteria that are to be taken into account regarding the establishing of same are set out in 6.1 – I – IV referred to above.

The main thread which runs through all four categories is the concept of "residence".

The ordinary meaning that is given to "residence" is "the place where an individual eats, drinks, and sleeps or where his family or his servants eat, drink and sleep. (Wharton's Law Lexicon).

Residence as envisaged by the said Circular would imply a permanent abode which has been used for a continuous

period. The manner in which 35 marks have been allotted would indicate that the continuity in such residence should be at least for a period of 5 years. Such residence does not necessarily connote ownership as the circular speaks of leases whether registered or unregistered being acceptable for the purpose of establishing residence. Credence is also given to the acceptability of other documents such as utility bills, employment letters, bank documents, letters received etc which would all serve as items establishing the genuineness of the residence. Such documents if available for a long period of time would indicate that they have been obtained for the purpose of getting a residential qualification. Procurement of such documents is sometimes referred to as "manufacturing" of documents. Care has to be taken in identifying such "manufactured" documents from genuine documents. Therefore interview panels should consider all the documents that are submitted by a prospective applicant and assess them carefully and see whether the cumulative effect of such documents would establish the genuine residence of such applicant.

According to Clause 6.1, 35 marks are given for the electoral register Extracts which would seem to be the basic and most important criterion and that the other documents referred to in Sub-Clause 6.1 – II and III substantiate or confirm the residence given in the electoral register extract. Therefore, if the electoral register extracts have been accepted and the entitlement of full marks (35) have been given, there is no reason as to why such an applicant cannot get marks under Sub-Clause 6.1 – IV which is 50 marks less 5 marks for each school from the residence to the school applied.

In R2 the interview sheet, under the category for other schools, the figure "6" being entered is significant, which would mean that there are six other schools between the residence and the relevant school for which 30 marks would be deducted and the applicant would be entitled to 20 marks. This is apparently the reason why the figures "20" have been entered in R2 within brackets and for some reason best known to the Interview Panel has been struck off with an oblique stroke and with the note "not entitled to marks as there is no valid deed".

It is my view that, once marks are given under Clause 6.1 for the Electoral Register Extracts which satisfied the criterion of "residence", then such an applicant is entitled to marks under Clause 6.1 – IV. Therefore accepting the fact that 20 marks could have been given as is seen in R2, to deprive the petitioner of such marks is incorrect and they are entitled to 20 marks on that score.

The Petitioners had also submitted several other documents, among which the relevant documents were the National Identity Cards and Telephone Bills which were in the name of the 2nd Petitioner, Child Health Development Record, Bank statements, documents regarding employment which refer to the residence of the petitioner etc. The other utility bills such as electricity and water were in the name of the mother of the 1st Petitioner, Kusumalatha. The documents that can be considered under Clause 6.1-III are not confined to the five documents listed therein, it refers to other documents without mentioning the type of documents. It is left to the interview Panel to consider other relevant documents. They cannot rule out those documents just because they are not listed in the relevant Clause. What is necessary to be seen is as to whether such documents can

be considered to confirm the residence of the Applicants. In such circumstances important documents such as the child's health development record, and the letters regarding their employment should have been considered. Only 2 marks had been given under this category whereas according to the documents produced, even if the other documents are disregarded, for the two national identity card, the telephone bill and the health record marks should have been given. I am of the view that at least 4 marks should have been given under this category.

The other matter that requires consideration is the documents produced as P17 which is a document issued by the National Housing Development Authority on 1st June 2004 in favour of "K. U. P. Kusumalatha", which states that the said premises has been conveyed to her. According to the Affidavit tendered as P16 she is the mother of the 1st Petitioner. According to Clause 6.1, the documents listed are Transfer deeds, Gift deeds, Leases both registered and unregistered and government quarters documents. Would it mean that the document P17 cannot be considered to satisfy the criterion of residence, just because it is a letter and not a deed? From the documents that are to be considered in the circular, what is important is the establishing of the "residence" and not ownership. In effect the writing of the name "Kusumalatha" in R2 is indicative of the fact that the Interview Panel's attention had been drawn to P17.

On the face of it, P17 is not a deed which confers ownership of a premises. However, it is a document issued by the National Housing Development Authority relating to the particular residence wherein the petitioner's mother Kusumalatha is residing. If the deed of a parent of an

applicant, and if a registered or unregistered lease document can be considered in favour of an applicant to establish residence, I see no reason as to why P17 cannot be considered, a reading of which clearly indicated that Kusumalatha would be given the said premises, which certainly goes to establish her residence at the said address, as well as its legitimacy. When the appeal was considered, the Petitioners had submitted P22 which was a confirmation of P17 issued by the National Housing Development Authority. In the said circumstances the Petitioners are entitled to get marks for P 17 and since it is in the name of the mother of the Petitioner it should entitle the petitioner to get 6 marks.

In *Haputhantirige and others v. Attorney General,* the question of residence and ownership was looked into by this Court in relation to a previous circular by the Ministry of Education and it went on to note certain instances where there have been large amounts of "manufactured deeds" shown as evidence of ownership when entering children into government schools. It was further noted that in circumstances such as where a property was inherited from a parent who had died and testamentary proceedings were not concluded or where instances of co-ownership or prescriptive possession could not be proven by title deeds people in such circumstances who would be considered owners of the property would not be allocated marks according to the marking scheme. It is clear that the interview panel should always have to look at the establishment of evidence to prove residence and consider the totality of what has been put forward as evidence by a parent to establish evidence rather than only carrying out an exercise of ticking the relevant box in relation to the specified documents mentioned in the circular alone. It has to be noted that such arbitrary