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DIGEST

RPF was the result of the failure of the railway authorities to seek funds in their annual budgetary estimates submitted to the relevant government authorities responsible for allocating annual budgetary provisions for the Railway Department.

The learned Deputy Solicitor General in her written submissions dated 02.08.2010 has stated that this application should be dismissed *in limine* for the failure of the petitioners to cite a necessary party. i.e. the Secretary to the Treasury who should have been heard with regard to the allocation of funds for paying overtime claims of the members of the RPF.

With all due respect to the learned Deputy Solicitor General I am not inclined to agree with this submission for two reasons. The first reason is that this objection has not been taken up before or at the hearing of this application. The second and the more compelling reason is that the Attorney General who is the Principal Law Officer of the State who represents all public officers including the Secretary to the Treasury in all fundamental rights applications (except in cases where the Attorney General declines to appear for any public officer who is alleged to have acted in violation of fundamental rights) is a respondent to this application from the beginning and as such the Attorney General had an opportunity to present to this Court the views of the Secretary to the Treasury with regard to the payment of overtime to the members of the Railway Protection Force.

I have already decided that the failure and or the refusal of the railway authorities to pay overtime to the members of the RPF is a violation of the fundamental right guaranteed to the petitioners by Article 12(1) of the Constitution.

However the right to claim and obtain payment for overtime work is subject to the provisions of the Establishment Code and the Financial Regulations. The Railway Department has the authority to formulate the rules, in accordance with the law, for the payment of overtime to the members of the RPF.

The petitioners have sought a direction from this Court directing the 1st to 3rd respondents or any one or more of them to pay over time to the petitioners and the other members of the RPF for duties performed by them outside their normal working hours in the past years. As I have already pointed out, there were no budgetary allocations for the payment of overtime to the members of the RPF. Accordingly this Court cannot direct the Railway Department to pay the past overtime claims of the petitioners and the other members of the RPF. As set out in the Establishment Code (Chapter VIII Rule 1:2) payment of overtime depends on the availability of funds. It is the responsibility of the 1st respondent to seek budgetary allocations for the payment of overtime to the members of the RPF. I trust that the relevant Government Authorities responsible for the allocation of funds for the Railway Department will bear in mind that if the Government gets its subjects to work for the Government, there is a legal and a moral duty to properly remunerate them for their labour. I make no order for costs.

J.A.N. DE SILVA, C.J. – I agree.

EKANAYAKE, J. – I agree.

Application allowed.

DR. PERERA V. HON ATTORNEY GENERAL AND 66 OTHERS

SUPREME COURT
J.A.N. DE SILVA, CJ.
AMARATUNGA, J. AND
SRIPAVAN, J.
S.C.F.R. NO. 221/2009
APRIL 27TH, 2011

Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 – New public buildings or public places to comply with specified design requirements.

The Supreme Court recognized that people have different levels of ability to move freely, and that many – specially, the growing number of Seniors, Disabled Persons and Pregnant Mothers are restricted in their movement.

Held:

(1) No person should be discriminated against on the ground of disability and their mobility restricted in a manner which precludes or impedes them from enjoying equally their inherent right for access, safety and accommodation in day – to - day life at man – made public buildings, public places and facilities provided there.

(2) Parts of all new public buildings or public places, specially toilet and wash facilities, as defined in the Accessibility Regulations No. 1 of 2006 made under the Protection of Persons with Disabilities Act No. 28 of 1996, as amended, hereafter shall be designed and constructed in accordance with the 'design requirements' specified in the regulations in force.

(3) Compliance with this Court order is mandatory in order to gain approval of building plans, to certify the buildings on completion and to issue the certificate of conformity and hence, together with owners who are equally responsible, all authorities that are

empowered to do so shall refrain from doing so in respect of all new constructions violating this order.

APPLICATION against discrimination of disabled persons.

Dr. Ajith C. S. Perera Petitioner appears in person

Ms. Indika Demuni De Silva, Deputy Solicitor General for Respondent.

Cur.adv.vult.

April 27th 2011

J.A.N. DE SILVA CJ.

This case is called for the purpose of clarifying the order that was recorded on 14.10.2009.

After hearing the submissions, the Court replaced the order made on 14.10.2009, with the following order:

This Court recognizes that people have different levels of ability to move freely, and that many – specially, the growing number of Seniors, Disabled Persons and Pregnant Mothers are restricted in their movement.

This Court further recognizes that in terms of the protection of the Rights of Persons with Disabilities Act No. 28 of 1996, as amended, and the regulations made there-under, no person should be discriminated against on the ground of disability and their mobility restricted in a manner which precludes or impedes them from enjoying equally their inherent right for access, safety and accommodation in day – to – day life at man-made public buildings, public places and facilities provided there.

Accordingly, this Court orders that Parts of all NEW public buildings or public places, specially toilet facilities,

as defined in the Accessibility Regulations No. 01 of 2006 made under the Protection of Persons with Disabilities Act No. 28 of 1996, as amended, hereafter shall be designed and constructed in accordance with the 'design requirements' specified in the regulations in force.

The Court further orders that compliance with this Court order is mandatory in order to gain approval of building plans, to certify the buildings on completion and to issue the certificate of conformity and hence all authorities that are empowered to do so shall refrain from doing so in respect of all constructions which would violate this order.

Failure to comply with this Court order shall be a serious punishable offence and shall attract punitive repercussions as set out in the law.

These proceedings are terminated. In case of any violation a fresh action could be filed to deal with that situation.

AMARATUNGA J. – I agree.

SRIPAVAN J. – I agree.

Application allowed.

Directives issued.

ROHANA ALIAS LOKU V. HON. ATTORNEY GENERAL

SUPREME COURT
J.A.N. DE SILVA, C.J.
AMARATUNGA, J AND
RATNAYAKE, J.
S. C. APPEAL NO. 89A/2009
S.C. SPL. L.A. 02/2009
H. C. ANURADHAPURA NO. 149/2003
MARCH 29TH, 2011

Rape – Section 364(2) – Penal Code – Amendment 22 of 1995 – Rape of woman under eighteen years of age – Statutory Rape – Mandatory minimum sentence 10 years? – Court exercising its discretion with regard to the sentence. – Section 354 – Penal Code – Abducting a minor below 16 years of age from the custody of her lawful guardian – Constitution - Article 4(c). Article 11, Article 12(1).

The Accused – Appellant was indicted in the High Court of Anuradhapura, for committing the offences of abduction and rape of a minor below 16 years of age. The first charge was for an offence punishable under Section 354 of the Penal Code and the second charge was for committing the offence of rape under Section 364(2) (e) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995. There is a mandatory minimum sentence of 10 years prescribed by law which prevents the Court from exercising its discretion with regard to the sentence.

The learned High Court Judge, after trial, held that the Accused was guilty of the offence punishable under Section 364(2) (e) of the Penal Code and sentenced him to 10 years rigorous imprisonment, the mandatory minimum period of imprisonment prescribed by law. The Accused appealed against the conviction and sentence to the Court of Appeal.

The Court of Appeal, after considering the facts and circumstances of the case, and particularly the fact that the prosecutrix urged the Accused to take her away from her home and threatened to commit

suicide in the event of his failure or refusal to comply with her request, had set aside the period of 10 years rigorous imprisonment imposed by the High Court, and imposed a period of 5 years rigorous imprisonment.

The Accused appealed against the sentence imposed by the Court of Appeal to the Supreme Court.

Held:

(1) The Accused is technically guilty of the offence described in Section 364(2) (e) of the Penal Code. However upon considering the facts of the case and the submissions of the Counsel, this is not a case where the Accused has to suffer a custodial sentence.

Per Gamini Amaratunga, J. –

> "The unanimous opinion of the Court in that determination (S.C. Reference 3/2008, HC Anuradapura Case No. 333/2004, SCM 15. 10. 2008) was that the minimum mandatory sentence in Section 362(2)(e) is in conflict with Articles 4 (c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion norwithstanding the minimum mandatory sentence".

Case referred to:

SC Reference 3/2008, HC Anuradhapura Case No. 333/2004, SCM 15.10. 2008 - 2008 B.L.R. - Part III - BASL Law Journal (2008) Vol XIV - 160

APPEAL from a judgment of the High Court.

A.S.M. Perera, P.C. with *Neville Ananda* for the Accused – Appellant

Dileepa Peiris, Senior State Counsel for the Attorney – General

Cur.adv.vult.

May 12th 2011

GAMINI AMARATUNGA, J.

The accused appellant hereinafter referred to as the accused, was indicted in the High Court of Anuradhapura,

for committing the offences of abduction and rape. The first charge was that on 29.4.1999 at Thalawa he abducted R. M. Anusha Priyadarshani, a minor below 16 years of age from the custody of her lawful guardian, an offence punishable under Section 354 of the Penal Code. The second charge was for committing the offence of rape on the said Anusha Priyadarshani, an offence punishable under Section 364(2)(e) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995. The punishment prescribed for the offence falling within Section 364 (2)(e) is rigorous imprisonment for a term not less than ten years and not exceeding twenty years and a fine plus compensation to the victim of rape. Thus there is a mandatory minimum sentence of ten years prescribed by law which prevents the Court from exercising its discretion with regard to the sentence.

When the accused pleaded not guilty to the charges framed against him the trial commenced on 25.4.2006, almost seven years after the date of the offence. The prosecutrix was fifteen years and three months old at the time of the offence. According to the evidence given by the prosecutrix at the trial, she was a student studying in Grade 11 in the school. She had a love affair with the accused. When her mother discovered this she (the mother) was not in favour of this love affair and wanted the prosecutrix to put an end to it. When the prosecutrix continued her association with the accused, her mother's attitude became hostile and she began to scold and harass the prosecutrix. The life at home became intolerable to the prosecutrix. One day when she left home in her school uniform she met the accused on her way to the school. She asked the accused to take her away and threatened that she would take poison and commit suicide in the event of the

accused's refusal or failure to take her away from her home. The accused then took her to his uncle's house which was within walking distance from her house. In that house she stayed with the accused in a room for two days and during those two days they shared the natural sexual intimacy, natural to a man and a woman isolated in a room as willing partners. From the accused's uncle's house they moved into the accused's sisters house where they spent two more days before the police stepped in and arrested the accused.

Even in the history given by the prosecutrix to the Judicial Medical Officer she has stated that " I went with him on my own free will and lived together with him."

After the prosecution led the evidence of the other witnesses and closed its case, the accused did not give or offer evidence on his behalf. He did not even make an unsworn statement from the dock.

In terms of Section 363 of the Penal Code, as amended by Penal Code (Amendment) Act No. 22 of 1995 sexual intercourse with a woman under sixteen years of age is rape irrespective of the consent of the woman.

Accordingly, the learned trial Judge, by his judgment dated 31.10.2006 quite rightly held that the accused was guilty of the offence punishable under Section 364 (2) (e) of the Penal Code and sentenced him to ten years rigorous imprisonment, the mandatory minimum period of imprisonment prescribed by law, and a fine of Rs. 2,500/- with a default term of imprisonment for one year. There was no finding on the charge of abduction.

The accused appealed to the Court of Appeal against the conviction and sentence. Whilst this appeal was pending, a

Judge of the High Court in the course of the proceedings in a case where the accused in that case was charged under Section 364 (2) (e) of the Penal Code, (identical offence with which the accused was charged) submitted a reference to this Court in terms of Article 125(1) of the Constitution. In that reference the learned High Court Judge has posed the question whether Section 364(2) of the Penal Code as amended by Penal Code (amendment) Act No. 22 of 1995 has removed the judicial discretion when sentencing an accused convicted for an offence punishable under Section 364(2) (e) of the Penal Code.

This reference was taken up for determination before a Bench of Three Judges of this Court on 29.07.2008 with notice to the Attorney General and after considering the submissions of the learned Senior State Counsel who appeared as *amicus curiae* on behalf of the Attorney General, this Court pronounced its determination on 15.8.2008 on the question submitted to it.[(1)].

The unanimous opinion of the Court in that determination was that "the minimum mandatory sentence in Section 362 (2) (e) is in conflict with Article 4 (c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence."

This determination removed the knot of mandatory sentences which upto that time tied the hands of the trial Judges with regard to the appropriate sentence to be imposed in the circumstances of the particular case tried by them.

The accused's appeal against his conviction and sentence came up for hearing in the Court of Appeal on 24.11.2008 and it appears from the judgment of the Court of Appeal dated 24.11.2008, that their Lordships of the Court of Appeal were aware of the determination of the Supreme Court dated 15.10.2008 freeing the trial Judges from the shackles of mandatory sentences prescribed by ordinary law which prevent trial Judges from deciding the appropriate sentence to be imposed in the light of the facts and the circumstances of the case.

At the hearing before the Court of Appeal, the learned Counsel who appeared for the accused has quite rightly not challenged the correctness of the conviction. He has only urged for the reduction of the sentence.

Their Lordships of the Court of Appeal having taken into consideration the fact, that the accused had a love affair with the prosecutrix, and that the prosecutrix urged the accused to take her away from her home and threatened to commit suicide in the event of his failure or refusal to comply with her request, have set aside the period of ten years rigorous imprisonment imposed by the trial Judge and substituted therefore a period of five years rigorous imprisonment.

The accused, not being satisfied with the reduction of the sentence granted to him by their Lordships of the Court of Appeal, filed an application for special leave to appeal against the judgment of the Court of Appeal on the question of the sentence. This Court granted leave to appeal on the question of the sentence.

At the hearing before us, the learned President's Counsel for the accused submitted that it was the prosecutrix who had

prevailed upon the accused to take her away. The accused did not invite her to come with him. When the prosecutrix threatened to commit suicide, the accused, as a young lover, had acted under the impulse of his emotions. In that moment of indiscretion his reason had given way to his emotions.

The learned President's Counsel invited us to consider the conduct of the accused. He took the prosecutrix to his uncle's house where the couple was accommodated for two days. Thereafter the couple moved into the house of the accused's sister and spent two more days there. The learned President's Counsel submitted that this conduct of the accused shows that he intended to keep the prosecutrix as his partner in life with the blessings of his kith and kin.

At the time the prosecutrix gave evidence at the trial she was a mother of a child by her marriage to another person. The High Court record shows that the prosecutrix was a reluctant witness against the accused. The evasive answers given by her to the questions put to her by the prosecuting counsel clearly demonstrate her reluctance to testify against the accused. However the prosecutor had slowly and gradually extracted from this reluctant witness all the details he had to establish to prove the charge against the accused.

I do not think that the accused's case in mitigation of the sentence was placed before their Lordships of the Court of Appeal in the same way the learned President's Counsel placed his case before this Court.

There is no doubt whatsoever that the accused is technically guilty of the offence described in section 364 (2) (e) of the Penal Code. However after considering the facts of the case and the submissions of the counsel I hold that this

is not a case where the accused has to suffer a custodial sentence.

I accordingly set aside the sentence of five years rigorous imprisonment imposed on the accused by the Court of Appeal and substitute therefor a sentence of two years rigorous imprisonment suspended for a period of ten years from the date of the judgment of the High Court of Anuradhapura (31.10.2006). The fine and the default term ordered by the trial Judge is affirmed.

The accused is on bail pending appeal. The learned High Court Judge of Anuradhapura is hereby directed to notice the accused to appear before the High Court and comply, in his presence before Court, with the stipulations set out in Section 303 of the Code of Criminal Procedure Act as amended, with regard to suspended sentences.

J.A.N. DE SILVA C.J. – I agree.

RATNAYAKE J. – I agree.

The sentence imposed on the Accused by the Court of Appeal set aside. The fine and the default term ordered by the trial Judge affirmed.

Two years rigorous imprisonment imposed suspended for 10 years from the date of the judgment of the High Court.

L. B. FINANCE LTD V. WELIGAMAGE AND OTHERS

SUPREME COURT
J.A.N. DE SILVA, CJ.
AMARATUNGA, J. AND
RATNAYAKE, J.
S.C. APPEAL NO. 19/2009
S.C. (SPECIAL) L.A. APPLICATION NO. 157/2008
COURT OF APPEAL NO. CA 246/97 (F)
D.C. COLOMBO CASE NO. 95406/MHP
2ND DECEMBER 2009

Consumer Credit Act – Section 18 (1) – Owner to provide 2 weeks notice to the hirer as a condition precedent to the act of termination – Section 19 – Consequences of the termination of the agreement. – Strict observance Necessary? What is Notice?

The Plaintiff entered into a hire purchase agreement with the Defendant. The Plaintiff instituted this action on the basis that the Defendant had defaulted the payments under the said agreement. The main issue was the application of Section 18 of the Consumer Credit Act as to whether actual notice is sufficient in terms of Section 18 or whether strict observance of the Section is necessary. Section 18(1) positively requires the owner to provide two weeks' notice in writing as a condition precedent to the act of termination and the said notice of termination to be given to the hirer in writing.

Held:

(1) The notice of termination referred to is not a precursor to a fresh period of notice, but the culmination of the process of termination of the hire purchase agreement and hence the word 'notice' must be understood as being synonymous with "inform".

Per J.A.N. De Silva. CJ. –

> "in my view Section 18(1) requires the owner to give the hirer a clear 14 day period. That is, an explicit statement in no uncertain terms as to the date of commencement of period of notice and the date of expiry, the time interval being 14 days."

(2) The proviso to Section 18(1) provides the hirer with a right to pay back the arrears without facing rejection and ensuing termination. The owner at the same time is prevented from terminating the agreement. These rights and disabilities only exist during the pendency of the notice period. At its expiration the hirer looses the right and the option of termination is available to the owner.

(3) By deprivation of a full notice period of two weeks, the owner has deprived the hirer the full extent of his rights of repayment and has created unto himself the entitlement to terminate the agreement earlier than at a date he would have been entitled to originally. Therefore it is clear that the owner has encroached upon the right of the hirer.

J. A. N. De Silva, CJ. –

"It is pertinent to note that the said section (Section 18(1)) does not prevent the hirer remedying his failure by setting in motion the steps provided in Section 18 without prejudice to either party".

AN APPEAL from a judgment of the Court of Appeal.

Harsha Amarasekera for Plaintiff – Respondent – Petitioner

Hemasiri Withanarachchi for 1st Defendant – Appellant – Respondent.

Cur.adv.vult.

April 01st 2010

J.A.N. DE SILVA CJ

This is an appeal from a decision of the Court of Appeal dismissing the application of the Plaintiff–Respondent–Appellant (hereinafter referred to as the Plaintiff). The circumstances relating to the dispute in question is as follows. The Plaintiff, a well known finance company, entered in to a hire purchase agreement with the Defendant-Appellant – Respondent (hereinafter referred to as the Defendant). The Plaintiff instituted Action on the basis that the Defendant

defaulted upon payments under the agreement and sought recovery of such sums. The Plaintiff according to his reading of the Consumer Credit Act 29 of 1982, claims to have served notice on the Defendant by letter dated 16-11-1984 (marked P7). Thereafter the Plaintiff further claims termination of the agreement by letter dated 03-01-1985 (marked P8). The Defendant argues that the termination was contrary to the provisions of the said Act and therefore bad in law.

When this matter was supported for special leave the Supreme Court granted leave on the following two question suggested by the counsels for the Plaintiff – Appellant and Defendant- Respondent.

(a) Do the documents "P7" and "P8" when read together satisfy the requirement of section 18 sub section (1) of the Consumer Credit Act No. 18 of 1982?

(b) Whether the time to be specified in the notice of intention to terminate the hire purchase agreement is mandatory and whether actual notice of termination given later would cure the defect in the first notice?

The central question at issue is as to the precise application of section 18 of the Consumer Credit Act.

Section 18 of the Act reads as follows:

18 (1) Where a hirer makes more than one default in the payment of hire as provided in a hire-purchase agreement then, subject to the provisions of section 21 and after giving the hirer notice in writing of not less than –

(a) one week, in a case where the hire is payable at weekly or lesser intervals; and

(b) two weeks in any other case,

the owner shall be entitled to terminate the agreement by giving the hirer notice of termination in writing:

Provided that if the hirer pays or tenders to the owner the hire in arrear together with such interest thereon as may be payable under the terms of the agreement before the expiry of the said period of one week or two weeks, as the case may be, the owner shall not be entitled to terminate the agreement.

(2) If a hirer -

(a) does any act with regard to the goods to which the hire-purchase agreement relates which is inconsistent with any of the terms of the agreement; or

(b) breaks any express condition of the agreement which provides that on the breach thereof the owner may terminate the agreement,

The owner shall be entitled to terminate the agreement by giving the hirer not less than 30 day's notice in writing specifying the particular breach or act which entitles him to terminate the agreement:

Provided, however, that in case where the breach or act specified in the notice is capable of being remedied by the hirer, it shall be the duty of the owner to require the hirer by such notice to remedy the breach or act complained of, before the expiry of the said period of thirty days, the owner shall not be entitled to terminate the agreement."

Upon a plain reading of the above provision it is clear that section 18 requires two notices to be given. The objective

behind this period can be found in the proviso to the said section. It allows the defaulting hirer an opportunity to tender the hire in arrears together with any interest payable under the terms of the agreement. Sec 19 reveals the consequences of section 18. Section 19 reads thus,

> *19. Where a hire-purchase agreement is terminated under this Act, then the owner shall be entitled*
>
> *(a) to retain the hire and the initial deposit which have already been paid and to recover the arrears of hire due:*
>
> *(b) subject to the provisions of section 16 and section 21 and subject to any contract to the contrary to repossess the goods;*
>
> *(c) subject to the provisions of section 20 and section 21 to recover possession of the goods by action in court;*
>
> *(d) without prejudice to the provisions of subsection (2) of section 13 and of section 14 to damages for non-delivery of the goods, from the date on which termination is effective to the date on which the goods are delivered to or repossessed by the owner.*

Therefore the consequences are quite substantial from the point of view of the hirer. Hence it is vital that statutory notice be granted to the hirer.

In the instant case a letter 16-11-1984 (marked P7) informing the Defendant of a notice period ending 30-11-1984 had been issued. However due to what appears to be an error on the part of the Plaintiff the Defendant received less than two weeks notice. Despite this fact the letter of termination

dated 03-01-1985 (marked P8) was sent to the Defendant, and it is clear that a period far greater than two weeks was available to the hirer to tender the arrears.

The real question then before us is as to whether actual notice is sufficient in terms of section 18 or whether strict observance of the statutory provision is necessary.

Closer scrutiny of section 18 makes for interesting reading. Section 18 (1) positively requires the owner to provide two weeks' notice in writing as a necessary condition precedent to the act of termination. The said section also requires *notice* of termination to be given to the hirer in writing.

The word notice occurs twice in section 18(1). It was never contended that the words refer to one specific notice, and I do not think it is possible to do so. However a valid question can be asked as to whether the words import the same meaning. Bindra's interpretation of statutes 9th edition page 645 states that *"words are generally used in the same sense throughout in a statute unless there is something repugnant in the context".*

The first notice is one that is required to be given where hirer makes more than one default. The subsequent sentence refers to the content of the notice. The hirer is informed of a two week period within which he is expected to pay the amount overdue.

The word notice figures once more in the sentence immediately preceding the proviso to section 18. It requires the owner to give the hirer notice of termination. The inclusion of the word "notice" instead of communication is somewhat curious as it imports a meaning which is slighter than

the bringing of finality to the agreement. If the word notice were to be given the same meaning it was given in the first instance, the document would have the effect of a word of caution or warning of impending termination. I do not think the legislature intended this, as it would then render the first notice futile. Therefore the second document cannot be understood in the sense of being a mere notice.

The phrase "shall be entitled to terminate the agreement" is significant. The wording may be interpreted using one of two approaches. It could either be inferred that the entitlement devolves, upon giving the hirer notice of termination. This requires the word notice being given the meaning of termination *per se*.

Alternatively, the entitlement to terminate could be understood to devolve from the two notices already given. Consequently the final limb of the sentence is construed as a direction as to the mode in which termination should occur. This requires the term notice be given a meaning synonymous with the word inform.

An argument that can be offered to ensure that the word notice is given its ordinary meaning is that though notice of termination is granted by the second letter, the hirer would not receive the right contained in the proviso in respect of the second notice period. In other words, during the two week notice, the hirer enjoys the right of repayment. However during the time interval between notice of termination and actual termination the hirer enjoys no such right.

I find this argument to be rather tenuous. I think it can be safely presumed without being unduly charitable to the genus of owners that they would prefer repayment over termination and therefore the existence of a right of repayment

being available to the hirer would be of little importance. I do not foresee an owner rejecting repayment, having already sent notice. Therefore the distinction sought is rather illusory.

Furthermore construing the *notice of termination* as termination s*trictu sensu* would not prevent the owner sending a second *notice* (in the sense of a warning) on his own accord which would result in the same legal consequences as above. This would then mean the legislature has attempted to statutorily compel the owner to issue a second notice without compelling him to accept repayment. I do not think the legislature would grant protection to the hirer during one period of notice and then not do so in the subsequent period. This is clear since the proviso only applies to the period of two weeks.

Hence it is my conclusion that the *notice of termination* referred to is not a precursor to a fresh period of notice, but the culmination of the process of termination of the hire purchase agreement and hence the word notice must be understood as being synonymous with inform.

Returning to section 18(1), it is my view that the said letters are only connected in a limited way. That is, the said section in no way requires the second notice to be made immediately at the end of the 14 day period. However it cannot be sent until the effluxion of that period. The relationship between the letters ends there.

Now I move onto the question of the notice that is required to be given in writing upon default (first *notice*). In my view section 18(1) requires the owner to give the hirer a clear 14 day period. That is, an explicit statement in no

uncertain terms as to the date of commencement of period of notice and the date expiry, the time interval being 14 days.

The need for such explicitness is found in the proviso to section 18(1). The proviso concurrently creates a right for the hirer as well as a disability on the part of the owner. The hirer is provided with a right to pay back arrears without facing rejection and ensuing termination. The owner at the same time is prevented from terminating the agreement. These rights and disabilities only exist during the pendency of the notice period. At its expiration the hirer looses the right and the option of termination is available to the owner.

It is pertinent to note that the existence of these rights and disabilities are dependent on the dates specified by the owner in the letter of notice. When in a contract rights and duties are delineated by a party, such enabling section must be read mandatorily as well as strictly in order to avoid the abuse of use of such power.

Therefore in considering section 18 this court must answer three questions.

1. Was a letter of notice specifying two weeks' notice issued to the hirer?

2. Was the said period available in full to the hirer?

3. Was the letter (notice) of termination received by the hirer after the expiry of the notice period?

In the instant case questions 1 and 3 can be answered in the affirmative. However question 2 must be answered in the negative. As noted earlier by this deprivation of a full notice

period of two weeks, the owner has deprived the hirer the full extent of his rights of repayment (irrespective of whether he had such intention or not) and has created unto himself the entitlement to terminate the agreement earlier than at a date he would have been entitled to originally. Therefore it is clear that the owner had encroached upon the right of the hirer.

I was tempted to include a fourth question, namely as to whether the hirer suffered material prejudice due to the act or omission of the owner. However I am firmly of the belief that where rights have been meddled with, a prejudice to the hirer had already occurred and thereafter looking in to the consequences of such prejudices would set a bad precedent.

Furthermore it is also pertinent to note that the said section does not prevent the hirer remedying his failure by setting in motion the steps provided in section 18 without prejudice to either party.

For the above reasons this appeal is dismissed without costs.

AMARATUNGA J. – I agree.

RATNAYAKE J. – I agree.

Appeal dismissed.

PERERA V. FERNANDO AND ANOTHER

SUPREME COURT
J.A.N. DE SILVA, CJ.
AMARATUNGA, J. AND
SURESH CHANDRA, J.
S. C. APPEAL NO. 8A/2009
W.P./HCCA/KAL 132/2001 (F)
D. C. PANADURA NO. 845/L
JANUARY 21ST, 2011

Trusts Ordinance – Section 83 – Where it does not appear that the transferor's intention was to dispose of beneficial interest?

The main issue before the Supreme Court was whether the two deeds referred to in the plaint, were absolute transfers or conveyances creating constructive trusts. The District Court held in favour of the plaintiff and held that the two deeds were not absolute transfers. On appeal to the Civil Appellate High Court, the judgment of the District Judge was set aside and judgment was entered in favour of the Defendants.

Held:

(1) When the owner of a property transfers it without intention to dispose of the beneficial interest therein, then a constructive trust is created and the transferee must hold such property in trust for the benefit of the transferor according to the principles laid down in Section 83 of the Trusts Ordinance.

Per Suresh Chandra, J. –

> ". . . . It would be necessary to conclude that both transfers did not convey absolute title to the transferees and that they held the property in trust for the transferor as the transferor in both instances had not intended to convey the beneficial interest in respect of the property. This is in line with the principle laid down in Section 83 of the Trust Ordinance"

(2) The Civil Appellate High Court was in error in concluding that the Plaintiff had failed to establish that he reserved the beneficial interest when effecting the conveyances, where as the learned

District Judge had arrived at the conclusion on the abundance of evidence placed before Court that the transactions effected by the Plaintiff had been loan transactions.

Cases referred to:

(1) *Muttamma v. Thiagaraja* (1961) 62 NLR 559

(2) *Dayawathie v. Gunasekera* (1991) 1 SLR 115

APPEAL from the judgment of the Provincial High Court of Appeal of the Western Province Holden at Kalutara.

H. Withanachchi for the Plaintiff – Respondent – Appellant

Ranjan Suwandaratne for the Defendants – Appellants – Respondents

Cur.adv. vult

May 09th 2011

SURESH CHANDRA J.

This is an appeal from the judgment of the Provincial High Court of the Western Province holden at Kalutara.

The Plaintiff instituted action seeking a declaration that the 1st Defendant was holding under a constructive trust in favour of the Plaintiff the property which was the subject matter of the case, for a direction on the Registrar of the court to execute such deed in the event of the 1st Respondent refusing to execute such deed and for a declaration that Deed No. 3742 dated 31.05.1993 was null and void.

The Plaintiff in this Plaint had averred that,

(i) the original owner of the subject matter namely P.H. Rodrigo had caused an amalgamation and a subdivision of the property and that after his death Lot No. 1 in the

subdivided plan devolved on his widow Bathilda Rodrigo and daughter Swarna Kumari Seneviratna respectively.

(ii) the said two persons by Deed No. 14046 conveyed the said Lot No. 1 to the Plaintiff.

(iii) in May 1987 the Plaintiff when in need of a sum of Rs. 50,000 had obtained a loan from Weda Maline Dhamalatha but on condition that an outright transfer be made to her which the Plaintiff had agreed had executed Deed No. 147 dated 05.05.1987.

(iv) by the said transaction the Plaintiff did not convey the beneficial interest and that the transferee had the property in trust till the sum of Rs. 50,000 was repaid with interest at 24%.

(v) in December 1987 Dharmalatha had wanted her money back and the Plaintiff too needed more money. He had negotiated with the 2nd Defendant who had agreed to advance the sum of Rs. 75,000 at an interest of 36% on condition that a transfer was effected in favour of his son the 1st Defendant.

(vi) the Plaintiff had thereafter executed Deed No 581 as agreed on 16.12.1987 with Dharmalatha signing as the transferor and the Plaintiff signing as a witness to signify the subsistent constructive trust.

(vii) the possession of the said property had remained with the Plaintiff throughout.

(viii) after the said transaction the Plaintiff had constructed a house thereon worth Rs. 600,000 and the value of the land alone was estimated at Rs. 400,000 as at 1987.

(ix) in order to negate the said constructive trust the 1st Defendant had by Deed No. 3742 dated 31.05.1993 purporting to convey once 1/6th share to the 2nd Defendant.

The Defendants filed their answer and stated that the Plaintiff had by Deed No. 147 transferred the property to Weda Malini Dharmalatha who in turn had by Deed No. 581 conveyed the same to the 1st Defendant for valuable consideration, that the Plaintiff was permitted to occupy the land and the said deeds been outright transfers there was no constructive trust.

The pivotal issue in the case was whether the deeds 147 and 581 were subjected to a constructive trust or whether they were absolute transfers. The Learned District Judge held in favour of the Plaintiff and held that the said deeds were not absolute transfers. On appeal to the Civil Appellate High Court the Judgment of the District Court was set aside and judgment was entered in favour of the Defendants.

On an application by the Plaintiff seeking leave this Court had granted leave on the following questions:

(i) Did the Civil Appellate High Court misdirect itself by concluding that there was no evidence to establish a constructive trust from Weda Malini or the Defendants?

(ii) Did the High Court err in law by failing to take into consideration that the District Court was satisfied with regard to the attendant circumstances surrounding the transaction between the parties?

(iii) Has the said High Court misdirected itself in law by drawing an inference from the alleged failure to deposit the money in Court to establish the bona fides of the Appellant?

The facts relating to this case as per the evidence led by the parties needs consideration in answering the above questions of law on which leave was granted.

It is not in dispute that prior to 1987 the Plaintiff was the owner of the said land. The Plaintiff by Deed No. 147 dated 1987 had conveyed the said property which on the face of it appears as an absolute transfer. However the evidence before the District Court was to the effect that it was not an absolute transfer as it had been executed for the granting of a loan of Rs. 50,000 with interest at 24%. The Plaintiff in his evidence before Court stated that since Dharmalatha the transferee on Deed No. 147 had wanted her money back and he too had wanted more money had made arrangements with the 2nd Defendant to obtain a sum of Rs. 75,000 at 36% interest on the basis of a transfer of the property being effected in favour of the 2nd Defendants son the 1st Defendant. It is in that light that Deed No 581 had been executed on 16.12.1987 by the said Dhamalatha with the Plaintiff signing as a witness to the said deed. The said Deed No. 581 on the face of it appears to be an absolute transfer. Right throughout these transactions the Plaintiff had not parted with possession of the property nor had the transferees on the said deeds 147 and 581 obtained possession. He had in fact constructed a house on the said land, obtained a subsidy for coconut cultivation on the land and had even taken an electricity supply to the house. The Plaintiff had produced a letter dated 15.07.1992 (P9) purported to have been sent by the 2nd Defendant asking the Plaintiff to see him and finalise the matter. The Plaintiff had also been charged in the Magistrates Court on a complaint made by the 2nd Defendant regarding a cheque for Rs. 50,000 given by the plaintiff in which case the plaintiff had been disparaged. The plaintiff had also got to know that the 1st Defendant had also transferred an undivided 1/6th share of the land to the 2nd Defendant by Deed no 3742 dated 31.05.1993. The Plaintiff had also stated in evidence that he had allowed his sister in law to occupy the house