## CIVIL PROCEDURE

*Ref. 01/01/2002*

Section 3(1) at 42(5) of the Rent Act

**C.A.L.A.Application No.246/98, D.C.Mt.Lavinia Case No.426/98/ RE,**

Decided by Edussuriya, J. (P/ CA) and Udalagama, J. on 24.03.2000.

**Edussuriya, J. (P/CA)** Held:

This application for leave to appeal has been filed to have the judgment entered after ex-parte hearing set aside on the basis that the learned District Judge had fixed the case for ex-parte hearing on the failure of the Defendant-Petitioner to file answer without considering the objections filed by the Defendant-Petitioner to the jurisdiction of the Court to hear the case.

The Plaintiff had instituted this action for the ejectment of the Defendant Petitioner and allthose holding under him and for damages, on 1st April 1998. Thereafter summons had been issued returnable on 30.06.1998. On 18.05.1998 the Attorney-at-Law for the Defendant-Petitioner had filed proxy along with a motion and moved Court for a date to file answer and objections (vide motion). On 30.06.1998 when the case was called a further date for answer and objections had been given namely, 01.09.1998. However, thereafter the word "and" had been struck off and the word "or" entered thereon making the said journal entry to read as "answer or objections" for 01.09.1998. On 01.09.1998 too it reads as "answer or objections" and a further date had been given namely, 29.09.1998. Thereafter on 22.09.1998 it is journalised that a rnotion had been filed along with the objections setting out that in as much as an action had been filed in the Magistrate's Court of Gangodawila against the Plaintiff and the Attorneys-at-Law who filed action on behalf of the Plaintiff, the action against the Defendant tenant cannot be proceeded with in terms of Section 42(5) of the Rent Act and should be laid by. Thereafter an order had been made to the effect that this application be mentioned on 29.09.1998. On 29.09.1998 when the case was called the Defendant had been represented by a counsel who moved that this action be laid by and Court had made order directing that the application to lay by be supported on 06.10.1998. On 06.10.1998 it appears that the application to have the action laid by had not been supported nor had there been any appearance on behalf of the Defendant and Court had made the following order "answer finally for" 10.11.1998. On 10. 11.1998 no answer had been filed and the action had been fixed for exparte hearing on 10.12.1998 and thereafter on 10.12.1998 Court had proceeded to ex-parte trial. The Petitioner has claimed that on 10.11.1998 when the Judge who came on the Bench, having read the journal entry for that date which said journal entry called for the answer finally proceeded to fix the matter for ex-parte trial, inspite of protests by counsel for Petitioner that the matter was fixed to be supported on that day.

As hereinbefore mentioned, the application of the Defendant-Petitioner to lay by the case was not fixed for support on 10.11.1998. On 29.09.1998 the Court had directed that the application be supported on 06.10.1998 and on 06.10.1998 it had not been supported and Court has given a final date for answer.

It is the view of this Court that the learned District Judge had correctly fixed the matter for ex-parte hearing in as much as the Defendant had failed to file answer after several dates and a final date given.

The Defendant-Petitioner has also sought an order from this Court to set aside the judgment entered after ex parte hearing and also to set aside all proceedings had after ex-parte hearing and for a direction that the application of the Defendant-Petitioner to lay by the case be dealt with. As hereinbefore mentioned, on 29.09.1998 the Defendant-Petitioner's counsel had been directed to support the application to lay by on 06.10.1998 and on 06.10.1998 there had apparently been no appearance for the Defendant-Petitioner nor had the application to lay by the case been supported. It was then, and only then that the learned District Judge had given a final date for answer namely, 10.11.1998. Therefore, in the circumstances the application for leave is refused.

The Petitioner had set out in paragraph 5 of the Petition that subsequent to the institution of this action the Petitioner had instituted an action bearing No. 8692 in the Magistrate's Court of Gangodawila alleging that the Respondent namely, the Plaintiff had violated Section 3(l)(a) of the Rent Act No.7 of 1972 and committed an offence punishable under Section 42(5) of the Rent Act as amended by No.34 of 1976, No. 10 of 1977 and No.55 of 1980. Section 42(5) of the Rent Act sets out that "where any prosecution against the landlord of any premises for any alleged contravention of the provisions of Section 3 or Section 9 is instituted by or at the instance of the tenant of such premises, then no prosecution against such tenant for any contravention of those provisions by reason of any payment or offer of payment alleged to have been made by him in respect of those premises, shall be instituted or maintained

(a) at any time while the proceedings in the prosecution against the landlord are pending; or

(b) at any time after the proceedings have terminated, if the landlord is, in such proceedings, convicted of the offence with which he was charged.

The words "convicted of the offence with which he was charged" clearly imply a prosecution by the landlord against the tenant in the Magistrate's Court and not an action filed by the landlord against the tenant in the District Court. Therefore, even if the application to lay by the case was supported it would not be of any avail to the Defendant-Petitioner in as such as this which he seeks to have laid by is not much as this action which he seeks to have laid is not an action filed in terms of Section 42(5) of the Rent Act in the Magistrate's Court. Therefore, once again we repeat that leave is refused with costs fixed at Rs.2100.

## CRIMINAL LAW

*Ref. 02/01/2002*

Interference with the verdict of the jury.

**W.Sisira alias Nandamitra v. The Attorney-General**

**C.A.65/98, H.C.Matara 231/94**

Decided by Hetor Yapa, J. and P. H.K.Kulaţilaka, J. on 17.02.2000.

*The jury had the benefit of observing the demeanour and the deportment of both the prosecution witness and the accused-appellant. No any cogent reason to interfere with the verdict of the jury and in the totality of the evi dence adduced in the case, the jury has come to a correct finding of fact.*

**P.H.K.Kulatilaka, J.** Held:

In this prosecution the accused-appellant was indicted in the High Court of Matara in terms of Section 296 of the Penal Code for committing murder. He was tried by a jury. At the trial the jury brought an unanimous verdict of guilty against the accused-appellant and accordingly the learned trial Judge has pronounced the sentence of death on him. He has appealed against the verdict and the sentence.

The accused-appellant when called upon for a defence opted to give evidence from the witness box and accordingly adduced evidence before the jury.

In the summingup to the jury the learned trial Judge has correctly directed the jury as to how they should examine the veracity of a witness. Further in dealing with the evidence of the main prosecution witness Ariyapala, he has categorically referred to the contradictions marked and produced by the defence and also the omissions proved by the defence. The learned trial Judge has in no uncertain terms explained to the jury the effect of such contradictions and omissions.

After a careful examination of the contradictions and omissions marked and proved in relation to Ariyapala's evidence, we are of the view that none of these contradictions and omissions relates to the core of the case. Therefore we hold that the jury had very correctly disregarded them as not being material, specially when all the important factor of probabilities echoed in favour of the version given by Ariyapala.

The learned counsel who appeared for the accused-appellant had no complaint regarding the medical evidence led in this case by the prosecution.

The learned trial Judge has dealt with very clearly as to how the evidence of a witness should be examined as to the veracity. Further the trial Judge has directed the jury to be extra cautious when considering the admission made by the accused-appellant under cross examination.

It is quite apparent that the jury being the trier of evidence it has rejected the version of the accused-appellant which was manifestly deficient taking into consideration the inconsistencies as per se of his evidence as well as the manner in which he stood the test of cross-examination.

Further it should be observed that the jury had the benefit of observing the demeanour and the deportment of both the prosecution witness Ariyapala and the accused-appellant and had accepted the version given by the prosecution witness Ariyapala.

Here the trial Judge had strongly expressed his opinion whereas in the instant case the learned trial Judge has placed before the jury the prosecution version and the accused's version and left to the jury the consideration of the evidence untrammelled by an expression of opinion by him.

In this case the prosecution has relied upon the evidence of the eye witness Ariyapala, medical expert and the police evidence. The accused-appellant gave evidence on his own behalf. The trial has not been a complex one. It was a straight forward case.

The learned trial Judge at the commencement of the trial in his short address has briefed the jury about their duty as Judges of fact and as such they were possessed of the fact that they should give a careful hearing to the evidence adduced before them. During the course of the summing up the jury had a break of 30 minutes.

The Judge has told the jury that they cannot consider the fact of absconding in isolation and that they should consider absconding evidence along with the other evidence in the case. It is in evidence that the accused-appellant had absconded for a period of more than two months after the commission of the offence until he surrendered to the Morawaka Magistrate's Court and thereby he kept himself out of the reach of the law enforcement officers. This is conduct influenced by the fact in issue. We do not see any misdirection in this regard by the learned trial Judge.

In the totality of the evidence adduced in the case, we are of the considered view that the jury has come to a correct finding of fact. Therefore we do not see any cogent reason to interfere with the verdict of the jury. In the circumstances we dismiss the appeal.

(Cases referred - *Martin Silva alias Dharmadasa and another Vs. The Queen 15 CLW 14, M.J. Fernando Vs. The Queen 54 NLR 255, Barwada Bhoginbhai Hirjibhani Vs.State of Gujerat 1983 AIR SC 753, Mendis Vs.Queen 54 NLR 177, Bhoraj Vs.Sita Ram AIR 1936 PC 60, Jagathsena Vs.Bandaranayake 1984 2 SLR 397 and H. S. Perera Vs. The Queen 76 NLR 217)*

**WRIT (1)**

*Ref. 03/01 /2002*

Parties in Writ applications - necessary party - proper party.

**Rawaya Publishers (guarantee) Ltd. and Others v. Mr. Wijeyadasa Rajapaksha and Others**

**C.A.No.1166/99**

Decided by J.A.N.de Silva, J. (P/CA) on 27.07.2001.

*In the context of writ applications, a necessary party is one without whom no order can be effectively made and a proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings.*

**J.A.N.de Silva, J. (P/CA)** Held:

The petitioners in this application seeks to quash the order made by the first to seventh respondents on 02.11.1999 wherein they directed the petitioners to apologize to the complainant one Tilwin Silva, within one month from the receipt of the said order. The complainant Tilwin Silva claims to be the Secretary General of the Janatha Vimukthi Peramuna and the complaint has been made to the Press Council by document marked P2.

When this application came up for hearing a preliminary objection on behalf of the respondents was raised that the General Secretary of the Janatha Vimukthi Peramuna in whose favour the order which is sought to be quashed has been made has not been made a party to this application and the failure to do so is fatal to the application filed by the petitioners.

Tilwin Silva is the complainant in the case. The order of the Press Council is in his favour. Petitioner cannot be permitted to proceed with an application keeping the original complainant out of the proceedings.

In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings.

As stated earlier Tilwin Silva is the complainant. Failure to make him or Janatha Vimukthi Peramuna a party to this application is a fatal irregularity. Petitioners should not be permitted to use the process of Court to cover their lapses. This application is dismissed with costs.

(Cases referred - *James Perera Vs.Godwin Perera -48 N LR 190,*

*Gunathilaka Vs. GA Galle 47 NLR 49, Farook Vs. Siriwardena, Election Officer and Others (1997) 1 SLR 145, Abayadeera and 162 Others Vs.Stanley Wijesundara, Vice Chancellor and Another (1983) 2 SLR 267, Ramasamy Vs. Ceylon State Mortgage Bank and Others 78 NLR 510 and Udit Narayan Singh Vs. Board of Revenue AIR 1963 SC 786.)*

**WRIT (2)**

*Ref. 04/01/2002.*

Decision made who had no authority to make it.

**A.M.Vijitha Kumara v. T.R.Anandaraja and Others**

**C.A.Application No.40/99**

Decided by U.de Z.Gunawardana, J. on 31.05.2001.

*The effect of the decision reflected in R3 (refusing to revoke the interdiction) is, in effect, a dismissal of the petitioner, from service. But there is nothing to show that the officer who had the authority to make it had made the same decision.*

**U. de Z.Gunawardana, J.** Held:

This is an application, badly drafted, made by the petitioner, a reserve police constable under interdiction, for an order of mandamus, to use the very words in the prayer to the petition, "compelling the respondents to reinstate the petitioner in the service". It is to be observed that the 4th respondent is the Attorney-General and one can be sure of one thing, if of no other, that, in the circumstances of this case, no order of mandamus would lie against him. The order of mandamus had been prayed for indiscriminately as against all four respondents.

The petitioner had been interdicted on 24.12.1992 on the ground that he had tendered on 21.8.1990, to the officer in-charge of the Badulla Police Station, a forged marriage cerificate to false show that he was married in order to qualify for permission to travel from home to the police station, Badulla, to which he was attached (vide P1).

In consequence, the petitioner had been charged in the magistrate's court of Badulla under (i) section 457 read with section 452 and (ii) section 401 of the Penal Code.

The petitioner had been interdicted on 30.01.1993, but five days thereafter was transferred to the Moneragala police station, thereby, in effect, withdrawing the interdiction. But, on 24.09.1997, the petitioner was interdicted again for the same reason. I wonder whether it is technically correct for the petitioner to have been interdicted again after he was re-instated, which was what the transfer to Moneragala involved.

On 27.01.1998, the learned magistrate had found the 1st charge (under section 457 of the Penal Code, based on forgery for the purpose of cheating) proved, but the learned magistrate had dealt with the accused under section 306 of the Criminal Procedure Code and conditionally discharged the accused whilst ordering the accused to pay Rs.1500/= as state costs. Obviously, the learned magistrate had felt that there were extenuatine circumstances. The petitioner had been discharged on the 2nd charge, (based on cheating with knowledge that wrongful loss may thereby be caused to a person whose interest the petitioner was bound to protect), on his pleading guilty to the 1st charge.

In fact, the said communication (R3) embodies and conveys to the petitioner the decision not to reinstate him. It is relevant to observe that the sole relief that the petitioner had prayed for is an order of mandamus compelling, indiscriminately, the four respondents to reinstate the petitioner in the service. The quashing of that decision conveyed by R3 had not been sought on this application which, in fact, the petitioner ought to have done for sake of completeness, if not, for anything else.

The effect of the decision reflected in R3 is, in effect, a dismissal of the petitioner from service. But there is nothing to show that the decision in R3 refusing to revoke the interdiction, had been made by the officer who had the authority to make it.

The decision ( R3 ) not to reinstate the petitioner has, in the circumstances, the effect of a dismissal although that decision had been taken by an officer who was not the commandant which means that that decision had been taken by someone who had no authority to do so. Although, the quashing of R3 had not been sought, for the sake of completeness, I do hereby quash it. In the result the only relief sought, that is, an order of mandamus directing the respondents to reinstate the petitioner has to be granted. (As explained earlier no order of mandamus could be granted as against the 4th respondent). I do hereby direct the 1st respondent (who was the commandant at the date of this application) to reinstate the petitioner. If he has ceased to hold office the officer presently holding that office is directed to give effect to this order.

However, this order will not prejudice any proper disciplinary inquiry being held by the relevant authority under The Establishments Code.

Order of mandamus is hereby granted as prayed for in the petition of the petitioner directing that he be reinstated.

Under the judicial review procedure the court is not concerned with the merits of the case, whether the decision was right or wrong, but whether it was lawful or unlawful.

In fact, the scheme of the Establishments Code clearly contemplates or requires an inquiry to be held against the officer who had been convicted of an offence by a Court of Law. Such an inquiry has to be held after the conviction. No such inquiry had been held. In fact, the Court that dealt with the petitioner under section 306 of the Criminal Procedure Code had, in fact, not reported the matter to the relevant authority, as was its (Court's) duty to have done. It is worth observing that an order under section 306 is tantamount to a conviction.

(Case referred - Chief *Constable of the North Wales, Police Vs. Evans (1982) 1 WLR 1155 at 1173)*

## O.P.A. Committee

This committee in collaboration with the Organisation of Professional Association arranged for a Seminar on;

"Party Non-supportive of the President of Sri Lanka demands majority in Parliament - what follows?."

The main speakers were; Professor G. L. Peiris Hon. Batty Weerakoon, Minister of Justice, Mr. Rohan Edirisinghe, Senior Lecturer of Law. Mr. S. Bagirathan, Chairman of O.P.A. Committee presided. This was held at the O.P.A. Auditorium and a large number of professionals attended. Mr. Ajantha Atukorale President of B.A.S.L. and Dr. Gopalasundaram, President of O.P.A. graced this occasion.

