ARBITRATION

Ref: 1/5/2004 *Rs. 50.00*

Sec. 37(1) of the Arbitration Act – Time limit within which leave to appeal application to be made to the Supreme Court

George Steuart & Co. Ltd. v. Lankem Tea & Rubber Plantations (Pvt) Ltd.

S.C. (CHC) LA No. 12/2002
H.C.(RB) No. 773/2001

Decided by Shirani A. Bandaranayake, J, P. Edussuriya, J and H.S. Yapa,J on 29.01.2004

When the learned President's Counsel for the petitioner sought to support the application for leave to appeal, a preliminary objection was raised on behalf of the respondent that this application was out of time and therefore it should be rejected.

It was common ground that the order of the High Court was made on 01.03.2002 and that the petitioner filed this application on 18.06.2002, which is 108 days after the said order.

Shirani A. Bandaranayake J, with P. Edussuriya J and H.S. Yapa, J agreeing, held:

"Firstly, it was pointed out by learned President's Counsel for the respondent that if the contention of the petitioner is upheld, there is no time limit for an application for leave to appeal to be lodged, then such an application could even be made after 10 years from the date of the order of the High court. While endorsing the contention of the learned President's Counsel for the respondent I wish to add further that such a situation would lead to an absurdity in that, the party who was successful in the High Court in the action for the enforcement of the award, will have to wait for an unknown period not knowing whether there would be a leave to appeal application made by the other party to the Supreme Court. Such a situation would lead to an absurd system, where it would not be possible for the arbitration act to work as stipulated. It is a well known fundamental rule that any interpretation given to a statute must not lead to absurdity that would direct the smooth functioning of a system in to chaos.

"Secondly the decision in Mahaweli Authority of Sri Lanka (Supra) was decided on 12.12.2001 and the other of the High Court in the petitioner's case was made on 01.03.2002. By the time the said order of the High court was made, the Supreme Court had decided that an application for leave to appeal from the High Court has to be made within 42 days of the date of the order of the High Court. Therefore the petitioner had sufficient notice of the time limit to make an application for leave to appeal from the High Court to the Supreme court and sufficient notice to comply with the said decision if hew anted to do so.,

"For the aforementioned reasons, I uphold the preliminary objections raised, and reject this application for leave to appeal."

INDUSTRIAL LAW

Ref: 2/5/2004 *Rs. 50.00*

Discretion of the employer to retire a workman form service on his reaching 55 years without extending his services should be exercised in a reasonable and equitable manner.

S.C. Appeal No. 70/2002
S.C.L.A. No. 08/2002
H.C.A.L.T. No.3/98 Kandy
L.T. No. LT9/TK/1241/95

Elpitiya Plantations Ltd. –v- Ceylon estates Staff Union and others

Decided by Bandaranayake, J, Edussuriya, J and Hector Yapa, J on 29.,01.2004

JUDGMENTS TO BE CITED

The first respondent appealed against the said order of the Labour Tribunal to the High Court of Kandy. The learned High Court Judge after hearing the parties by his order dated 26.02.2002, held that the retirement of the workman on his reaching 55 years of age was unjust and inequitable and therefore directed the appellant to reinstate the workman from 01.11.1994 with back wages. Aggrieved by this order of the High Court, the appellant made an application for leave to appeal to the Supreme Court and on 04.09.2002 the Supreme Court granted leave to appeal on the following questions of law:-

(i) Is the order of reinstatement with back wages justifiable in respect of a workman who is almost 63 years of age, when the 1st respondent claims that the compulsory age of retirement is 60 years and the petitioner (appellant) claims that the retiring age is 55 years;
(ii) Has the High Court Judge failed to consider that the oral and documentary evidence presented, which established that the retiring age was 55 years, and has he thereby misdirected himself?

Hector Yapa, J with Bandaranayake, J and Edussuriya, J agreeing held:

"If on the other hand the submission of learned counsel for the 1st respondent is accepted that document 'A' which suspended the retirement of employees over 55 years in the Plantation Sector applied to this case, then it is seen from the two cases referred to above that the judiciary has clearly accepted the position that the optional age of retirement of employees in the Plantation sector as 55 years and that any extension of service was at the discretion of the employer or the management. Therefore, as a matter of right a workman was not entitled to get an extension.



JUDGMENTS TO BE CITED

Regard to these cases learned counsel for the 1st respondent sought to argue that the said cases do not concern drivers but related to officers such as Superintendents and therefore these judgments will not apply to this case. It is to be noted that document 'A' is of general application to employees of the Plantation Sector and therefore such a distinction as suggested by counsel will not be permissible. Since Document 'A' is of general application, it is seen that the judiciary has decided that any extension of service after 55years is at the sole discretion of the employer. What is important here is that the discretion should be exercised in a reasonable and equitable manner. Therefore irrespective of whether document 'A' applies or not, the optional age of retirement of the workman was 55 years. Any extension of service of the workman after 55 years was at the discretion of the management. Hence the decision of the appellant to retire the workman from service on his reaching 55 years without extending his services has been due to his unsatisfactory service record. Such a decision cannot be held to be unjust and inequitable.

"In this case learned High Court Judge has concluded that in terms of document 'A' the compulsory age of retirement of the workman was 60 years and therefore the retirement of thee workman at 55 years was unjust and inequitable. However, as seen from the material referred to above, irrespective of whether document 'A' applied or not, the optional age of retirement of the workman was 55 years and any extension of service was at the discretion of the management. Hence the workman was not entitled to any extension as a matter f right. Therefore, one cannot blame the appellant for not extending the services of the workman after 55 years having regard to his unsatisfactory service record.,

"For the aforesaid reasons, first question of law is answered in the negative and the second question of law is answered in the affirmative. Accordingly, the judgment of the High Court dated 26.02.2002 is set aside and the appeal is allowed with costs fixed at Rs. 2,100/-."

LAND ACQUISITION

Ref: 3/5/2004 Rs. 40.00

Section 2 notice should state the public purpose – urgency to act under Section 38 provision (a) should be established by definitive and positive material- Courts have a duty to review – Rule (38) of the Court of Appeal (Appellate Procedure) Rules 1990

Udapussellawa Plantations and another v- Anuruddha Ratwatte and others

C.A. Application No. 466/03

Decided by K. Sripavan, J on 12.1.2004

In this application the petitioner contended that notice under section 2 of the Land Acquisition Act did not state the public purpose and that there was no urgency to act under Section 38 and acquire the land

K Sirpavan, J held:

".....In terms of Section 2(2) of the said Act, the notice shall state the public purpose in order to investigate the suitability of the land for **that public purpose.....**

".....The impugned order in this application made under section 38 provision (a) of the said Act is not preceded by a lawful notice made under Section 2. hence, it is a nullity.....

".....However the 2nd respondent has failed to place before Court any material to explain the basis upon which the then Minister decided to acquire the land on the ground of urgency. There must be definite and positive material to show that the land had to be acquired urgently..... It is not the dispute that the Minister is empowered to decide the question of urgency., But, the Courts have a duty to review the matter..... The totality of the material placed before this Court by the learned Senior State Counsel for

the respondents does not measure up in any degree to satisfy the requirement of urgency.....

".....The respondents did not seek to contradict or controvert this position taken up by the 2nd petitioner by filing a further affidavit with the leave of Court. In terms of Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules 1990, a party may with the prior permission of Court has the right to file additional affidavit or other documents within the time granted by Court. Hence, the position taken up by the respondents that they had no opportunity to reply to the new material in the second petitioner's counter affidavit cannot be accepted.

"For the reasons set out above, a Writ of Certiorari is issued quashing the order dated 29th October 2001 made under the proviso (a) to the section 38 of the Land Acquisitions Act."

PARTITION

Ref: 4/5/2004 Rs. 40.00

Section 48 of Partition Law – its finality effect – Revisionary Powers of the Appellate Courts are not affected by sec. 48 – exercise of powers of revision and restitution in integrum when proceedings are tainted by what has been called fundamental vice.

Heendeniya Jayaratna and another –v- A.M. Premadasa and others

S.C. Appeal No. 20/2003
C.A.L.A. No. 28/2000
D.C. Ratnapura No. 940/P

Decided by S.N. Silva, CJ, Ismail, J and Weerasuriya, J on 13.2.2004

The application of the petitioner-respondent-respondents dated 19.03.1999 was to set aside the judgment and interlocutory decree entered or in the alternative to restrict the corpus to 30 acres as described in the schedule to the plaint.

The Court of Appeal has sought to justify the order of the District Judge by reference to the inherent powers of the District Court in terms of section 839 of the Civil Procedure Code.

Weerasuriya, J (with S.N. Silva, CJ and Ismail, J agreeing) held:

"It would be clear that this application was outside the scope of section 48(4) of the Partition Law for several reasons, namely (a) it was not made by the parties to the action (b) it was intended to set aside the interlocutory decree or in the alternative to restrict the corpus to 30 Acres (c) it did not set out the nature and extent of the right, share or interest of the parties to the land to which the action relates and (d) it did not specify to what extent and in what manner the parties seek to have the interlocutory decree amended, modified or set aside. It must be noted that a party could make an application to set aside the interlocutory decree only where the party is entitled to the entirety of the property.

"It is significant that section 48(1) of the Partition Law gives final and conclusive effect to the interlocutory decree subject to the decision on any appeal which may be preferred therefrom and sub-section (4) as referred to earlier. Having regard to the stringent provisions of section 48 of the Partition Law which had as their sole object the finality of the interlocutory decree it is obvious that learned District Judge had acted in blatant disregard of the provisions of section 48.

"On a consideration of the above material it would be manifest that District Court had no jurisdiction to entertain the application of the petitioner-respondent-respondents to seek the relief they prayed for and the application was misconceived. The Court of Appeal has taken the erroneous view that notwithstanding the provisions of Section 48, learned District Judge was justified in restricting the corpus to 30 acres using the inherent powers of Court in terms of Section 839 of the Civil Procedure Code. For the foregoing reasons I hold that the Court of Appeal has erred in affirming the order of the District Judge which was patently outside this jurisdiction. Therefore, I set aside the order of the District Judge dated 04.11.1998 and the order of the Court of Appeal dated 07.03.2002."

REI VINDICATIO ACTION

Ref: 5/5/2004 - Rs. 35.00

In a rei-vindicato action the burden is on the plaintiff to prove and establish his title.

Gnaneswary and others v. Kanapathipillai Thamu and another

C.A. Appeal No. 642/86(F)
D.C.Chavakachcheri case No. 6559/L

Decided by Shiranee Tilakawardane, J (P/CA) and P. Wijayaratne, J

The main issue in this case was whether the Plaintiff had established title to the land that he is claiming a declaration of title to as required by law.

In allowing the appeal Ms. Shiranee Tilakawardane, J(P/CA) with P. Wijayratne J, agreeing held:-

"In the case of *Muththasamy Vs. Seneviratne* 321 CLW 91 it has

JUDGMENTS TO BE CITED

been specifically stated that in an action for declaration of title, it is for the Plaintiff to establish his title to the land he claims and not for the defendant to show that the Plaintiff has no title. This was also followed in the case of *Peiris Vs. Savunhamy* in 54 NLR page 207 where it had been held "in an action for declaration of title to land where the Defendant is in possession of the land in dispute, the burden is on the Plaintiff to prove that he has dominium." In the case of D.A. Wanigaratne Vs. Juwanis Apouhamy 65 NLR page 167 it has been held that "in a rei vindication action the Plaintiff must provide and establish his title. He cannot ask for a declaration of title in his favour merely on the strength of the Defendant's title is poor or not established." All these cases had been followed by the recent case of *Luwis Singho Vs. Ponnamperuma* (1996) 2 SLR Page 320 where Justice Wigneswaran has stated that "it is a recognized principle that in an action for declaration of title the Plaintiff must discharge the burden of proving his title. In a rei vindication action cause of action is based on the sole ground of violation of the Right of Ownership, in such an action proof is required that (1) the Plaintiff is the owner of the land in question, i.e. he had the dominium and (2) that the land is in possession of the Defendant." A similar position unfolds in this case, where the Plaintiff's action for declaration of title is based on the premise that he asserts that he has title and that the Defendant is in possession of the land.

"The main issue that comes up for consideration of this Court is that the Plaintiff has not established his title to the said land in so much as he has been unable to prove that there was a divesting of the said land after it had admittedly been vested under the Land Reform Law referred to about."