JUDGEMENTS TO BE CITED

Ref No. 01/09/2004

BAIL

Section 47 of the Immigrants and Emigrants Act - Art.13(2) of the Constitution.

U.J.Thilanga Sumathipala Vs.The Inspector General of Police and others, C/A (B/A) Application No.171/2004, Decided by Andrew Somawansa J., K.Sripavan J., Gamini A.L.Abeyratne J. on 18.06.2004.

Sec.47(1) of the Immigrants and Emigrants Act would be unconstitutional and unreasonable in terms of Supreme Law of our land. Art.13(2) of the Constitution provides that a person shall not be deprived of personal liberty except upon and in terms of the order of a judge made in accordance with procedure established by law.

K.Sripavan J.

"The Accused Petitioner who is presently in remand custody in respect of an alleged offence of aiding and abetting one Dhammika Amarasinghe to travel abroad in July 1999 using as genuine a forged passport, seeks bail in terms of Sec.404 of the Code of Criminal Procedure Act No.15 of 1979, pending trial.

In view of certain question of fundamental importance, a Divisional Bench was constituted by His Lordship, the President of the Court of Appeal in order to consider, inter alia whether the Court of Appeal has jurisdiction to grant bail in terms of Section 404 of the said Act.

The jurisdiction conferred on the Appeal in terms of Art.138 of the constitution is two fold, namely, as appellate and revisionary jurisdiction as provided in Art.138 and an appellate and original jurisdiction as Parliament may by law vests as provided in Art.138(2). Learned President's Counsel submitted that the jurisdiction vested in the Court of Appeal in terms of Sec.404 of Act No.15 of 1979 is original and as such this court has jurisdiction to grant bail to the petitioner. The learned Counsel for the respondents however submitted that Sec.404 vests jurisdiction in the Court of Appeal primarily to make three types of orders namely Appellate and / or Revisionary jurisdiction and that Sec.404 does not vests any form of original jurisdiction in the Court. Though both Counsels submitted that there is inconsistency between the Sinhala text and the English text in respect of Sec.404 it was agreed that the Sinhala text shall prevail. It was the submission of the learned President's Counsel that the words at any stage appearing in the Sinhala text and not found in the English version gives an express conferment of an original jurisdiction in the Court of Appeal. It has been found that Sec.404 of Act No.15 of 1979 has been interpreted in two reported cases. In Rev.Singarayar et al Vs. Attorney-General Sriskantha Law Report II page 154 a Divisional Bench of this Court held that the power given to the Court of Appeal by Sec.404 of the Code of Criminal Procedure Act is an appellate power and that a pre requisite for its exercise is the existence of and order of an original Court. In Benwell Vs. The Attorney-General 1988 Vol.1 page 1 at 3 Sharvananda C.J. made the following observations.

"...It was urged that in any event, the Court of Appeal had powers under this section to admit the Appellant to bail. In my view, this section does not support Counsel's submissions. The expression "in any case" can only refer to the cases referred to in the two previous sections, viz 402 and 403 of the Code, and is not of general application. The Court of Appeal is empowered in the exercise of its appellate jurisdiction to admit any person in custody to bail in the cases referred to in Sections 402 and 403."

As averred in paragraph 27 of the petition, the Magistrate has refused to grant bail to the petitioner. Hence, the existence of an order of an original Court was in force at the time the petitioner made this application, for this Court to exercise its jurisdiction.

The Code of Criminal Procedure Act No.15 of 1979 is a general law purporting to deal with the procedure. The Immigrants and Emigrants Act No.20 of 1948 as amended by Act No.68 of 1961 was enacted, inter alia to regulate the departure from Sri Lanka of citizens and persons other than citizens of Sri Lanka. Looking at the preambles in the two Acts, it may be said with more justification that in the context in which both apply to this case, the Code of Criminal Procedure is a General Act and the Immigrants and Emigrants Act is a special Act. By an amendment made to Sec.47 of the Immigrants and Emigrants Act by Act No.42 of 1988, the legislature brought into operation the following new section.
"Notwithstanding anything in any other Law -.....offences...shall be non-bailable and no, person accused of such an offence shall in any circumstances be admitted o bail"

With the institution of criminal proceedings against the petitioner in the Chief Magistrates Court, Colombo in case No.55305/01 the petitioner became an accused of having committed in terms of Sec.45(1)(b) read with 45(2) of the Immigrants and Emigrants Act. Accordingly, Sec.47 as amended by Act No.42 of 1998 becomes applicable to the petitioner. By this section the legislature makes it clear that in any circumstances, the petitioner cannot be enlarged on bail.

It is also a well recognized rule of interpretation that when a special provision is made in a Special Statute, that special provision excludes the general provision in the general law.

Accordingly, by Sec.47 the legislature intended that a person accused of an offence under Se.45 of the Immigrants and Emigrants Act shall not in any circumstances be admitted to bail. The cardinal rule of construction is to give effect to the words of the statute. It is only in situations where there is doubt or difficulty as to the interpretation that the Court may look to the object of the enactment or the purpose for which it was made. If the meaning is clear and quite unambiguous that meaning must be accepted by the Court irrespective of other considerations.

However, Article 13(5) of our Constitution states that every person shall be presumed innocent until he is proved guilty. Art.13(2) further provides that a person shall not be deprived of personal liberty except

upon and in terms of the order of a judge made in accordance with procedure established by law. If a strict interpretation is given to Sec.47(1) of the Immigrants and Emigrants Act, it would mean that the petitioner has no remedy at all until his case s concluded in the Magistrate Court.

Any strict interpretation to Sec.47(1) of the Immigrants and Emigrants Act would in my view would be unconstitutional and unreasonable in terms of Supreme Law of our land. ..Any interpretation in this context must be made in a manner respecting petitioner's liberty taking into account the fundamental rights enshrined in the Constitution. Being paramount law, the Constitution is outside the purview of the Courts, but a statute would be invalid if it contravenes any express provision of the Constitution. Effect has to be given to the paramount law to which all other laws must yield.

Where the statute fails to provide a solution or offers a solution that is inconsistent with the basic notions of justice and the provisions of the Constitution, the Court is forced to frame a new precedent that will not exhibit those defects.

Petitioner be enlarged on bail subject to strict conditions imposed by this Court."

Gamini A.L.Abeyratne, J

Learned President's Counsel appearing for the Accused-Petitioner strenuously urged Court to consider the effect of section 404 of the Code of Criminal Procedure which endowed this Court with original jurisdiction in the nature of Forum jurisdiction to entertain applications of this nature. According to learned Counsel, Article 138(2) of the constitution also empowered this Court to exercise original jurisdiction. It was submitted on behalf of the Petitioner that the Singarayer case was decided per incuriam as the three bench judgment was predicated on a misconception of the law, in that the earlier provision of law in the form of section 396 of the 1898 Criminal Procedure Code was identical to the present provision of law in force contained in section 404 of the Code of Criminal Procedure Code that is Act 15 of 1979. Section 396 of the old Code and section 404 of the present Code were construed to be identical and equated with each other, disregarding the vital factor that they differed in the quintessence and section 404 of the wider scope than section 396. Learned Counsel for the petitioner also observed that this was the first occasion on which the State was adopting a stance of this nature with regard to bail matters coming within the purview of the Immigration and Emigration Act.

The State took refuge in the submission that the Court of Appeal like the Supreme Court was a creature of Statute and hence only powers expressly conferred by statute as opposed to by implication, could be exercised. As an illustration learned State Counsel cited section 10 of the Offensive Weapons Act where the Court of Appeal is conferred exclusive jurisdiction in the matter of granting bail. Reference was also made with regard to Election Petitions. The attitude of the State to matters of this nature under the Immigration and Emigration Act in the past and present in the other divisions of this Court escaped the vigilance of the learned Deputy Solicitor General who led the State team.

In addressing judicial attention to the peculiarities of the present situation, it becomes germane to the issues involved to consider that the ordinary meaning of the word jurisdiction is "the authority by which courts and judicial officers take cognizance of and decided cases the legal right by which Judges exercise their authority". Jurisdiction that is referred too, may be either appellate, revisionary or original- appellate can be described as the power vested in the appellate court to review and revise the judicial action of an inferior court evidenced by an appealable order or an appealable judgment pronounced by such court. The power and authority to take cognizance of a cause and proceed to its determination not in its initial stages but only after it has been finally decided by an inferior court. Revisionary jurisdiction includes the power to review and re-examine for purpose of correction on questions of fact rather than law. It is an extraordinary jurisdiction exercised for the purpose of amendment, correction, re-arrangement of even improvement. In the light of this background suffice it to state, for the purpose of brevity, that Original jurisdiction means jurisdiction in the first instance to take cognizance of a cause at its inception try it and pass judgment upon the law and facts.

Appellate and Revisionary jurisdiction presupposes prior decision as requisite for determination by the Court of Appeal whereas original jurisdiction does not envisage that particular requirement.

it would not be incorrect to state that one need have no perspicacity to conclude that there is no ambiguity manifest in this section to prevent the Court of Appeal from exercising original jurisdiction.

Article 18 and 23(1) of the Constitution makes it imperative to place reliance on the Sinhala text in preference to the English. It is significant to observe that the query addressed to the Secretary-General of Parliament in the course of the proceedings of this Court as to which text prevailed in authority with regard to applicability of sections 404 of the Sinhala and English acts evoked the response that the Sinhala text prevails and that the English text is a mere translation of the Sinhala text which is in the official language of the country. This obviates the necessity to indulge in the future exercise of academic discourse or dependence on the guidance of decided cases and regard the same as authority in an attempt to establish Judge made law.

In the context of this factual background it has to be considered whether it would not be ludicrous to resort to a case decided two decades and an year ago,. The case of Rev. Singarayer although decided by a Bench of three learned Judges reflected an instance of judicial apathy by having been misled by learned State Counsel to believe that section 396 of the earlier criminal procedure code was identical to section 404 of the present code of criminal procedure code Act No. 15 of 1979. Learned State Counsel did not direct the attention of the bench to the clause, inherently part of section 404 of the Code of Criminal Procedure Code namely:-

"Notwithstanding anything to the contrary in this code or any other law....'

This was not included in the earlier section 396 of the 1898 Criminal Procedure Code.

The inclusion in the section 404 in the present code of Criminal Procedure Code Act No. 165 of 1979 of the words :-"the Court of Appeal" and "in any case" should clinch the matter even in the eyes of the mentally negligible.

This, in the opinion of this Court invests the Court of Appeal with original jurisdiction.

In view of the above, to dwell on the case of Ganapathipillai 21 NLR 490, important to section 396 of the earlier Criminal Procedure Code would be redundant similarly, the necessity to indulge in discourse about the evolution of the law until the enactment of the Code of Criminal Procedure and surmise, deduce or conjecture the intention of the legislature and split hairs with regard to the interpretation of words and idiosyncrasies and whimsical fancies of Jurists is obviated. This court is inclined to the view that there is a clear exposition of the law reflected in the relevant statute in unambiguous, unequivocal terms. That is that the Court of Appeal has original jurisdiction.

It would be incomplete to terminate this brief exposition of the position with regard to lack of jurisdiction without reference to the fact as to whether the Immigration and Emigration Act being a later law, a special law than the Code of Criminal Procedure a general law affects the jurisdiction of Court section 47(1) of the Immigration and Emigration At states that:-

".....shall be non bailable and no person accused of such an offence shall in any circumstances be admitted to Bail."

It is significant that there is no prohibition for a court to grant bail.

The preceding section of the Immigration and Emigration Act, section 46, deals with the fact that all offences under the Act must be tried in the Magistrate's Court-this necessarily pre-supposes the fact that the Magistrates Court has no jurisdiction to grant bail in these matters the only logical conjecture stemming from this position would be that the jurisdiction for the Court of Appeal to grant bail under section 404 has not been eroded upon. Had it been so, one could have logically envisaged a situation of the nature that has arise with regard to the Antiquities Act to repeat itself in the same form of manifestation. The Antiquities Act was amended in May 1998. The same year as the amendment to the Immigration and Emigration Act. In July, it is significant that the amendment to the Antiquities Act section 15c, contained the words:

"Notwithstanding anything to the contrary in the Code of Criminal Procedure Act No. 15 of 1979 or any other written law, no person charged with, or accused of an offence under this ordinance shall be released on bail."

It is logical to presume that had the legislature intended the later amendment to have the strike prohibition contained in the earlier one with reference to the Code of Criminal Procedure in the latter amendment it would have expressly stated so.

The constitution has been adopted and enacted as the Supreme law of the Democratic Socialist Republic of Sri Lanka in which case all other enactments and laws are subordinate and the provisions of the Constitution take precedence. Accordingly this Court is inclined to the view that as in instances of this nature if as the State claims, an individual is left bereft of any relief or remedy with regard to matters where deprivation of liberty occurs solely due to inadventure or omission on the part of the legislature resulting in lacuna or because of restrictive elucidation as a consequence of ambiguity or conflict in interpretation of laws any individual is jeopardized and prejudiced with regard to his right of liberty which demand immediate attention by an appropriate forum to which he is entitled as of right as a human being and this is being denied him, then the protective provisions of the Constitution are activated and is the only remedy available to him. Similarly, in this instance section 404 of the Code of Criminal Procedure is very clear and unambiguous with regard to jurisdiction of the Court of Appeal conversely, to an inquisitive mind section 47(1) appears to post a question with regard to jurisdiction. If the question cannot be resolved in the manner enumerated above the only matter of solution would be to have recourse to the Constitution as the supreme law of the country, and the applicability of section 404 once again would be unquestionable.

In accordance with the analytical legal reasoning indulged in by this Judicial review, on the question of jurisdiction I am inclined to the view that even my insatiable curiosity with regard to this matter stands resolved, and I hold that there is no merit whatsoever in the submissions made by the Respondents, and furthermore that the Court of Appeal does not possess jurisdiction by virtue of Articles 138(2) and section 404 of the Code of Criminal Procedure Act No., 15 of 1979 and thus could entertain applications pertaining to matters preferred under the Immigration and Emigration act and its amendments.

Ref: 02/09/2004

FINANCE (AMENDMENT) BILL

Reference under Article 122(1)(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C.(S.D.) No. 23/2004

Decided by : Sarath N. Silva, CJ, H.S. Yapa, J and N.K. Udalagama, J

06.08.2004

Her Excellency the President by written reference dated 5th August 2004 addressed to the Chief Justice requested the special determination in respect of the Bill bearing the above title, in terms of the provisions of Article 122(1)(b) of the Constitution. The Bill bears the endorsement of the Secretary to the Cabinet of Ministers that it is urgent in the national interest.

Notice was issued on the Attorney General as required by the Constitution and the Additional Solicitor general assisted this Court in the consideration of the constitutionality of the provisions of the Bill.

The purpose of the Bill is to repeal the provisions contained in sections 19 and 20 (Part IV) of the Finance Act No. 11 of 2002. These two sections of the Finance Act No. 11 of 2002 had in turn been repealed, Part VI of the finance Act No., 11 of 1963.

Therefore the purpose of the present amendment is to bring back into operation the provisions of Part VI of the Finance Act No. 11 of 1963, as amended Part VI of the Finance Act No. 11 of 1963 imposed a tax on a transfer of property under certain conditions, to a person who is not a citizen of Sri Lanka. The Act originally covered a transfer of land and shares of companies. By a later amendment the operation of the tax was restricted to transfer of land in favour of person who is not a citizen of Sri Lanka., The tax thus imposed is the amount equivalent

to the value of the land. The present Bill revives and brings back into operation the provisions of the Act No. 11 of 1963, as amended together with all orders, notifications, rules and regulations made in terms of that Law.

Clause 4 of the Bill contains in addition two new provisions, they are, that

(I) transfer of ownership of land to any person who is not a citizen shall not be affected at a value below the value as specified in the regulations to be made by the Minister. Such regulations have to be made with the concurrence of the Minister of Lands and the Chief Valuer taking into consideration the prevailing value of land in any particular administrative district, Divisional Secretary's Division or Grama Seva Niladhari's Division, as the case may be. The purpose of this provision appears to be to prevent land being under valued in order to evade the tax, that is payable.

(II) that the transfer tax will be payable if the transfer is to a company in which more than 25% of the shares issued are owned by persons who are not citizens of Sri Lanka.

The amendment revives provisions that have been in operation from 1963, and repeated in the year 2002. These provisions impose a tax on the basis of a classification. The tax is imposed only in respect of purchase of land by non citizens or companies where more than 25$ of the issued shares are owned by non citizens.

Land being a limited resource should primarily be available to the citizens of this country and the tax is imposed not only as a revenue measure but also to set right a disparity in economic terms between non-citizens who seek to invest in land and citizens who require land to set up a residence or to eke out a livelihood.

We are of the opinion that the classification which has been in operation from 1963 is reasonable in relation to its objective and is based on intelligible criteria. The provisions are therefore not inconsistent with Article 12(1) of the Constitution which guarantees to every person the equal protection of the Law.

Mr. Goonewardena urged two matters for consideration by this Court. They are -

(i) that the amendment would have the effect of imposing a tax on companies of which more than 25% of the shares are owned by non-citizens who have entered into investment agreements with the Board of Investment in terms of sections 16 and 17 of the Board of Investment of Sri Lanka as amended.

ii) that the imposition of the tax on non-citizens may be in contravention of the provisions of International Treaties and Agreements entered into by the Government and approved by the Parliament in terms of Article 157 of the Constitution.

Learned Additional Solicitor General submitted that the Board of Investment is empowered in terms of Section 17 to enter into agreements and to grant exemptions from any law referred to in Schedule "B" of Law No. 4 of 1978.

He submitted that at the time the Law bearing title Greater Colombo Economic Commission Law was enacted, Part VI of the Finance Act No. 11 of 1963 which imposed the Property Tax in question was in operation. Section 17 empowered the Commission to grant exemptions from any law referred to in Schedule B of the Law. Schedule "B" contains a reference to Finance Act No. 65 of 1961 which does not cover the Property Tax in issue. Thus it is seen that at the time the Greater Colombo Economic Commission Law was enacted the legislature did not empower the Commission to grant exemptions from Property Tax in question. Thus the approved investments would be subject to the property tax imposed by act No. 11 of 1963.

As regards international treaties and agreements, Mr. Goonewardene has not been able to furnish this Court with any evidence of any such treaty that has been approved by a Resolution passed by not less than two thirds of the whole number of members of Parliament as required by Article 157 of the Constitution.

In the short period of 24 hours, that is permitted to this Court to examine the constitutionality of the Bill we are not in a position to embark on a voyage of discovery of treaties that have been approved by Parliament in the manner prescribed by Article 157 of the Constitution. In any event the matter of interpretation of the provisions of any such treaty and a finding that any law is in contravention of the provisions of such treaty would necessarily have to be the subject of appropriate legal proceedings in which such issue may arise for determination.

On the basis of available material we see no ground to express an opinion that the provisions of the Bill are inconsistent with Article 157 of the Constitution.

"the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors."

It is seen from this provision that the Constitution guarantees every citizen being a qualified elector the right to exercise the franchise at Elections and referenda. The name of the person being entered in the register of electors is a necessary pre-requisite for the exercise of franchise. The proposed amendment, in our opinion is a safeguard against impersonation and thereby enhances the exercise of franchise by ensuring that the person whose name is in fact entered in the register of electors is issued a ballot paper for the purpose of voting.

Article 93 of the Constitution contains a general provision with regard to the manner in which elections shall be conducted and it reads as follows:-

"The voting for the election of the President of the Republic and of the Members of Parliament and at any Referendum shall be free, equal and by secret ballot."

The requirement contained in this provision that an election shall be free, equal and by secret ballot will also be enhanced by the proposed amendment, which would prevent impersonation and ensure that the person whose name is entered in the register is the one who in fact votes at the election.

The necessary implication of the amendment is that a person whose identity cannot be ascertained with reference to a valid identity document is not issued a ballot paper. Thus the law makes a distinction between

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persons whose identity could be ascertained with reference to a valid identity document and persons whose identity cannot be so ascertained.

We are of the opinion that this distinction is reasonable in relation to its objective being the prevention of impersonation and is based on intelligible criteria.

The Registration of Persons Act No. 32 of 1968 has been in operation from 1971 and every person whose name is entered in the register of electors would be issued with an identity car in terms of the Act.

Furthermore as submitted by learned Additional Solicitor General the phrase "valid identity document" is given a wide interpretation in clause 3. It permits the identity of the person being ascertained with reference to any document issued by the Government of Sri Lanka in pursuance of any law for whatever purpose. In the circumstances the distinction made between persons whose identity can be ascertained by means stated in the Bill and the persons whose identity cannot be so ascertained, would not be inconsistent with the provisions of Article 12(1) of the Constitution.

For the reasons set out above we make a determination in terms of Article 123(1) of the Constitution that neither the Bill as a whole nor any of its provisions are inconsistent with the Constitution.

Ref: 03/08/2004 Rs.

PROHIBITION OF FORCIBLE CONVERSION OF RELIGION BILL.

Determined before Weerasuriya, J, Dissanayake, J and Raja Fernando, J on 06.08.2004 and 09.,08.2004

A Bill titled "Prohibition of Forcible Conversion of Religion" has been presented as a Private Member's Bill and was placed on the Order Paper of Parliament on 21.07.2004. Twenty one petitions have been presented challenging the constitutionality of the Bill in terms of Article 121(1), invoking the jurisdiction of this Court for a determination in terms of Article 123 of the Constitution. In addition twenty one intervenient petitioners were made parties on their application.

The purpose of the Bill is stated to be to provide for prohibition of conversion from one religion to another by use of force or allurement or by fraudulent means and for matters incidental therewith or incidental thereto.

The objections raised by the petitioners who opposed the Bill relate to the constitutionality of the entire Bill.

The Preamble of the Bill reads as follows:-

"Whereas, Buddhism being the foremost religion professed and practiced by the majority of people of Sri Lanka due to the introduction by Great Thathagatha, the Sambuddha in the eighth month after he had attained Buddhahood on his visit to Mahiyangana in Sri Lanka and due to the complete realization after the arrival of the Arahat Mahinda Thero in the 3rd century B.C.

"And Whereas, the state has a duty to protect and foster the Buddha Sasana while assuring to all religions the rights granted by Article 10 and 14(1) of the Constitution of the Republic of Sri Lanka;

"And Whereas the Buddhist and non-Buddhists are now under a serious threat of forcible conversions and proselytizing by coercion or by allurement or by fraudulent means.

"And Whereas, the Mahasangha and other religious leaders realizing the need to protect and promote religious harmony among all religions, historically enjoyed by the people of Sri Lanka."

Clause 2 of the Bill

It was the contention of the petitioners who opposed the Bill that clause 2 read with the interpretation clause 8 are inconsistent with Articles 9, 10, 14(1)(e), 12(1) and 12(2) of the Constitution. They submitted that Article 10 which grants freedom of thought conscience and the freedom to adopt and to have a religion of one's choice are absolute and unconditional and any attempt to regulate manifestation and practice of religion guaranteed under Article 14(1)(e) through Article 15(7) would in effect negate and nullify the contents of Article 10.

The intervenient petitioner in S.D. 4/2004, who is the proponent of the Bill submitted that the Bill seeks to prohibit only conversion from one religion to another by the sue of force, or allurement or by fraudulent means and gives effect to the freedom guaranteed under Article 10 of the Constitution.

Article 10 assures that every person is entitled to freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of his choice. Thus Article 10 protects absolutely the holding of any religious belief of his choice, no matter how bizarre or irrational. Therefore the freedom guaranteed by Article 10 to every person to adopt a religion or belief of his choice postulates that the choice stems from the free exercise of one's though and conscience, without any fetter which in any way distorts one's choice.

This position becomes clear by examining Article 18(2) of the International Covenant on Civil and Political Rights which states that "No one shall be subject to coercion which would impair his freedom to have or to adopt are religion or belief of his choice."

It is not disputed that the right to freedom of religion includes the right to adopt the religion or belief and entails the right to change one's religion. The present Bill seeks to prohibit conversions from one religion to another by the use of force or allurement or fraudulent means.

The freedom to practice or exercise one's religion guaranteed by Article 14(1)(e) of the Constitution is subject to the restrictions that can be lawfully imposed in terms of Article 15(7) of the Constitution. But those restrictions must be prescribed by law and must be for the following purposes, namely
(a) national security
(b) public order and the protection of public health
(c) morality
(d) for the purpose of securing due recognition and respect for the rights and freedom of others
(e) of meeting the just requirements of the general welfare of a democratic society.

The intervenient petitioner in S.D. 4/2004 who is the proponent of the Bill submitted that the Special Presidential Commission to report on Buddha Sasana has disclosed material pertaining to conversion by the use of force, fraud and allurement and by unethical means. Clause 3 of the Preamble makes reference to this situation and seeks to address it by way of legislation.

The essential ingredient of the offence of allurement as a means of conversion is the causing of a temptation or an inducement by offering a person some benefit calculated to fascinate him or attract him which may affect his decision.

The contention of some of the petitioners who oppose the bill that acts of benevolence and charity in obedience to the gospel command may be construed as acts of enticement, falling within the definition of allurement in the bill making it an offence, merits our consideration. What is improper in this context is the willful engagement of a deceitful exercise to secure a conversion. Conversion by allurement has been dealt with as a method of improper conversion in the case of Kokkinakis Vs. Greece (European Court of Human Rights Vol. 26) in the following terms.

> (i) "First of all a distinction has to be made between bearing Christina witness and improper proselytism. The former corresponds to true evangelism which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility f every Christian and every church. The latter represents a corruption or deformation of it. It may according to the same report take the form of activities offering material or social advantages with a view to gaining new members for a church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought conscience and religions of others."

In the circumstances we are of the view that subject to the restrictions recommended to the definition of allurement in Clause 8(a) of the Bill Section 2 of the bill does not offend Articles 9, 10, 12(1), 12(2) and 14(1)(e) of the Constitution.

Clause 8(a) of the bill defines allurement to mean, offer of any temptations in the form of:

(i) any gift or gratification whether in cash or kind;
(ii) grant of any material benefit whether monetary or otherwise;
(iii)grant of employment or grant of promotion in employment.

Clause 8© defines force to include a show of force including threat of harm or injury of any kind or threat of religions displeasure or condemnation of any religion or religious faith.

The definition of the offence of force as set out in Clause 8(c) which seeks to give an extended meaning is not a novel feature in our law. Section 169c (2)(b) of the Penal Code provides that an inducement to a candidate at an election to believe that he or any person in whom he is interested will be rendered an object of divine displeasure or spiritual censure as committing undue influence.

Clause 8(d) of the bill defines fraudulent means to include misrepresentation (misspelt as misinterpretation) or any other fraudulent or any other contrivance.

Section 23 of the penal code states that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. Thus the two forms of wrongful conduct namely the use of force and the adoption of fraudulent means are already found in the penal code for different offences.

Therefore the restrictions sought to be placed by the bill though 15(7) on Article 14(1)(e) are designed to ensure public order, morality and for the purpose of meeting the just requirements of the general welfare of a democratic society.

We recommend certain amendments to clause 8(a), 8(c) and 8(d) (which would be dealt with later) in view of the concerns raised by some opponents of the bill in respect of its application.

Clause 3(a) and 3(b)

We agree with the contention of the petitioners who opposed the Bill that Clauses 3(a) and 3(b) of the bill requiring the "convert", the facilitator, and the witness to such ceremony to notify the Divisional Secretary of the fact of conversion from one religion to another is inconsistent with Article 10 as it would be a restraint on his freedom of thought, conscience, and religion.

Clause 4(a)

This clauses deals with punishment f the offenders. The Magistrate's Court is vested with jurisdiction to try the offences made out in clause 2. Having regard to the provisions of Section 14 of the Code of Criminal Procedure Act relating to the punitive powers of the Magistrate's Court, we are of the view that it is arbitrary and irrational to exclude the applicability of the provision of the code of Criminal Procedure Act to the offences made out in this bill.

The inclusion of a woman in the proviso to Clause 4(a) in the category of persons against whom the offence is committed which attracts an enhanced punishment does not violate Article 12(2) of the Constitution in view of the special protection granted to women and children under Article 12(4) of the Constitution.

We are of the view that item 11 in schedule 1 of clause 4 which relates to the category of persons referred to in the proviso is violative of Article 76(1) of the Constitution.

Clause 4(b)

In view of the findings that clause 3 of the Bill in its present form is inconsistent with Article 10, Clause 4(b) which seeks to enforce the terms of clause 3, is also inconsistent with Article 10.

Clause 5

Clause 5 relates to institution of proceedings in the Magistrate's Court. The categorization of persons authorised by this Clause to institute proceedings against persons accused of committing any offence under the Bill is irrational and arbitrary and therefore violative of Article 12(1).

Clause 6

This clause empowers the Minister to make rules and regulations for the enforcement and carrying out the provisions of the Act. The prescribed purpose is overly broad and ambiguous. In the circumstances we are of the view that it violates Article 76(1) of the Constitution.

Recommendations

In view of our findings that clause 3 and clause 4(b) of the bill violate Article 10 of the Constitution the bill in its present form has to be passed by not less than 2/3rd of the whole number of members (including those not present) and approved by the people at a Referendum in terms of Article 83(a) of the Constitution.

If clauses 3 and 4(b) are deleted the bill will not be inconsistent with Article 10 of the Constitution.

Clause 4(a)
In view of the finding that Clause 4(a) of the bill is violative of Article 12(1) of the Constitution we recommend that the words "Notwithstanding anything to the contrary to any provision in the code of Criminal Procedure Act" in clause 4(a) of the bill deleted. We further recommend that item 11 of the schedule 1 referred to in the proviso to clause 4(a) of the bill be deleted.

Clause 5

We have come to a finding that clause 5 is arbitrary and irrational and violates Article 12(1) of the Constitution. In the event of Clause 5 being amended to specify that any institution of proceedings relating to the offences mentioned therein be instituted in accordance with the provisions of section 136 of the Criminal Procedure Act and subject to the written sanction of the Attorney-Genera, the inconsistency will cease to exist.

As the primary objective of the bill is to prevent conversion of a person from one religion to another by the use of force or allurement or by any fraudulent means, it is desirable to define the terms force, allurement or fraudulent means in relation to the primary objective of the bill.

In the circumstances we recommend to interpolate the words "for the purpose of converting a person from one religion to another" after the word 'temptation' in sub-paragraph (a) of Clause 8. Similarly we recommend the interpolation of the words "for the purpose of converting a person from one religion to another" at the end of sub-paragraph (c) of clause 8.

We also recommend the interpolation of the word "willful" after the word "includes" in sub-paragraph (d) of Clause 8 and the interpolation of the words "for the purpose of converting a person from one religion to another" at the end of the sub-paragraph 8(d)."

Ref: 05/09/04

PENAL CODE

R. W. Ariyadasa vs- The Hon. Attorney-General

C.A. No. 142/200
H.C. Anurahdapura No. 246/99

Decided by C. Nanayaakkara, J and Gamini A.L. Abeyratne, J on 5th August 2004
The accused-appellant in this case was charged with having committed the murder of one L.V. Gunatillake, an offence punishable under Section 296 of the Penal Code. He was also charge din the course of the same transaction with having made an attempt to commit the murder of one P. Karunawathie an offence punishable under Section 300 of the Penal Code. At the end of the trial the learned High Court Judge found the accused-appellant guilty of both charges and sentenced him to death on the charge of murder and six years Rigorous Imprisonment on the charge of attempted murder.

It is against the said conviction and sentence the accused-appellant has preferred this appeal.

Nanayakkara, J

"The factual circumstances are briefly as follows:

"The deceased was a farmer by profession. He was residing with the witness Karunawathie's family at her residence. Karunawathie was married to one Wimalachandra and they had four children by the marriage. Karunawathie was also related to the accused-appellant and the deceased. On the day in question the deceased after returning home, was teaching the two younger children of Karunawathie in one of the rooms of their house. Suddenly, the accused-appellant appeared on the scene and had stabbed Karunawathie with two sharp knives. Thereafter she had pushed the accused-appellant into a room and had run out of the house and hid herself in a thicket close by. A short while alter her husband Wimalachandra had returned home and discovered the deceased lying the room with serious injuries.

At the hearing of the appeal,, the learned Counsel for the accused-appellant in his submissions to Court has made a valiant attempt to impute responsibility for the commission of the offences with which the accused-appellant was charged on the main eye witness's husband Wimalachandra. Basing his submissions on certain items of evidence chosen at random from the proceedings the learned Counsel sought to establish that there was an illicit relationship between witness Karunawathie and the deceased and Karunawathie's husband Wimalachandra had every reason to harm his own wife and the deceased.

The conviction an sentence were assailed mainly on the ground that there was a failure on the part of the trial Judge to appreciate the complicity of Wimalachandra in the commission of the crime.

At the outset, it should be observed that this belated position of Wimalachandra being involved in the commission of the crime which was only advanced at the appeal stage is not tenable in the light of strong direct and circumstantial evidence available in regard to the injuries inflicted on Karunawathie and the deceased. The attempt on the part of the learned Counsel to establish an illicit relationship between the decease and Karunawathie as providing a strong motive for Wimalachandra to commit the offences with which the accused-appellant was charged for several reasons.

The evidence points to the fact that the accused-appellant had tried to drive a wedge between Wimalachandra and his wife Karunawathie by carrying false tales of an illicit affair between Karunawathie and the deceased to Wimalachandra.

Evidence clearly establishes Wimalachandra had rejected these tales out of hand and continued to repose utmost confidence in his wife Karunawathie and continued to live with her permitting the deceased to live with his family.

Wimalachandra had never entertained any doubt in regard to his wife's loyalty and devotion to him in spite of the false accusation made against her by the accused-appellant. It is also clear from the evidence that the accused-appellant had an axe to grind with the deceased because, few weeks prior to the incident the deceased had lodged a compliant of assault on him by the accused-appellant with the Police. Evidence also reveals that Wimalachandra was nowhere in the vicinity when the attack on Karunawathie and the deceased took place. Threfore these circusmtnaces rather than providing a strong motive for Wimalachandra to commit the crime provided a strong motive for the accused-appellant to commit the

crime. If it is the position of the accused-appellant that Wimalachandra was the person who really inflicted fatal injuries on the deceased and injuries on his wife, it is incomprehensible as to why this position was not suggested to any of the main witnesses namely, Karunawathie and her two children Nadeeka and Thushari.

It is significant that the accused appellant has failed not only to make any suggestion to these witnesses in regard to complicity of Wimalachandra but has also failed to question Wimalachandra in regard to his involvement when he chose to testify at the trial.

The learned Counsel for the accused-appellant has tried to make much of the item of evidence where witness Karunawathie observed that she could not exactly figure out the person who moved out of her house towards the back yard with a lit torch from the place where she was hiding following the attack on her by the accused-appellant.
It should be observed that this piece of evidence should be assessed having regard to the time of the incident and the context in which it was uttered by the witnesses. The incident is alleged to have occurred around 7.00 p.m. in the evening, and it was not possible for the witness to observe from where she was hiding the person who moved out of the house towards the backyard at that time of the day.

But having regard to the attendant circumstances it can be said without any manner of doubt that t was none other than the accused-appellant who moved out of the house having inflicted injuries on the witness Karunawathie and the deceased.

The totality of the evidence led in this case leads to an inescapable and irresistible inference and conclusion that it was the accucsed-appellant who inflicted injuries on witness Karunawathie and the deceased. There is absolutely no doubt about the role played by the accused-appellant in the commission of the offence with which he was charged.

The three main witnesses' Karunawathie, Nadeeka and Thushari evidence in regard to the important facts remains unshaken and the learned trial Judge has assessed the evidence in its correct perspective having regard to the principles governing the reception and evaluation of circumstantial evidence.

In view of the above mentioned circumstances I do not see the need for a retrial in the case as urged by the Counsel for the accused-appellant. It is my view, the learned trial judge has carefully evaluated the direct as well as the circumstantial evidence transpired in this case.

Accordingly the appeal is dismissed.

Ref No. 04/09/2004

PARTITION LAW

Scope of the section 48 of the Partition Law Section 839 of the CPC.

Heendeniya Jayaratne and another Vs. Andadole 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 C.J., Ismail J., Weerasuriya J. on 13.02.2004.

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). The revisionary powers of the Appellate Court are unaffected although section 48 of the Partition Law invests interlocutory decree entered under the Partition Law with finality.

Weerasuriya J.

"The original plaintiffs instituted action in the District Court of Ratnapura seeking the amalgamated lands....in extent about 30 acres. Licensed Surveyor who was commissioned to do the preliminary survey, surveyed 71 Acres 1 Rood 20 Perches as forming the corpus and submitted his plan and report.

Judgment was delivered allowing a partition of the land as depicted in the preliminary plan. The interlocutory decree was entered in terms of the judgment and a commission was issued to prepare the final plan.
The petitioner-respondent-respondents filed an application to set aside the judgment and the interlocutory decree or in the alternative to restrict the corpus to 30 acres. Learned District Judge after hearing the parties allowed the application to vary the judgment and the interlocutory decree by restricting the corpus to 30 Acres.
The Court of Appeal granted leave to appeal on the application by the appellants ans thereafter upon the conclusion of the hearing by its order dismissed the appeal and affirmed the order of the District Court.

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. It is apparent that the learned District Judge had acted solely in terms of the provisions of Section 48 of the Partition Law since he made express reference to it in the course of his order and made no mention of Section 839 of the Civil Procedure Code. Even the petitioner had failed to plead the invocation of the provisions of section 839 of the Civil Procedure Code.

Section 48(4) of the Partition Law as amended by Act No.17 of 1997 makes provision for a party to a partition action, as enumerated hereinafter whose right, title or interest in respect of the land has been extinguished by reason of the entering of the interlocutory decree or otherwise prejudiced by the interlocutory decree to make an application for special leave to establish the right, title or interest in respect of the land. This provision seeks to provide such relief to a limited category namely to a party (a) who has not been served with summons or (b) being a minor or a person of unsound mind who has not been duly represented by a guardian ad litem or (c) being a party who has duly filed his statement of claim and registered his address fails to appear at the trial. Any application for such relief shall be by petition supported by an affidavit setting out the nature and extent of his right, share or interest o the land and shall specify to what extent and in what manner the applicant seeks to have the interlocutory decree amended, modified or set aside and the parties

affected thereby.

The application of the petitioner-respondent-respondents dated 19.3.1999 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. 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 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 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 o 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 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 his jurisdiction.

The petitioner-respondent-respondents were not parties to the action and therefore no question of estoppel would arise in respect of their application to claim relief.

The revisionary powers of the Appellate Court are unaffected although section 48 of the Partition Law invests interlocutory decree entered under the Partition Law with finality. Thus the exercise of powers of revision and restitio in integrum to set aside partition decrees when it is found that the proceedings were tainted by what has been called fundamental vice is available to the Appellate Court.

I hold that the District Court had acted wrongly in proceeding to trial in respect of what appeared to be a larger land than that described in the plaint and not properly identified. In any event the peremptory steps relating to an amendment of the plaint, the registration of a new lis pendens and the fresh declaration in terms of section 12 have not been complied with.

Set aside the proceedings in the District Court leading upto the trial and the judgment and the interlocutory decree. No costs order for costs."

Ref. No. 02/09/2004

Civil Procedure

The Court is empowered, to issue a commission to the EQD in terms of sections 428 and 839 of the civil procedure code The word " Local investigation" is not confined to an investigation with regard to a place or premises.

BEFORE : GAMINI AMARATUNGA, J.
AND WIMALACHANDRA, J.

COUNSEL: Manohara R. de Silva for the Petitioner.
V. Kulatunga for the Respondent.

ARGUED ON : 11.05.2004.

DECIDED ON : 03.06.2004.

L. K WIMALACHANDRA, J:

The plaintiff-petitioner (hereinafter referred to as the petitioner) instituted this action against the defendant-respondent (hereinafter referred to as the respondent)claiming damages in a sum of Rupees One Million from the respondent for the injury caused to the petitioner by a defamatory statement made by the respondent.

When the matter came up for trial the petitioner moved for a Commission to be issued to the Examiner of Questioned Documents (EQD) to examine the said defamatory statement marked "P1". It was opposed by the defendant. The Court directed the parties to tender written submissions on the aforesaid application made by the petitioner. Thereafter the learned Additional District Judge made order dated 16.10.2001 refusing the petitioner's application for a commission to be issued to the Examine of Questioned Documents.

It is against this order that the petitioner has now sought relief by way of leave to appeal. The Court granted leave to appeal and the matter was argued after filing written submissions by both parties.

The learned Additional District Judge in his order for the rejection of the petitioner's application has taken the view that Section 428 of the Civil Procedure Code does not permit the Court to issue a commission to the Examiner of Questioned Documents and there is no other provision in the Civil Procedure Code to issue commissions of this nature to the Examiner of Questioned Documents. The learned Judge in his order has stated thus;

"එකී 428 වගන්තිය අදාල වන්නේ අධිකරණයට ස්ථානික විමර්ශන කිරීමට අවශ්‍ය වන අවස්ථාවකදී පමණි. සැකකටයුතු ලේඛනයකට සම්බන්ධයෙන් අත් අකුරු පරීක්ෂක වෙත කොමිසමක් නිකුත් කිරීමට එම වගන්තිය යටතේ ප්‍රතිපාදන සපයා නැත.

එමෙන්ම සිවිල් නඩු විධාන සංග්‍රහයේ වෙනත් වගන්ති යටතේද, එවැනි ප්‍රතිපාදන නැති බව පැහැදිලි වේ.

Section 428 of the Civil Procedure Code reads as follows: "

"In any action or proceedings in which the Court deems a local investigation to be requisite or proper for the purpose of

JUDGEMENTS TO BE CITED

elucidating any matter in dispute or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, and the same cannot be conveniently conducted by the judge in person, the Court may issue a Commission to such person as it thinks fit, directing him to make such investigation and to report to Court."

The learned Additional District Judge has given a narrow interpretation to the words "Local Investigation" in Section 428 of the Civil Procedure Code.

In my view, "Local Investigation" is not confined to an investigation with regard to a place or premises as stated by the learned Judge. It is to be noted that the first limb of Section 428 speaks of where the Court thinks it fit to issue a commission for a local investigation for the purpose of elucidating any matter in dispute. It does Section 839 of the Civil Procedure Code to make an order to issue a commission to the Examiner of Questioned Documents.

Sarkar in his Code of Civil Procedure volume 1 at page 842, states;

"Where a contingency happens which has not been anticipated by the framer of the Civil Procedure Code, and therefore no express provision has been made on that behalf, the Court has inherent power to adopt such procedure, if necessary to invent a procedure, as may do substantial justice, and shorten needless litigation."

In the case of Hevavitharana vs. Themis Silva 63 NLR 68 Thambiah,J. held that Section 26 of the Partition Act does not exhaust all the orders which a Court could make and the Court has the inherent power under Section 839 of the Civil Procedure Code, to make an order excluding a lot which has been wrongly included in the corpus. In support of his view Thambiah,J. cited the following observation made by Mahmood,J. in Narasingh Das vs Mangal Dubey [1883] 5 Allahabad 163 at 175,

"Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law.

It has to be noted that even as far back as 1895 the thinking of the Supreme Court was that the Court should not be trammelled by technical objections on procedural matters. In the case of Wickramatilake vs. Marikkar et al 2 NLR 9 at page 12 Withers, J., commenting on the technical objections observed:-

".....I think the District Judge should not have given effect to the technical objection which was raised. I commend to his attention, as to that of all other Judges of first instance, the observations of Jessel, M.R., in re Chenwell, 8 Ch.D. 506:-

"It is not the duty of the Judge to throw technical difficulties in the way of the administration of Justice, but when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

For the foregoing reasons, I allow the appeal and set aside the order of the Additional District Judge dated 16.10.2001 and the learned Additional District Judge is directed to issue the said Commission to the Examiner of Questioned Documents and call for the report. In all the circumstances I make no order as to costs of appeal.

JUDGE OF THE COURT OF APPEAL

GAMINI AMARATUNGA,J:

I agree.

JUDGE OF THE COURT OF APPEAL

The BASL comes..... Cont'd from page 01

and the USA applied laws to overcome such situation. He also explained the contribution made by the legal profession to develop law relating to commerce, based on Computer and Communication Technology. Finally, he gave an alarm signal to developing countries such as Sri Lanka about the disadvantages in to International Business and Market, if they do not improve e-commerce, e-banking and data protection law seriously.

Mr. Jayantha Fernando, Legal Advisor of Information and Communication Technology Agency made a special presentation on the proposed bills on e-commerce.

The distinguished Panel which comprised Honourable Saleem Marsoof, President's Counsel, the President of the Court of Appeal, Ms. Therese Perera, President's Counsel, the Legal - Draftsperson, Professor V.K. Samaranayake, and Ms. Dilrukshi Wickremasinghe, Senior State Counsel expressed their views on the seminar topics and made valuable contribution to improve e-commerce in this country.

Mr. Sunil D.B Abeyaratne, Assistant Secretary of the BASL and Chairman, ITC, welcomed the guests and participants and expressed the value of improving the knowledge on Computer Law. Ms. Yoshani Demuni proposed the vote of thanks.

A magazine comprising valuable articles on data protection, e-commerce, e-banking, Intellectual Property and dispute Resolutions in e-commerce written by eminent writers who have specialized on these subjects was released at the seminar. The magazine was highly appreciated by His Lordship the Chief Justice and other speakers.

The Information Technology Committee was able to raise funds for BASL by gaining a considerable profit in the organizing the Seminar.

BASL NEWS
Next Issue in November