EDITOR'S NOTE:

Copies may be obtained from the BASL Head Office on payment of the charges mentioned below.
Judgments have been summarised to save space.

Citation: BASL NEWS

ACTIO REI VINDICATIO

Ref: 01/6-7/2006 Rs. 120/-

Hemawathie Sahabandu v. Sumithra Rani Gunasekara and Other

C.A. No. 476/95 F,

D.C. Mt. Lavinia 1954/L

Sec. 754 (1) of the Civil Procedure Code-Declaration of Title & Ejectment-Damages-Constructive or implied Trust- Sec. 84 of the Trust Ordinance - Prevention of Frauds Ordinance--Sec. 114 (f)& 116 of Evidence Ordinance.

Decided on 03.03.006

W.L.Ranjith Silva, J.

A person, who enters into possession of a land as a licensee, fails to prove that the character of his initial possession had changed to an adverse and independent possession, at a particular point of time, against the interest of the land lord who let him into possession, in my view, is certainly not entitle to claim the benefit of section 3 of the Prescription Ordinance.

Approbate and Reprobate:-

In view of the findings of facts and the law reached by the Learned Judge and the conclusions drawn by him based on such facts resulting in the rejection of both the Defences put forward by the Defence namely the defence of trust and the, defence of prescription, it is my opinion that it would be frivolous or redundant for me to deal with this aspect of the law raised by the Respondent, in their submissions that the two defences are conflicting and therefore the appellant cannot maintain the two defences one and the same time.

The Appellant based her case mainly on two defences. The first of the two is that the property in suit is trust property held by the Respondent in trust for the appellant and the second defence is that the appellant acquired a prescriptive title to the said property. In the written submissions filed on behalf of the Respondent, the Respondent contends that the two claims/defences taken by the appellant, cannot be maintained as they are wholly inconsistent and in conflict with each other. In other words the Respondents argument is that if the property is held in trust on behalf of the appellant then the defence of prescriptive title of the appellant cannot stand; by the same token if the appellant maintains that she had acquired a prescriptive title to the said property then the claim/defence that the said property is held in trust by the Respondent on her behalf cannot exist; that is to say that the Appellant cannot be allowed to Approbate and Reprobate one and the same time(blow hot and cold, to affirm at one time and deny at another) In support of this the Respondent relies on two decision namely *Kandasamy Vs Gnanasekaram* SC Appeal No.60/82(CA Appeal No.629/79,DC Colombo 2096/RE) and *Ranasinghe Vs Premadharma* 1985 1 SLR 63.

Under certain circumstances a beneficiary can prescribe against a trustee but not vice versa. In the instant case, no matter whether the appellant was successful or not in proving that he prescribed to the land, quite independently of that, the appellant was not precluded in law from taking both the defences together at the trial.

BAIL

Ref: 02/6-7/2006 Rs.100/-

Vidanapathiranage Sumanadasa v. Hon. Attorney General

S.C. (Spl) No. 1-199 with 200-206,

Proceedings on the basis of complaints addressed by persons held in custody-Section 45 of the Immigrants and Emigrants Act.- Sections 114, 115(1) & 403 of Code of Criminal Procedure Act No. 15 of 1979- Article 13(2) & 118(b) of the Constitution.

Decided on 19.06.2006

Hon. Sarath N Silva C.J.

The case of the Petitioners is that in view of the provisions of Section 47(1) of the said Act, as interpreted by a Divisional Bench of this Court in the case of *Attorney-General vs Sumathipala* - S.C. Application No. 82/2004 - S.C. Minutes of 20.12.2005, (See BASL News 4/4/2006) no Court has jurisdiction to release them on bail and they have to necessarily languish in remand indefinitely pending the conclusion of the cases against them.

Since the persons are in prison and in view of the fact that there are 207 such complaints of continued incarceration without any remedy the Court decided to entertain these complaints in terms of Rule 44(7)(b) of the Supreme Court Rules 1990 and granted leave to proceed, in respect of the alleged infringement of the fundamental rights of the Petitioners guaranteed by Article 13(2) of the Constitution.

In the order granting leave to proceed, the Court has noted that the complainants did not have means to prosecute their complaints in the manner provided for in a regular application and that they continue to suffer substantial prejudice by reason of the alleged infringement being deprived of their liberty without a remedy before any Court.

Since the matter in issue is the same, Court made a further order that the Petitions will be considered together and the State may present a motion in each case as there are no disputed questions of fact, to obviate the need to file affidavits and formal pleadings. The contents of the motions that may be filed have been specified in the order dated 29.05.2006.

The observation of the Divisional Bench that if there is a conflict between the specific provisions of Section 47 (1) of the Immigrants and Emigrants Act and individual liberty it is for the legislature to make the necessary amendments, has to be considered as *obita dicta* since the two questions on which special leave to appeal had been granted and the matter set down for hearing before the Divisional Bench relate only to the interpretation of Section 404 of the Code of Criminal Procedure Act and Section 47(1) of the Immigrants and Emigrants Act.

The provision guarantees to every person held in custody, detained or otherwise deprived of personal liberty, two specific rights, they are:

i) the right to be brought up before the judge of the nearest competent court according to the procedure established by law , and;

ii) the right not to be further held in custody, detained or deprived personal liberty except upon and in terms of an order of such judge made in accordance with the procedure established by law.

It is to be noted at the outset that the Divisional Bench in its judgment has not made any distinction between a person "accused of " or "suspected of " having committed an offence in terms of section 45.

In this context we note that in terms of Article 118(b) of the Constitution this Court is vested with jurisdiction "for the protection of fundamental rights." The word "protection" is wider than the word "enforcement." It is incumbent on this Court to make such orders as are necessary to ensure that the fundamental rights guaranteed by the Constitution are adequately protected and safeguarded. Fundamental rights forms part of the sovereignty of the People and Article 4(d) of the Constitution being a basic provision on which the structure of our Constitution is founded, requires that fundamental rights be "respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided.

Hence the rights guaranteed to the Petitioners in terms of Article 13(2) should be secured and advanced by this Court and not be abridged, restricted or denied. Any such abridgment, restriction or denial has to be based only on specific provisions of the Constitution itself. Article 16(1) relied on by the Deputy Solicitor General does not amount to a specific restriction of the fundamental rights guaranteed by Article 13(2) of the Constitution. The permitted restrictions are contained in article 15(7) of the Constitution and the provisions of Section 47(1) of the Immigrants and Emigrants Act could never be construed as restricting the fundamental right guaranteed by Article 13(2) of the Constitution.

The next matter to be considered is the relief to be granted by this Court, in the absence of a procedure established by law in terms of which continued detention of a person could be adjudicated upon.

In this context we have to note that Article 140 of the Constitution which empowers the Court of Appeal to issue writs has a similar provision which states that such writs shall be issued "according to Law."

There is no law as defined in Article 170 of the Constitution with regard to the grant and issue of these writs. However, from the promulgation of the Constitution and even previously, writs have been granted on the basis of the common law principles as evolved by the judgments of the Superior Courts. We are of the view that the provisions of Article 13(2) should be similarly given effect to and the continued detention of persons accused of offences under the relevant provisions of Section 45 of the Immigrants and Emigrants Act should be adjudicated upon according to the procedure applicable to non-bailable offences.

In this context the Deputy Solicitor General submitted that the principles of law evolved in terms of section 403 of the Code of Criminal Procedure Act should be taken into account in considering the continued detention of these persons.

We are inclined to agree with the submission and hold that the continued detention of the persons who are produced with having committed offences in terms of section 45 of the Immigrants and Emigrants Act should be considered on the basis of the provisions of Section 403 of the Code of Criminal Procedure Act and the applicable case law.

We have had to deal with these complaints as a matter of urgency, in view of the continuing flow of complaints from persons who are in custody without an adjudication by any Court of law as to the basis of their detention. It was submitted that about 10 days ago a female suspect in the Negombo prison being one of the Petitioners who was held in a crowded cell died. since there was no response to urgent appeals for medical assistance when she fell ill in the night.

Continued detention of such large numbers necessarily resulting in over crowding in prisons, without proper adjudication of the basis of their detention negates the very essence of the fundamental right guaranteed by Article 13(2) of the Constitution.

We accordingly hold that the fundamental rights of the Petitioners guaranteed by Article 13(2) of the Constitution have been infringed by executive or administrative action, since the Petitioners have been detained in custody merely upon their being produced in court and incarcerated without a remedy until the conclusion of their trials. On the basis of the finding

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Seminar on 'Nithi Neethi Eganuma'

Programme held on Saturday 22nd July 2006 at the Ratnapura Lawyers' Sports Club.

stated above the respective Magistrate Courts are directed to decide on the continued detention of these persons in accordance with the procedure applicable to persons accused of non-bailable offences. See also, *Attorney General vs. Nilanthi (1997)2 Sri L.R. page 203.*

CONDITIONAL TRANSFER

Ref: 03/6-7/2006 Rs.80/-

K.H.M.A. Anulawathie Manike v. A.H.M.J. Abbeyaratne

C.A. No. 247/95(F),

D.C. Kegalle 2591/L

Action for enforcement of the order by Debt Conciliation Board-Sections 19A(1),22,49 & 56 of Debt Conciliation Ord.

Decided on 17.03.2006

Andrew Somawansa, J.

The plaintiff-respondent instituted the instant action in the district court of Kegalle seeking to enforce an order made by the Debt Conciliation Board to re-transfer the property in suit to the plaintiff-respondent which was transferred to the defendant-appellant on a conditional transfer.

The respondent made complaints to the Debt Conciliation Board that his attempts to pay the 1st instalment as per the settlement failed as the appellant refused to accept the same. Thereafter on the instructions of the Debt Conciliation Board action was instituted in the District Court to obtain an order to enforce the order of the Debt Conciliation Board.

The appellant took up the position that the respondent failed to pay the first instalment on the due date as per the settlement arrived at the Conciliation Board. She also took up the position that the settlement by the Debt Conciliation Board was bad in law, as the application made to the Board by the respondent had not been made within the stipulated time limit set out by law. The appellant further took up the position that application to the Board by the respondent had not been made according to law.

At the conclusion of the trial, the learned District Judge by her judgment pronounced on 21.06.95 held with the respondent. It is from this judgment that the appellant has preferred this appeal.

When the appeal was taken up for argument, the only issue raised by the counsel for the appellant was that since the respondent failed to make his application within the time frame specified in the Debt Conciliation Ordinance viz: one month before the expiry of the conditional transfer, the Debt Conciliation Board had no jurisdiction to entertain or to make an order and issue a certificate. Hence the said certificate is null and void and cannot be enforced. The appellant did not challenge the correctness of the judgment on the facts. However counsel for the appellant has in his written submissions referred to facts regarding the attempt to pay back the money which I would deal with later.

It is submitted by counsel for the appellant that the Debt Conciliation Board acted beyond its jurisdiction in that the settlement made by the Debt Conciliation Board in terms of Section 30 of the Debt Conciliation Ordinance is bad in law.He submits that in terms of Section 19A of the Debt Conciliation Board Ordinance an application to the Board has to be made at least 30 days before the expiry of the period in the conditional transfer and that in view of the words used in the aforesaid Section 19A(1): "The Board shall not entertain an application ... unless that application is made at least 30 days before the expiry of the period". An application not made within that stipulated period would be fatal.

In the instant action the conditional transfer had been made on 19.06.1979 and the two year period within which the property may have been redeemed would have expired on 18.06.1981. Therefore in terms of Section 19A(1) of the Debt Conciliation Ordinance the application to the Board should have been made on or before 18.05.1981. Evidence of the officer from the Debt Conciliation Board reveals that the Board received a letter sent by the respondent on 25.05.1981 though it was dated as 12.05.1981. Since this letter did not comply with the requirements of an application in terms of Section 17 of the Debt Conciliation Board Ordinance the Board had sent him a set of application forms by registered post. The Board had received this set of application forms perfected by the respondent on 16.06.1981 that is only 2 days prior to the expiry of the period within which the property should have been redeemed by the respondent. Even if 25.05.1981, the date on which the respondent's letter was received is taken as the date the application was made, it is still one week short of the period stipulated under Section 19A(1) of the Debt Conciliation Ordinance. Accordingly counsel submits that the questions to be determined in this appeal are:

a) When is an application deemed to have been made in the instant action in terms of Section 19A(1)?

b) Whether the Debt Conciliation Board has acted exceeding its jurisdiction in entertaining an application that was not made within the stipulated time limit under Section 19A(1)?

It is interesting to note that the appellant had submitted to the jurisdiction of the Board and in fact entered into a settlement. The jurisdiction of the Board to entertain, inquire into and determine the respondent's application was not challenged in any way. No objection taken to the validity of the application or the proceedings. It is trite law that issues relating to the fundamental jurisdiction of the Court or the tribunal to hear and determine a matter must be taken at the earliest opportunity -

and must be expressly set out. Therefore the appellant having taken no objection to the validity of the application made by the respondent and also having submitted to the jurisdiction of the Board and in fact having taken one step further by entering into a settlement the appellant cannot now be heard to say that the Debt Conciliation Board acted beyond its jurisdiction or the settlement entered into between the two parties in terms of Section 30 of the Debt Conciliation Ordinance is bad in law. Furthermore accepting and admitting the settlement before the Debt Conciliation Board the appellant as well as the respondent have waived off their rights to challenge any lack of latent jurisdiction (if any) of the Board to follow any procedure.

It is to be seen that the Debt Conciliation Board had jurisdiction to inquire into matters of this nature generally and therefore the Board was acting within its jurisdiction. In such a situation irregular exercise of jurisdiction can be waived by the parties which is exactly what the appellant had done, for the appellant did not take any steps to get the said certificate issued on the basis of the settlement entered into by both parties cancelled. In fact neither did the appellant take any objection to the settlement or to the certificate issued thereafter nor did he institute an action to have the aforesaid certificate cancelled until the respondent instituted the instant action.

After the settlement and issuance of the certificate upon the settlement in the present case, if the appellant wished to challenge the said settlement or procedure followed by the Debt Conciliation Board Act, the only remedy available for the appellant was to challenge the same by way of a writ which the appellant has failed to do.

In any event, Section 19A does not refer to any consequences if it is not complied with. It does not state that the order is illegal, unlawful or void. Thus giving the impression that parties could waive their right to object if any, and what becomes material is the intention of the parties as in the instant case to settle the dispute via Debt Conciliation Board.

Further, the appellant has not raised an issue either before the District Court or this Court that she entered into a settlement before the Debt Conciliation Board upon duress, misdirection of facts or law or for any other reasons.

In view of the appellant submitting to the jurisdiction of the Board not raising any objection whatsoever either to the validity of the application of the respondent or to the proceedings had at the Board and having entered into a settlement thereby waiving any lack of jurisdiction on the part of the Board cannot rely on the decision in *Praisoody vs. Gurunathapillai* (supra) or *Hilda Perera vs Lawrence Perera* (supra) wherein the facts could be distinguished for unlike in the present application, in those two cases proceedings were pending at the Board when a party came to Court whereas in the instant application the parties had submitted themselves to the jurisdiction of the Board without any objections and the parties having come to a settlement and thus had come to Court after the proceedings in the Board was concluded and the certificate issued.

It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed in appeal.

DELICT

Ref: 04/6-7/2006 Rs.130/-

Gardiel Polwattage Martinsingho v. Somasiri Mudiyanselage Mahipala & Two Others.

C.A. No. 1014/2003 (F),

D.C. Anuradhapura No. 15378/M

Appeal – Action for damages - Special damages -Measure of damages- Loss of general health and amenities of life – Negligence – Accident — Sections 151(3) and 149 (1) Motor Traffic Act (Cap 203) as amended by Act No.21 of 1981 - Act No.40 of 1984.

Decided on 17.02.2006

L.K. Wimalachandra.J.,

At the time of the accident the 1st defendant did not possess a valid driving licence issued by the Commissioner of Motor Traffic. Furthermore his negligence was quite apparent, in the instant when he saw a bus approaching from the opposite direction he had tried to overtake the cyclist who was in front instead of waiting till the bus passed, without paying attention to the cyclist and other users of the road. After the accident took place, he had stopped his vehicle about hundred feet away from the place of the accident. As a reasonably prudent man he should have taken precautions to avoid any collision when he was overtaking the plaintiff's bicycle, which was on the left side of the road in front of his vehicle. He would have foreseen the possible harm to the other road users when he was overtaking them. It appears that he had failed to exercise that degree of care the situation at the time of the accident demanded.

A further matter that appears to me to be relevant is that the defendant pleaded guilty to charges under the Motor Traffic Act (Cap 203 of Sri Lanka Legislative enactments) for negligent driving. The question that arises is whether a judgment or conviction in a Criminal Court is relevant in a case in a civil Court in respect of the same matter and if so, what effect it can have on the consideration of the civil matter. The accused (1st defendant) tendered an unqualified plea of guilt to all

charges, whereupon the accused was ordered to pay Rs.600/= as State costs. State Counsel contended that a plea of guilt in a criminal case has no effect on the consideration in a civil matter. The learned State Counsel heavily relied on the unreported Court of Appeal judgment in CA No.146/91(F) CA minutes of 29.10.1996. In this case Justice Edussuriya, held that a plea of guilt in a criminal case does not establish negligence in a civil action. The Court of Appeal of the United Kingdom in *Holligton Vs. Hewthon Ltd* (1943) 1 KB 587; [1943] 2 A E R 35 held that evidence of a conviction was inadmissible in subsequent proceedings. However the full Bench decision in *Western Australia in Mickelberg Vs. Director of the Perth Mint,* (1986) W A R 365 refused to follow that decision, and held, evidence of a prior conviction is admissible.

The Supreme Court of Sri Lanka has also held that a plea of guilt in a criminal court is admissible in civil proceedings. In the Supreme Court case of *Sinnaih Nadarajah Vs. Ceylon Transport Board* (1978-79) 2 S.L.R. 48 it was held that where the driver of a vehicle is sued along with his employer for the recovery of damages resulting from an accident in which the plaintiff suffered injuries by being knocked down, a piea of guilt tendered by the driver, when charged in the Magistrate Court in respect of the same accident, is relevant as an admission made by him and ought to be taken into consideration by the trial judge in the civil suit. The reasonable inference that could be arrived at is that the accident was caused due to -the negligence of the defendant.

R.G. Mc Kerron in "The Law of Delict", 6th edition at page 209 states thus:

"By the measure of damage is meant the standard or method of calculation by which the amount of damage is to be assessed...where the injuria is clear, substantial damages will as a rule be given, although no actual damage is proved."

With regard to personal injuries, Mckerron, explains thus:

"In an action for personal injuries the plaintiff is entitled to claim compensation for:

1) actual expenditure and pecuniary loss
2) disfigurement, pain and suffering, and loss of health and amenities of life.
3) future expenses and loss of earning capacity."

At the time of the accident, the plaintiff was 58 years old and he was employed as a tractor driver. This is borne out by the evidence of his wife and Ariyapala. In the absence of evidence to the contrary it can be admitted that he was employed as a tractor driver at the time of the accident. It could be assumed that if the plaintiff was not seriously injured, he would have utilised his earning capacity until normal retiring age. The plaintiff said he was drawing a salary of Rs.2000/= per month employed as a tractor driver. The damages awarded is calculated on the assumed loss to the victim, in money terms, at the time of trial. But the monetary loss will increase with inflation as inflation leads to increases in wage levels.

The plaintiff can claim compensation not only for the physical injury that had been occasioned by the accident and its aftermath, but also for the inconvenience and loss of amenities. This includes the deprivation of the ability to participate in normal activities in day to day life. This may also include the deprivation of sexual pleasure, mental suffering and frustration resulting from the victim's inability to lead a normal life.

Burchell in "Principles of Delict", Cape Town, Juta & Co. (1993) at page 136 has this to say on loss of amenities of life -

"The legal concept of amenities of life comprises all the factors which go to make up an enjoyable human life ..... As Claasen.J., in Reyneke Vs. Mutual and Federal Insurance Co. Ltd. 1991 (3) SA 412 (W) at 419(C) said:

"The amenities of life flow from the blessings of an unclouded mind, healthy body, sound limbs and the ability to conduct unaided the basic functions of life such as running, eating, reading, dressing and controlling one's bladder and bowels."

Mckerron in "The Law of Delict" at page 114 has this to say:

"The damages recoverable under second head, (disfigurement, pain and suffering loss of general health and the amenities of life) cannot be assessed on any arithmetical or logical basis. There are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The usual method adopted is to take all the circumstances into consideration and award substantially an arbitrary sum".

In the circumstances, it is my considered view that the learned District Judge is not wrong in awarding a lump sum of Rs.300,000/= as damages to the plaintiff.

The damages awarded to him by the District Court will have to be increased taking into account the inflation in the economy and the depreciation of the Sri Lankan Currency. Therefore in my view legal interest should be added to the aforesaid sum of Rs.300,000/= from the date of the judgment until the payment is made in full.

MAINTENANCE

Ref: 05/6-7/2006 Rs. 60/-

Handari Devage Inoka Manohari v. Polwatta Gallage Samantha Kumara

S.C. Appeal No. 44/2005,

H.C. Kalutara Case No. 118/2003
M.C. Matugama Case No. 13390
Maintenance for the Child born out of wedlock-High Court-Article 154 P of the Constitution read with Section 14 of Maintenance Act No. 37 0f 1999- Leave to Appeal to the Supreme Court- Section 14(2) of Act No. 37 of 1999 read with Section 9 of Act No. 19 of 1990 - Appeal-Preliminary objection.

Decided on 15.06.2006
Raja Fernando J.

The applicant Respondent-Respondent hereinafter referred to as the Respondent instituted Action No. 13390 (Maintenance) on 6th July 2000 in the Magistrate's court of Mathugama claiming maintenance from the Respondent-Appellant-Appellant (hereinafter referred to as the Appellant) for the child born out of wedlock.

The learned Magistrate by his order dated 17.12.2002 ordered the Respondent to pay a sum of Rs.750/= per month as maintenance for the child.

Being aggrieved by this order the appellant appealed to the High Court under Article 154 P of the Constitution read with Section 14 of Maintenance Act No. 37 of 1999, and the High Court dismissed the appeal on 10.3.2005

The Appellant thereafter sought leave to appeal to the Supreme Court in terms of Section 14 (2) of Act No. 37 of 1999 read with Section 9 of Act No. 19 of 1990 from the High Court and leave was granted by the High Court on 6.6.2005.

After leave to appeal to the Supreme Court has been granted by the High Court on 6.6.2005 the appellant on 13.6.2005 has filed a petition of appeal addressed to the Supreme Court in the Registry of the High Court.

When the matter came up before this Court counsel for the Respondent took up a preliminary objection that the Petition of Appeal has not been filed in terms of the Rules after the High Court granted leave.

Written submissions of both parties were filed on 24.3.2006.

It was the position of the respondent that the Petition of Appeal has been filed out of time and that the Petition of Appeal ought to have been filed in the Supreme Court whereas the appellant has lodged the petition in the High Court and therefore there is no valid appeal before Court.

Under the old Maintenance Ordinance No. 19 of 1889 as amended by Act No. 13 of 1925 an appeal from the order under the Maintenance Ordinance was to the then Supreme Court and the procedure was the same as if the order was by the Magistrate in a criminal case. (Vide Section 17 of the Maintenance Ordinance No. 19 of 1889).

In 1978 with the new Constitution when the Court of Appeal was established; Article 138 vested the Court of Appeal with appellate jurisdiction in respect of orders made by courts of first instance, resulting in all appeals under the Maintenance Ordinance which hitherto came to the Supreme Court being directed to the Court of Appeal.

The 13th Amendment to the Constitution which came into force on 14.11.1987 by Article 154 P 3(b) vested the High Court of the Province with jurisdiction in respect of orders made by the Magistrate.

The present Maintenance Act No. 37 of 1999 repealed the Maintenance Ordinance and Section 14 specifically provides for an appeal to the Provincial High Court and from there to the Supreme Court with the leave of the High Court and when such leave is refused with the Special Leave of the Supreme Court first had and obtained. (vide Section 14 of Act No. 37 of 1999)

The Appellant in this case has in terms of Section 14 of the Maintenance Act No. 37 of 1999 read with Article 154 P 3(b) of the constitution made an appeal to the High Court of the Province. He has obtained leave to appeal to this Court from the High Court.

The Appellant has thereafter filed a petition of appeal addressed to the Supreme Court in the registry of the High Court.

This procedure is being challenged by the Respondent as being contrary to the Supreme Court Rules of 1990.

The Appellant submits that no Rules exist at present governing appeals from the Provincial High Court to the Supreme Court and there is no default on his part.

Supreme Court Rules of 1990 have categorised Appeals to the Supreme Court into three groups:

Part 1A - Appeals with special leave obtained from the Supreme Court

Part 1B - Appeals with leave to appeal from the Court of Appeal

Part 1C - Other appeals

Part 1C - Rule 28 of the Supreme Court rules read as follows:

"(1) Save as otherwise specifically provided by Parliament, the provisions of the rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other court or Tribunal"

The present Appeal is neither with special leave from the Supreme Court nor with leave of the Court of Appeal but with leave from the High Court. Therefore the instant appeal clearly falls into the category of other appeals and hence rules in Part 1 C dealing with other appeals would apply.

The position of the Appellant that there are no rules governing appeals from the Provincial High Court to the Supreme Court is therefore incorrect.

An appeal to the Supreme Court from an order of the Provincial High Court can be either with the leave of the Provincial High Court or with Special Leave obtained from the Supreme Court upon a refusal of leave by the High Court.

If the Appeal is with leave of the High Court then Supreme Court rules under Part 1 C (Other appeals) shall apply; if the appeal is with special leave of the Supreme Court then Supreme Court rules under Part 1 A (Special leave to Appeal) shall apply *mutadis mutandis* since Rule 2 relates to "every application for special leave to appeal....."

As regards the procedure in the instant case the rules applicable to Other Appeals in Part 1 C of the Supreme Court rules shall apply.

A question arises in fixing the time within which the Appeal is to be filed in the Supreme Court for the reason that the Rules are silent on the matter.

In determining the time for an aggrieved party to lodge an application for special leave to the Supreme Court where no time is fixed either in the statute or the rules; this Court has in the case of *Tea Small Holders Limited Vs. Weragoda* 1994 3 S.L.R. 353 and in the case of *Mahaweli Authority of Sri Lanka v. United Agency Construction (Pvt.) Ltd.*, 2002 1 S.L.R. 8 held that the Petitioner should make his application within a reasonable time, and relying on the time period prescribed in the rules for similar applications has held that 42 days is reasonable time.

Following the same reasoning I am of the view that the time frame for a petitioner to file an Appeal should be 42 days from the date leave to appeal is granted by the High Court. Coming to the preliminary objection with regard to the place of filing of the Appeal papers after having obtained leave from the High Court; Part 1 C (Other appeals) is clear in its provisions as to the papers that need to be filed and also the place where it has to be filed.

According to rule 28(2) "every such appeal shall be upon a Petition in that behalf lodged at the Registry" (Supreme Court).

It is undisputed that the petition of appeal has been filed in the Registry of the High Court contrary to the provisions of Rule 28(2) of SC Rules 1990.

Further the Appellant has failed to comply with rule 28(3) which requires the Appellant to tender with his petition of appeal a notice of Appeal.

Therefore I hold that the Appellant is guilty of non-compliance of the Rules and hence the preliminary objection raised by the Respondent must succeed.

Accordingly this Appeal of the Appellant is rejected.

PARTITION

Ref: 06/6-7/2006 Rs.110/-

O.P.M.P. Dewasurendra v. V.C.P.R.S. Premathilleka.

C.A. No. 406/95F,

D.C. Kegalle 24627/P

Final decree of Partition Action - Prescriptive title - Co owner- Appeal.

Decided on 28.02.2006

W.L. Ranjith Silva J.,

Where there are several co owners and if a stranger buys the entire land from one or some of the several co owners in good faith without the knowledge or in ignorance of the fact that there are other co owners, may under certain circumstances prescribe to the entire land if he possesses the land for the required period (10 years or more) exclusively, independently and adversely not acknowledging the rights of any other person including the co owners who did not subscribe to the deed, which conveyed the entire land to him, without more that is even without an overt act of ouster.

What is discernible from dictum in decided cases is that it is not absolutely impossible to establish prescriptive title despite the fact that such deeds were executed provided there is strong and cogent evidence showing that it was never the intention of the person executing such deeds to recognize any rights title or interest of any other co owner in respect of the land. Such acts and deeds will only militate against the plea of prescription.

For the reasons adumbrated by me on both the facts and the law I find no justification in interfering with the judgment.

For Lawyers & Judges on Rent

The BASL committee room at Organisation of Professional Associations (OPA) at No.275/75, Prof. Stanley Wijesundara Mawatha, Colombo 7, is available on rent for lawyers and judges for informal arbitrations and small conferences. For details contact, Secretary, Mr. Sunil Abeyratne.

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Pocket (Counsel)	– Rs. 200/-
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NEETHI RANGA

A date for the *'Neethi Ranga'* to be determined very soon. It may be a date in November 2006.

LAWASIA CONFERENCE 2009

The BASL has decided to host the LAWASIA Conference for the year 2009 in Sri Lanka and BASL has already bid for the same. Over 1000 lawyers from this entire region to be attended the conference. There will also be a parallel 'Conference of Chief Justices of Law Asia'. BASL has requested His Excellency the President to declare open the conference and it is the tradition in the region. The government assistance and support is solicited for the success of the event.