CIVIL PROCEDURE

Ref: 01/10-12/2006
CALA 323/2004 (DC Mount Lavinia 751/03/SPL)
S. D. M Ramanathan v P. S Sathyaseelan
Decided on 25.05.2006
Determined by: Justice Andrew Somawansa (P/CA) and Justice L. K Wimalachandra

Sections 60 (2), 754 (2), 757 (1) and (2) of the Civil Procedure Code - defendant not resident at given address - substituted service of summons - ex parte trial

After several unsuccessful attempts to serve summons on the 4th defendant, the court on the application of the Plaintiff made order for substituted service. There was also proof of publication of summons in a newspaper. The fiscal's report stated that the 4th Defendant was not living at the given address. Subsequently, court pointed out it was the duty of the Plaintiff to furnish to court the correct address of the 4th Defendant and refused to fix the matter for ex parte trial. The Plaintiff appealed.

Held:

There is no provision to serve summons by way of newspaper publication. The order by court allowing the Plaintiff's application to serve summons on the 4th defendant by way of substituted service was incorrect without proof that the defendant was in the island. Substituted service of summons is available where a defendant is avoiding summons and not when the defendant is not living at the given address. It would be unreasonable to serve summons by way of substituted service by affixing a copy of the summons on a premises on which he is not living. The learned District Judge was correct in refusing to fix the matter for ex parte trial.

Cases referred to:
Fernando v Fernando 9 N. L. R page 325 and Palaniappa Chetty v Arnolis Hamy 22 N. L. R 368

WRIT/ LABOUR

Ref: 02/10-12/2006
CA WRIT/ 523/2003
Ceylon Electricity Board v Hon. Alavi Moulana and others
Decided on 12.06.2006
Determined by: Justice S. Sriskandarajah.

Article 140 of the Constitution - Sections 4, 4(1), 20 (1) and 34 (1) of the Industrial Disputes Act - appointment of arbitrator - reference by Minister - award - repudiation of award - Certiorari - alternative remedy - discretionary remedy - jurisdiction of the High Court.

The High Court set aside the order of the Labour Tribunal dismissing the application of the 4th Respondent, and held that he was entitled to arrears of salary and other benefits from the date of his termination, but made no mention of the arrears during the period of termination. Following a dispute, the minister referred for arbitration the question whether the employee was entitled to arrears of salary during his interdiction. The Petitioner contended that the dispute had already been determined by the High Court and objected to the hearing of the dispute by the Arbitrator. The Arbitrator overruled the dispute and gave an award after hearing the parties. The Petitioner made application to quash the appointment of the Arbitrator under section 4 (1) of the Industrial Disputes Act and also to quash his award. The Respondents contended that the Petitioner cannot seek a writ as it had failed to avail itself of the alternative remedy provided by section 20 (1) of the Industrial Disputes Act.

Held:

Unlike the Labour Tribunal, the High Court cannot give a just and equitable order. The High Court order was restricted to back wages and other benefits from the date of termination to the date of reinstatement. The High Court cannot consider any other dispute other than the termination. Therefore, the High Court correctly decided not to deal with the period of interdiction. Therefore, the Minister's reference of the dispute to the Arbitrator was legal. If as complained by the Petitioner, the award was unintelligible, the Petitioner could have sought an interpretation under section 34 (1) of the Industrial Disputes Act. The repudiation of an arbitration award cannot be considered as an effective alternative remedy to the remedy by way of a writ of certiorari.

Cases referred to:
E. S Fernando v United Workers Union and Others (1989) 2 S.L.R 119 at 204, Obeysekera v Albert and others and Thirunavukarasu v Siriwardena and others

REVISION/ PARTITION

Ref: 03/10-12/2006
CA No. 1812/2001 (D.C Tangalle 3213/P)
Danny Wanigabadu v R. Mahindapala and another
Decided on 14.12.2005
Determined by: Justice Chandra Ekanayake and Justice S. Sriskandarajah

Revision - Section 36 A of the Partition Law - Partition Act No.17 of 1997 - availability of specific remedy - delay - miscarriage of justice

The Petitioner sought to revise and set aside an order by the District Court without invoking the remedy set out in section 36 A of the Partition Law as amended. The court inquired into the question whether any exceptional circumstances had

been shown by the Petitioner that would warrant the court to exercise discretionary powers of revision although the alternate remedy specified in section 36A of the Partition Law was not exhausted. The Petitioner delayed by about 4 ½ months in filing the revision application.

Held:
On a consideration of the order of the learned judge, it was clear that a cardinal error had been committed when arriving at certain findings and making allotments of land, which were in fact contrary to the interlocutory order and even the judgment in the case. The impugned order is erroneous. The Court of Appeal is possessed of the power to set aside in revision an erroneous order of the District Court in appropriate cases. This case was an appropriate instance to act in revision and set aside the order of the District Court. Although there was delay on the part of the Petitioner, there were very special and exceptional circumstances resulting in a miscarriage of justice. Therefore, it is a fit instance to invoke the court's revisionary jurisdiction.

Cases referred to:
Rustom v Hapangama (1978-79 - 80) 1 S.L.R 353 at 356, Sinnathangam v Meera Mohideen 60 N. L. R page 394 and Gnanapandithen and another v Balanayagam and another

WRIT/ CUSTOMS

Ref: 04/10-12/2006
CA WRIT/ No. 595/ 1999
Expo Lanka Commodities (Pvt) Limited v Director General of Customs
Decided on 19.06.2006
Determined by: Justice S. Sriskandarajah

Article 140 of the Constitution - Certiorari - Schedule E of the Customs Ordinance - under invoicing - floor price

The Petitioner imported certain consignments of onions from Pakistan in March 1999, and submitted a valuation of US dollars 210 to 250 p.m.t. The Respondent assessed the duties payable, on the basis of several invoices, submitted by other importers, on a price of US 418 p.m.t, which was also the "floor price" fixed by the Pakistani customs. The Petitioner's appeal was rejected. The Petitioner sought to quash the assessments.

Held:
The Respondent, under the Customs Ordinance, is entitled to assess the valuation of the onions imported. The application was dismissed as the assessment of valuation and the import duty are in accordance with the provisions of law.

Cases referred to:
Tyre House (Pvt) Ltd v Director General of Customs CA Writ 730/ 99 and Kuruwita Manchester Textile Mills Ltd and another v Director General of Customs (2003) 3 S. L. R page 158 at 160

RENT

Ref: 05/10-12/2006
CALA 424/ 2003
D. Halgahage v D. D. Wijemanne
Decided on 09.03.2006
Determined by: Justice Chandra Ekanayake

Leave to appeal Section 29 of the Rent Act - ejectment - writ pending appeal - section 763 of the Civil Procedure Code - substantial loss - Section 23 of the Judicature Act. - substantial question of law

The Petitioner sought leave to appeal against the order which allowed the Respondent's application for writ pending appeal. The Petitioner contended that the Rent Act did not apply and that there were substantial questions of law to be determined at the appeal and that substantial loss would be caused to him if the writ was not stayed, and that the trial judge had not considered such matters.

Held:

The trial judge had totally failed to consider the position with regard to the substantial question of law which are awaiting determination in the appeal. Whether a question of law is substantial or not must depend on the circumstances of each case. Issues 4 to 7 of the Defendant, the answers to which would have determined whether he was a protected tenant or not, are the most important issues the trial judge had to decide at the trial, which were substantial questions of law to be determined in appeal. The trial judge had allowed application for writ pending appeal solely on the basis of the determination with regard to substantial loss. The District Court had failed to consider the provisions of section 23 of the Judicature Act. Execution of the decree stayed and the Defendant ordered to enter into a cash bond of Rs.25,000/-

Cases referred to:
Saleem v Balakumar (1981) 2 S.L.R, Colletes Ltd v Bank of Ceylon (1982) 2 S.L.R and Charlotte Perera v Thambiah (1983) 1 S.L.R

PARTITION

Ref: 06/10-12/2006
CALA 479/2004 DC case no. 2737/P
G. Anil Fernando Vs K. Peduru Fernando & 31 others
Decided on 24/03/2006
Determined by: Justice Andrew Somawansa (P/CA). & Justice Wimalachandra

Removal of a substituted party- appointment of a new substituted party - Section 81 (1) of the Partition Law

Application for leave to appeal from the order of the Addl. District Judge refusing an application by Petitioner to remove the legal representative of the deceased 3rd Defendant (D3D), the substituted 3(a) Defendant (S3(a)D) and to appoint herself as the legal representative of the D3D. As per S.81(1) of the

Partition Law, D3D filed a memorandum nominating his wife to be his legal representative; he died and his wife was duly appointed as the S3(a)D. Petitioner stated that S3(a)D did not take any interest in looking after the interests of D3D and had failed to prosecute D3D's case diligently; S3(a)D had revoked the proxy granted to her AAL and had not appointed any other AAL. S3(a)D Respondent and other Respondents had failed to make any appearance though notices had been issued on several occasions. S3(a)D was the legally married wife of the D3D and they had no children; apart from D3D's wife the other intestate heir of the deceased is the 4th Defendant (4D); 4D made this application to appoint herself as the legal representative of D3D and to remove the present S3(a)D.

Held:

"It is an imperative provision of law that a person should be substituted to represent the estate of a deceased party to a partition action during the pendency of the action. If the legal representative appointed by Court to represent the estate of the deceased party, fails to look after such interest, Court has power to remove such party and appoint a suitable person as per S.81(11)(B) of Partition Law. In making a fresh appointment of a new legal representative the foremost consideration of Court is the interest of the heirs of the deceased." Leave to appeal granted; part of the order set aside; the learned Judge directed to hold a fresh inquiry with regard to Petitioner's application.

BAIL / REVISION / INTERPRETATION

Ref: 07/10-12/2006
CA/189/2004 High Court, Colombo No. HCBA 2090/2203, MC, Mt.Lavinia No. B6653/3
M.H. Jayawathi Vs. Hon. A.G. & others
Decided on 27/04/2006
Determined by: Justice D.J. de S. Balapatabendi & Justice Eric Basnayake

An application to revise the order of High Court, refusing bail - Ss.14, 16 &17 of Bail Act - "Does S.14 apply to Ss.16 & 17?" - If Court cancels bail under S.14 can a suspect too claim the benefit of S.16?

Learned High Court Judge giving reason for refusal mentioned a case of murder, armed robbery of van & jeep and possession of a T46 rifle with 5 bullets, pending against the suspect.

Petitioner stated that suspect is 28 years, married with two children; bread winner, no previous convictions and that investigations are complete.

Counsel for Petitioner submitted that in terms of Ss.16 &17 of the Bail Act no one can be kept in remand for over 24 months; no application made by Hon. A.G. in this case under S.17 for an extension; S.14 of the Bail Act had no application to Ss. 16 &17; therefore suspect is entitled to bail as he has been in remand for the maximum period of 24 months.

Held:

"Ss.4, 5 & 7 empower Court to release suspects on bail. Anyhow if the conditions laid down in S.14 are present, the Court may refuse or cancel bail"

"Considering S.16 in isolation, the argument that no person, including those referred to in S.14, should not be kept in remand for more than 12 months could be accepted as correct. In that event there would be a contradiction between Ss.14 &16. The Court after inquiry may either refuse or cancel bail (in terms of S.14) the reason for refusal or cancellation may be due to one of the grounds mentioned in S.14. If the above argument is correct whatever the Court rules that is whether bail is refused or cancelled, S.16 would come into play and the accused may come out in 12 months. This provision would then strengthen the hand of the accused and he may turn out to be an even worst offender the second time around. Even if he commits other crimes and threatens the witnesses and obstructs the course of justice, the Courts would be helpless. This would lead to absurdity. If that is the law it would only lead to complete anarchy."

"The Court could revive the orders made by it under S.14 if there are grounds to believe that the reasons to refuse or cancel bail are no longer existing (S.14(3)). Court can do this only in the event, the circumstances that influenced Court to refuse or cancel bail are no longer in existence, as long as those conditions are in existence, the order of refusal should stand. There is no guarantee that after the lapse of one year the circumstances leading Court to either refuse or cancel bail would disappear. S.14 (3) empowers Court to review and rescind or vary any order it made under subsection (1). This section would be meaningless if suspects or accused are entitled to bail after 12 months or 24 months by operation of Ss.16 &17. It cannot be presumed that the legislature intended to strengthen the powers of Courts with one hand only to take it all back with the stroke of another. When Courts either refuse or cancel bail due to any reason set out in S.14, those cases will have to go back to the same Courts if any variation is required. Only cases that fall outside S.14 would come under Ss.16 &17. To that extent Ss. 16 & 17 are subject to S.14. Due to the above reasons I am of the view that the Ss.16 &17 should be read subject to S.14. Only then can one see harmony between the provisions of the Bail Act." Application refused.

Cases referred to :
Perumal Vs. Dharmalingam (1981) 1SLR26 at 43
Canada Sugar Refining Company Vs. R (1898) AC735 at 741

LABOUR / WRIT

Ref: 08/10-12/2006
CA/WRIT/2115/2002
S.L.W. Dissanayake Vs. Unilever Ceylon Ltd & 2 others
Decided on 29/03/2006
Determined by: Justice S. S. Sriskandarajah

Termination of employment - compensation - incidental benefits decision - of the Commissioner - Certiorari

Petitioner sought to quash an order by 3rd Respondent granting permission to 1st Respondent to terminate the services of Petitioner among others mentioned in the order after paying the compensation specified in the order and also prayed for a writ of Mandamus to direct the 2nd & 3rd Respondents to pay compensation equivalent to the salary till retirement or 6 months salary per each year of service or 3 months salary for each year of service without a ceiling and to include the monthly value of the package of benefits as part of the salary in computing the compensation.

Petitioner's main complaint against the said award is that by this award he was only granted 3 months salary per each year of service up to a maximum of 50 months salary. Further in computing the salary the monthly value of the package of benefits had not been added. Petitioner submitted that the award is contrary to law and it is unreasonable.

Held:

"The Commissioner's decision to not include the monetary value of the aforesaid (Car lease rental, Professional subscription CIMA, Club subscription, Telephone charges, Subsidised meals, Gift pack, Holiday Bungalow free & Medical benefits) benefits to the salary of the petitioner cannot be considered as ultra vires or unreasonable as these benefits are incidental benefits."

The Commissioner submitted that the compensation awarded in the given facts and circumstances are just and equitable.

"The assessment of compensation is eminently a matter within the province of the Commissioner. The remedy by way of Certiorari cannot be made use to substitute a correct order for a wrong order and if the Commissioner's award of compensation was not set aside in whole or in part it had to be allowed to stand."

"A Court on review is concerned only with the question whether the award under attack should be allowed to stand or not..... thus the object of this Court upon judicial review is strictly to consider whether the whole or part of the award of compensation pronounced by the Commissioner of Labour is lawful or unlawful. This Court ought not to exercise its appellate powers and jurisdiction when engaged in the exercise of its supervisory jurisdiction and judicial review over an award of compensation decreed by the Commissioner of Labour."

Application dismissed without costs.

LAND AQCUSITION ACT / WRIT

Ref: 08/10-12/2006
CA/WRIT/1020/2004
Katugampala M.P.C.S Ltd Vs. Divisional Secretary Pannala & 4 others
Decided on 17/05/2006
Determined by: Justice S. Sriskandarajah

Co-operative Societies (Special Provisions) Act No. 35 of 1970 Land Acquisition Act determination of the Acquiring Officer valuation - compensation

Petitioner's predecessor, the Giriulla M.P.C.S. in 1971 made an application under S.10(1) of the Co-operative Societies (Special Provisions) Act No. 35 of 1970 to acquire the premises in issue; Petitioner made the same request in 1990 to 1st Respondent (1R) and submitted an application in terms of Land Acquisition Act; The Minister of Land appointed 1R as the Acquiring Officer(AO) who by his letter of 17.07.1992 informed the Petitioner that the property is valued at Rs.165, 000. Respondents contended that Rs.165,000 referred therein is neither the market value nor the value assessed by the Government Valuer (GV) in terms of Land Acquisition Act but an estimate sum obtained in July 1992. The acquisition process continued and a S.38 proviso (A) order was published on 22.01.1997; S.5 notice was published on 03.09.1997 and S.7 notice was published on 26.12.1998; 1R requested GV to value this land and upon receipt of the same, 4th &5th Respondents (4&5R) were informed the said value as they are the owners and the claimants of the said property. On their request GV submitted the revised assessed value at Rs.1,740,000. 1R made a request to the Petitioner to pay the said sum. Petitioner refused to deposit any amount in excess of Rs.165,000. Petitioner prayed for a writ of certiorari to quash the decision of 1R, for the Petitioner to pay Rs.1,740,000, by the GV's letter dated 21.08.2000 and also for a mandamus directing 1R/2R/3R to pay 165,000 and interest to 3&4R.

Held:

The determination of the AO is final after making an award under S.17(1) and he should comply with S.17(1)(D) of the Act which provides that the amount of compensation which in his opinion should, as per the provisions of part vi of the Act, be allowed for such acquisition. Part VI in S.45(1) provides the compensation should be the market value as at the date on which S.7 notice was published in the Gazette (on 26.12.1998); 1R had called for a valuation from the GV after publishing this notice by letter dated 18.02.1999; GV sent his valuation on 21.08.2000 valuing the property for Rs.1,740,000, after considering the relevant facts; 1R, based on this valuation, had awarded compensation under S.17. 1R cannot consider any valuation of the said land that was made prior to the publication of S.7 notice.1R had acted as per the provisions of the Act and the Court was not inclined to interfere with the award. Application dismissed without cost.

Citation: BASL News
Copies of these judgments may be obtained from the BASL office on payment