STAMP DUTY

Ref: 01/01-02/2007
SC CHC (Appeal) No.48/ 2004

Liability to pay stamp duty - Section 17 of Stamp Duty Act No.43 of 1982 Section 33 (1) of Act No.43 of 1982 - Gazette Extraordinary No.224/3 dated 20.12.1982 - Gazette Extraordinary No.948/15 dated 06.11.1996 curability of defect delay - guarantee/ indemnity - 'bond, pledge and mortgage' definite and certain sum of money overdue interest.

Ceylease Financial Services Ltd v L. Anjalee Siriyalatha

Determined by:
Justice Shirani Bandaranayake
Justice N.G Amaratunga
Justice Saleem Marsoof

The Appellant instituted action against the Respondents to recover a sum of money based on three guarantee and indemnity documents relating to three lease agreements. When the Appellant's witness sought to produce the guarantee and indemnity, the Respondent objected on the basis that this document had not been properly stamped. The Attorney General appeared as *amicus curiae* as the issues involved were of public importance.

Held:
The guarantee sought to be marked in evidence clearly fell within the meaning of the words "bond, pledge and mortgage". The definite and certain sum that the Respondents had guaranteed by the guarantee and indemnity was the amount that was stated at the time of entering into the lease agreement. Default interest will not come within the definition of 'definite and certain sum'. Where an instrument has to be admitted in evidence and if it is not duly stamped, the deficiency has to be cured prior to the instrument is marked in evidence.

Cases referred to:
1. Yousoof Mohamed and another v Indian Overseas Bank (1999) 3 SLR page 278
2. Wickremasinghe v The Goodwill Marine Academy (Pvt) Ltd (2001) 2 SLR page 284
3. Karunapejjalage Bilindi v Wellawa Attadassi Thero (1945) 47 NLR page 7

ADMINISTRATIVE LAW

Ref: 02/01-02/2007
C. A. Writ Application No:2055/2004

Order, in the nature of a writ of mandamus and writ of certiorari- Sections 2(3), 4, 7, 9,10 (1)a and 38 of the Land Acquisition Act- wrong description of land in the Notice

Zainul Abdeen Sithy Jiffriya Zubair & 4 Others Vs Gampola Multipurpose Cooperative Society Limited and others.
Determined by : Justice S. Sriskandarajah
Decided on 18/07/2006

The Petitioner sought a writ of Certiorari to quash the notice published under section 7 of the Land Acquisition Act. Proceedings were held under section 9 of the Act and a Writ of Mandamus to publish a valid notice under section 7 of the Act. The Petitioner claimed that they were the lawful owners of the premises, that they were not informed of any inquiry and that they were not aware of an order under section 38. Their main contention was that the Notices published in the Gazette did not give the proper description of the land that was acquired and therefore they were denied the lawful right to make a claim at the inquiry.

Held:
The Petitioners could not attend the compensation inquiry held under Section 10 (1) as they were not noticed and the notice published did not give proper description of the land. Therefore, the decision arrived at the inquiry has to be set aside as they were not given a hearing.

Cases referred to:
1. Karunanayake Vs De Silva 70 NLR 398 at 399
2. Manikkage Sai Nona Vs Mahananda and People's Bank BASL News 1/3/90 [SC Appeal No.33/86]

CUSTOMS / COPYRIGHT

Ref: 03/01-02/2007
S. C. Appeal No.43/2004

Sections 9 (1), 10, 51 and 52, and Schedule E of the Customs Ordinance - software imports - Prohibition - HS Code - copyright - customised software - valuation of imported goods - carrier medium of software

Lakshman Perera, Director General of Customs and 2 others v Hatton National Bank

Determined by:
Justice T. B. Weerasuriya
Justice N. K. Udalagama
Justice Raja Fernando

Decided on 27/04/2006

The Respondent bank was issued a notice by the Petitioner to provide information relating to its software imports from 1990, in terms of section 9 (1) of the Customs Ordinance. The bank invoked the jurisdiction of the Court of Appeal against this notice and the Court of Appeal held with the respondent bank.

Held:
It is clear from a plain reading of section 10 that the levy of duty under that section is upon goods, wares and merchandise imported into or exported out of Sri Lanka. Therefore, all tangible goods, wares and merchandise whether imported or exported is liable to stamp duty. In terms of the provisions of Schedule E of the Customs Ordinance there is no basis to draw a distinction between the value of the carrier medium and the software. The subject of taxation is the tangible unit and not its intangible component per se and the relevant item is taken as a whole for the purpose of valuation. There is no legal basis for the proposition that customised software packages imported as intangible property on a licence fee should be valued on the basis of carrier medium only, while '*off the shlef*' software sold outright to a user are liable to customs duty on their full value.

GRATUITY

Ref: 04/01-02/2007
C. A. Writ Application No: 2077/2004

Application for Writ of Certiorari-Retirement from employment-Gratuity- duty to give reasons

The Associated Newspapers of Ceylon Limited Vs S. K. Abeysinghe and 3 others.
Determined by : Justice S. Sriskandarajah
Decided on 28/07/2006

The 1st Respondent retired on 31st December 2000 on reaching 55 years. Prior to that, he made a request for an extension of the service. Thereupon petitioner engaged the 1st Respondent immediately after his retirement 1st on assignment for 2 weeks and thereafter on contract until 31st March 2004. The 1st Respondent contended that he should be paid Gratuity for the extended period of service as well. The Petitioner's position was that the 1st Respondent's contract of service should terminated in law from the date of retirement, and that he was not entitled to claim gratuity for the period served on contract after retirement.

Held:
The 1st Respondent applied for extended service before retirement and after considering his request he was employed continuously from the date of retirement in the same capacity. Although he was in a different contract, his service continued with the Petitioner for the purpose of the provisions of the Gratuity Act even after retirement. Therefore the 1st Respondent has a service period of 21 years and not 18 years. The liability of the Petitioner is a statutory liability. The Commissioner has only calculated the sum payable by the petitioner and had communicated to the Petitioner, giving the break-down of the payment and the relevant provisions of law under which he is bound to make payments. The Petitioner was also given a fair hearing by the Commissioner. In these circumstances the Commissioner's order cannot be set aside only on the basis that it has not contained detailed reasoning.

Cases referred to:
1. The Finance Company Limited Vs. K. D. S. B. Kodipilli and others C.A. Application 1111/2003 C. A. Minutes 23.11.2005
2. Karawita Vs Abeyratne (1983) 2 SLR 306
3. Kegalle Plantation Vs Silva(1996) 2 SLR 180,
4. Unique Gemstores Ltd Vs. Karunadasa (1995)2SLR 357
5. Blanka Diamonds (Pvt) Ltd Vs Coems (1996) 1 SLR 200
6. Yaseen Omar Vs Pakistan International Airlines Corporation (1999) 2 SLR375

TESTAMENTARY

Ref: 05/01-02/2007
C.A.L.A No.321/2004

Letters of administration - last will - Section 529, 531, 536, 537 - Recall of Probate for letters of Administration - Section 754 (2) & 757 (1) of the Civil Procedure Code - Article 138 of the Constitution

K. K. S. D. Gunathilake Vs M. A. S. Mangalika & 4 Others
Determined by : Justice L. K. Wimalachanddra
Decided on 06/06/2006

The Respondent filed testamentary action in the District Court seeking letters of administration for herself. The Court granted order Nisi and directed publication. As no objections were received Court made order granting letters of administration. Thereafter, the Petitioner filed a petition in the same proceedings that letters of administration be recalled on the footing that the deceased died leaving a last will. The Petitioner filed a separate testamentary action seeking to be declared the Executor praying that probate be granted to her.

Held:
The Petitioner did not file objections to the orde made by Court when granting letters of administration to the Respondent. As prescribed in section 529 (2) of the C. P. C. When a period of time specified by law before the expiration of which any act has to be done by a party in a Court of law that Court has no jurisdiction to permit that act to be done after the expiration of time within which it has to be done. Section 537 of the C. P. C. provides the recall of a probate or letters of administration only where an order absolute is issued in the first instance and in the instant case only order Nisi has been issued in the first instance. Therefore, Section 537 which deals with the power to revoke or recall or cancel a probate or grant letters of administration does not apply. Application dismissed.

Cases referred to :
1. Ceylon Brevery Vs Jax Fernando (2001) 1 S L R 270
2. Biyanwala Vs Amerasekera 67 N L R 488 Adoris et.al Vs Perera
3. Haleema Umma Vs Abdul Rahuman (1999) 2 S L R 293

CERTIORARI / TERMINATION OF EMPLOYMENT OF WORKMEN (SPECIAL PROVISION ACT NO.45 OF 1971)

Ref: 06/01-02/2007
C. A. Writ Application No:2077/2004

Section 6 of Act No.45 of 1971- delegation of authority - "He who hears must decide" - Certiorari

Panda Lanka Toys Exports (Pvt) Limited Vs Commissioner General of Labour and others
Determined by : Justice S. Sriskandarajah
Decided on 04/07/2006

The 1st Respondent awarded compensation to the workers of the Petitioner, in terms of Act No.45 of 1971. The 1st Respondent delegated power to the 2nd Respondent to hold an inquiry. The 2nd Respondent held the inquiry, but did not submit a recommendation to the 1st Respondent who made the impugned order.

Held:
There is nothing to show that the 1st Respondent addressed his mind to evidence and documents provided at the inquiry and the issues involved. The 1st Respondent had made an order on a recommendation which was made by a person who did not hold the inquiry. This is in violation of the principle that "he who hears must decide". Such an order is *ultra vires.* Application for writ of Certiorari allowed.

CIVIL PROCEDURE CODE

Ref: 07/01-02/2007
C.A.L.A No.500/2002

Application for leave to appeal under Section 754 (2) of the Civil Procedure Code- Rejection of issue-Approbation and Reprobation-Forgery of a Deed

D. Harischandra and others Vs C. N. Mahtani and another
Determined by : Justice S. I. Imam
Justice S. Sriskandarajah
Decided on 26/06/2006

Counsel for the Defendants objected to issues 11,12, 13A & 13B raised on behalf of the Plaintiffs. On both parties tendering written submissions, the learned District Judge made order on the 14th November 2002 rejecting the issues No.11 - 13 B. The learned District Judge rejected issues 11- 13B accepting the Defendants submissions of Approbation and Reprobation.

Held:
The Defendants submission for the rejection of the issues 11 and 13B which is based on the principles of "Approbation and Reprobation" has absolutely no bearing on the facts in this case. The Defendants after denying the pleadings and pleading a defence now cannot be heard to complain that those causes of action are contradictory and amount to Approbation and Reprobation. The issues do not reflect inconsistent positions according to the pleadings of the case. The District Judge's order rejecting the issues was made without affording an opportunity to the Plaintiffs to be heard. Such rejection has seriously prejudiced their case. The Court directed the District Judge of Colombo to accept issues 11and 13 B.

Cases referred to :
1. Ranasinghe Vs Premadarme (1985) 1 SLR 63 at pages 69-70
2. Gorden Frazers Company Ltd Vs Lady Gymara Fernando (1980) 2 SLR 97
3. Vithal Madhu Vs Narayan R. Dole AIR 1936 Nagpur 177 at page 179
4. Abdul Ghani Vs Subramanium AIR 1929 Madras 44
5. Mohan Lal Jaganath Vs Hashiran Gokal AIR 1950 Nagpur 71

REVISION

CA/779/2003 (REV)

Revision - Section 23 of the Judicature Act - Section 763 (2) of the CPC - Rule 3(1) (a) of the Court of Appeal (Appellate Procedure)

Visaka de Alwis Vs. Weerasinghe Arachchige Asoka
Determined by : Justice Andrew Somawansa
Justice L.K. Wimalachandra
Decided on 31/03/2006

Plaintiff prayed for a declaration of the title to the scheduled property. While the Appeal filed by the Defendant to the Court of Appeal was pending, on the Plaintiff's Application made to the District Court for execution of the decree, the District Judge, after inquiry, ordered the issue of Writ upon a security deposit.

It is settled law that the matter is governed by the provisions of S.23 of the Judicature Act, as amended by Act No. 37 of 1979 and by S.763 (2) of the CPC as amended by Act No. 53 of 1980. The Supreme Court, in *Charlotte Perera Vs. Thambiah (1983) 1SLR 352* held that S.23 permits the Court to stay Writ if the judgement debtor satisfies the Court that substantial loss may result, and these provisions are not linked. The Court is thus empowered to act under either of these Sections. Defendant had not filed the proceedings of the inquiry held by the District Judge with regard to the application for the execution of the decree pending Appeal.

Our Courts have held that compliance with the Rules is mandatory and the failure to observe the Rules will amount to a fatal irregularity which would result in dismissal of the petition.

Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rules, 1990 quoted. If certified copies cannot be obtained in time, it is the bounden duty of the Plaintiff to mention that fact in the Petition and obtain leave of this Court to tender them subsequently.

Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rule is analogous to *Rule 46 of the Supreme Court Rules of 1978.*

The question of whether an Application should be rejected for non-compliance of a Rule of the Court of Appeal depends on the discretion of the Court and it must be exercised depending on the relevancy of that document to review the order canvassed by the Petitioner.

In the instant case, the Plaintiff has not provided an explanation for not filing the proceedings of the inquiry and the written submissions filed by the parties and neither has he sought the permission of this Court to file copes of the written submissions and the proceedings of the inquiry held in the District Court. Accordingly, I hold that the Plaintiff has failed to comply with Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rules. On this ground too the Plaintiff's application should necessarily be dismissed.

For these reasons, the application of the Petitioner is refused with costs fixed at Rs.7500/-

Cases referred to :
1. Charlotte Perera Vs. Thambiah (1983) 1SLR 352
2. Cooray Vs. Illukumbura, 1996 (2) SLR 263

REVISION

Ref: 08/01-02/2007
CA (PHC) 147/2004

Revision - Sections 29, 110 (3), 110 (4), 425 - of Criminal Procedure Code (Cr.P.C) - Section.24 and 27 of the Evidence Ordinance

Don Pituwansa Jayagoda & another Vs. Attorney-General
Determined by : Justice D.J.de S. Balapatabendi
Justice Eric Basnayake
Decided on 18/05/2006

Application to revise the High Court order forfeiting some productions claimed by them at a claim inquiry.

Petitioners claimed entitlement to the items in issue as of right due to, no proof of any offence being committed, the accused being acquitted of the charge, there being no other claimants, the property being taken from the possession of the Petitioners and that admissions of the accused could be used only for the purpose mentioned in S.110 (3) of Criminal Procedure Code (Cr.P.C) Act and *"shall only be used to prove that he made a different statement at a different time"*

No requirement that a charge should be established or proved prior to the disposal inquiry. *"at the conclusion of a trial when an accused is acquitted, a Court may not always find whether an offence was committed. What the Court finds out is whether the accused had committed a crime"*

"Even if a particular accused could not be found guilty, it does not mean that a crime had not been committed. That may be the reason why Courts are given authority to dispose of property when it appears to Court that an offence has been committed in respect of any property."
"When the Court finds that there is no evidence to prove a charge, there is no rule that the property against which an offence appears to have been committed should be returned to the person from whom it was taken."

The submission that the proviso to S.110 (3) applies to Sub S.(4) as well and therefore even if the statements recorded during the investigation are called for, those statements if made by the accused could be used only to contradict and nothing else was rejected. Application of S.110 (3) is limited to trials. The formula beginning *"Provided that ..."* is placed at the end of a Section or Sub section of an Act or a Paragraph on Sub-paragraph of a schedule and the intention of which is to narrow the effect of the preceding words. The proviso *"refers only to the provisions to which it is attached. Ordinary, a proviso to a Section is intended to take out a part of the main Section for special treatment; it is not expected to enlarge the scope of the main Section."* There for the proviso has no application to Sub sections other than Sub section (3).
"..... S.24 of the Evidence Ordinance which makes those statements" irrelevant in criminal proceedings" does not prevent a Court from acting on them in an application under S. 413 (1) [same as S.425] of the Cr.P.C. which is not a criminal matter." "According to S.110 (3) statements made by any person to a Police Officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance other than to corroborate. Such statements, if made by an accused could be used only to contradict. This restriction would not apply in the event of a discovery made in terms of the provisions of S.27 of the Evidence Ordinance. It is clear therefore that this Section applies to trials where rules of the Evidence Ordinance have to be observed."

"There is no rule that the property should be returned to the person from whom it was taken when the Court finds that an offence appears to have been committed in respect of the property. The Court is entrusted to make such order as it thinks fit. If the Court is bound to return the property to the person that it was taken from knowing that it did not belong to him and that no evidence had been led to prove that the claimant is entitled to it, it would not be a fit order. Therefore, I do not find this a fit case to exercise the revirsionary jurisdiction of this Court."

"The learned High Court Judge erred by holding this inquiry in terms of S.431 (1) of Cr.P.C. Act which deals with property seized under S.29 of the said Act.

Any how no prejudice was caused to any party due to this error. Further this was not raised as an issue. Hence this application is refused."

Cases referred to :
1. Dhanraj Baldeokishan Vs. State (A.I.R. 1965 Raj 238)
2. Bal Kaur Vs. State of Himachal Pradesh (1976 Cr.L.J. 1928 (HP);
3. Agrawal Vs. Emperor(A.I.R. 1949 No. 17) and Queen Empress Vs. Nilamber (1LR 2 A11 276)
4. Maithripala Senanayake Vs. Mahindasoma (1998 (2) SLR), Joseph Vs. Attorney-General (47 NLR 446)

APPEAL

Ref: 09/01-02/2007
CA/705/91/F

Issues - Section 187 of the Civil Procedure Code

Ganhewayalage Siyadoris Vs. Ganhewayalage Karunaratne
Determined by: Justice Andrew Somawansa
Justice Chandra Ekanayake
Decided on 10.12.2004

Plaintiff prayed for declaration of title to a paddy land and for damages until possession if restored and for ejectment of the Defendants and to restore quiet and vacant possession of the same.

The main question for determination, identified by the learned District Judge was, as to whether the transferor in the Deed in-issue was in fit and proper mental condition at the time of execution of the same.

The Issue No. 16 raised on behalf of the Defendant (which being the sole issue on prescription) had been answered by the Judge as, *"The Defendant is not entitled for reliefs prayed in the same"*

"Bare answers without reasons to issues or points of contest raised in a trial are not a compliance with the requirements of the S.187 of the Civil Procedure Code"

Appeal allowed, the impugned judgement set aside and the case sent back for a re-trial. The District Judge directed to hear and conclude the matter as expeditiously as possible. No order on cost.

Cases referred to :
1. Dona Licihamy Vs. Ciciliyanahamy (59 NLR 214)

WRIT

Ref: 10/01-02/2007
WR839/2003

An application for Writs of Prohibition, Certiorari and Mandamus - S. 29(D) of the People's Bank Act - S.22 of the Interpretation Ordinance.

M. Sarath Weerasinghe Vs. People's Bank and 4 others
Determined by : Justice Chandra Ekanayake
Justice S. Sriskandarajah
Decided on 06/09/2006

The cardinal question to be determined by the Court is whether the validity and/or the legality of the resolution passed by the board of directors of the Bank could be challenged by the Petitioner.

A plain reading of S. 29(D) of the People's Bank Act (as amended by Act No. 32 of 1986) reveals that it shall not be competent for the borrower or any person claiming through or under the borrower to move in any Court to invalidate the said resolution for any cause whatsoever and no Court shall entertain such application. But the above provisions have to be read with S.22 of the Interpretation Ordinance. When done so, the borrower is precluded from challenging the legality and/or validity of any resolution passed under and in terms of S.29 (D) of the People's Bank Act.

Hence the reliefs of a mandate in the nature of prohibition and permission to pay the outstanding amounts and/or to write-off the excessive amounts of interest or any surcharges, sought by Petitioner, cannot be granted.

Application dismissed.

Cases referred to :
1. Podi Nona Vs. V.U.C. Horana
2. Jayaweera Vs. V.Wijeratne (1985(2)SLR):

Citation: B.A.S.L. NEWS
Copies of these judgments may be obtained from the B.A.S.L. head Office on payment.