Judgments

Civil Procedure Code

C.A. Appeal No. 758/95 (F), DC Case No. 981/ M

Section 705(1) (2),708 of the Civil Procedure Code , Sec 63(20 of the Evidence Ordinance ,

The Peoples Bank Vs D.V.Premaratne

Determined by: P. Wijayaratne J

Decided on : 06/ 02/2007

The Plaintiff appellants instituted action for the recovery of an arrears of a balance payment due upon pledge loan facility. The defendant appellant sought court permission to defend the action unconditionally and relied in the fact that the plaint is not in conformity with the requirements of Sec 705(1), affidavit is defective , affidavit not claiming the amount justly due.

Held

Secondary evidence submitted in terms of Sec 63(1)of the Evidence Ordinance and subsequent deposit of the original document as authorized Sec 708 of the Civil Procedure Code is in compliance with the requirement of chapter LIII of the Civil Procedure Code. Once the plaint is accepted by the court it cannot be rejected , returned for amendment .....once accepted the court cannot dismiss same without on such grounds as defects in the plaint.

Cases referred to;

1. Thilageratnam Vs E.A.P. Edirisuriya (1982)1 SLR 59
2. Ranasighe Vs Zubair (2002) 2 SLR 399
3. Fernando Vs Soyza 2 NLR 40
4. Appuhamy Vs Dionis 12 NLR 382

Criminal Procedure Code

CA (PHC) APN Revision 148/2005 , H.C. Negambo 49/2004

Section : 317,318 , 319,320 ,322(2) , 340(2) of the Criminal Procedure Code

T.G.N.Wasantha Vs A.G.

Determined by: J.Balapatabendi J and Eric Basnayake J

Decided on : 21/ 09/2006

The accused appellant petitioner charged under Section 317 of the Criminal procedure Code in the Magistrate Court of Negambo. The appellant appealed against the said conviction and the sentence of the High Court. A preliminary objection was taken by the learned state counsel., that the accused could not maintain the action due to his failure to file a certificate from a lawyer certifying that there is a legal question fit for adjudication. The learned high court judge held that the accused violated the provisions of section 322 (2) of the Criminal Procedure Code , thereby upheld the preliminary objection.

Held

Section 322(2) should be read with section 320(1) of the code whish is subject to the provision of section 317, 318and 319 , any person whoa shall be dissatisfied with any judgment or final order pronounced by any Magistrate Court in a criminal case or mater to which he is a party may prefer an appeal to the Court of Appeal against any judgment fro any error in law or in facts. The certificate is needed only in situations where an appeal could be made only on a point of law. Any party is entitled to appeal against any judgment on any error of facts as well . In such a situation no certificate need be filed.

Cases referred to;

1. Solicitor General Vs Perera 17 NLR 413
2. Thavarayan Vs Balakirishnan 1984(1) Sri LR .189

Land

C..A. No. 1261/2002 (F), DC Case No. 559/ L

He who flees judgment confesses his guilt

A public law or right cannot be altered by the agreements of private persons

The trust of the argument was on : the requirements of administration of the estate, prescription rights leading to a declaration of the title, judgment no consistent with the answers to the finding.

Held

" One of the several co -owners of the land may maintain an action in ejectment against a tress passer with pout making his co-owners parties to the action" .

Cases referred to;

1. Umma Lebbe Vs Zayee (1893)2 SCR 56
2. Ismail vs Andris 7SCC 48
3. Mendis Vs Sineris (1915) 3 Bal. Notes 36

Fundamental Rights

SCFR No. 333/2005

Article 12 (1) of the Constitution

S.P. Munasinghe Vs R.C.A Vandergert and 10 others

Determined by : Dr. Shirani A Bandaranayake J

N.E. Dissanayake J

Raja Fernando J

Decided on : 3/ 08/2007

The petitioner alleged that by the decision to retire him from service, on account of general inefficiency and recommending that 1% of his pension be deducted his fundamental rights guaranteed in term of Article 12 (1) of the Constitution was violated .

According to the petitioner , employed under the Surveyor Generals Department , if the services of an employee is found inefficient he should be transferred and be placed under the direct supervision of the Assistant superintendent of Surveys. Also there were similarly placed surveyors , who had a progress less than 1005 , he was singled out and treated differently.

Held

The objections filed by the 9th Respondent clearly demonstrated the reasons for the decision , which refers to the retirement of the petitioner on the basis of inefficiency.

The question to be addressed by the court was to determine whether the decision to retire the petitioner and the deduction of 1% of his pension by the respondents was warranted.

The Respondents contention was that the clause 33.1 of chapter XLVIII of the Establishments Code was strictly adhered to when proceeding with this matter. A careful examination of the aforesaid clause reveals that in order to take steps under this clause , it is necessary to have proof that the officer in question had failed to improve his conduct and efficiency for a continuous period of time.

Article 12(1) which deals with the right to equality embraces both the non discrimination as well as the wider concept of equality that would include the right to equal treatment of all classes without any discrimination.

An allegation of mere inequality will not be sufficient in terms of Article 12(1) of the Constitution to hold that equal protection has been denied . In order to hold that there had been a violation of equal treatment it is necessary to show that the alleged decision was ' actually and palpably unreasonable and arbitrary' .

When a decision against the executive and / or the administrative action is challenged before court , it is necessary to point out that the decision in question is unreasonable and arbitrary and has no rational basis to the main object in order to come within the scope of Article 12(1) of the Constitution.

The court held that the present day administrative functions undoubtedly confer author-

3. Padfield Vs Minister of Agriculture and Fisheries and Food (1968) AC 997

4. Breen Vs Amalgamated Engineering Union (1971) 2 Q.B 175

5. E.P. Royappa Vs State of Tamil Nadu (1974) AIR SC555

6. Menaka Gandhi Vs union of India (1978) AIR SC 597

7. International Air port Authority (1979) AIR SC 1628

8.Ajay Hsia Vs Khalid Mujib (1981) Air SC 487

Testamentary

C.A.L.A. No. 84 /2004 ,

DC Case No. 35557/T

Section ; 516 , 529, 537 of the Civil Procedure Code

K.A.S.Alwis Vs K.A.K. Alwis and others

Determined by: L.K. Wimalachandra J

Decided on : 12/ 01/2007

The appellant made an application acting under the provisions of section 537 of the Civil Procedure Code and sought to recall the letters of administration issued to the respondents with the joint will and seeking a declaration that the last will was a forgery and it was executed fraudulently and collusively. The appellant had waited 22 years from the 1st testators death and also waited until the notary who attested the last will had died. The respondent in this matter was not the executor named in the will . The executor of the will pre -deceased the testator.

Held .

In terms of Section 516 of the Civil Procedure Code, after the testators death, the will must be produces within three months after the finding of the will. Where the letters of administration with the will annexed has followed upon an order nisi , the provisions of Section 537, do not apply . The appellant in this petition only says that in the effect the will produced is a forgery . This allegation which amounts to 'untested' information is of no evidentiary value. The court at this state cannot act upon such allegations, when an issue of letters of administration with the will annexed ha followed an order nisi. Where there is fraud in connection with the obtaining of letters of administration with the will annexed even after an order nisi, an independent action might be brought to set aside the letters of administration.

Cases referred to;

1.Haleema Umma Vs. a. Rahuman (1999) 2 SLr 293

2. Andoris et.al Vs Perera 17 NLR 212

Writ

HC Galle Writ application 379/04

Article 138 read together with Article 154 P (6)

Bishop of Galle and another Vs Southern Provincial Council

Determined by: C.Ekanayake J

Sisira de Abrew

Decided on : 18/ 01/2007

This is an application filed to set aside the order of the learned High Court Judge, wherein the petitioner's application was dismissed by which the petitioner sought to quash the decision of the Respondent.

Held

Article 138 (1) of the Constitution provides for the reversionary jurisdiction of the Court of Appeal.

Reversionary powers should be exercised when a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice .Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shock the conscience of the court.

Provided that no judgment, decree or order of any court shall be reserved or varies on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

Guilt makes equal those whom it stains

Computation of Compensation on Termination of Employment - Whether Salary Includes the Monetary Value of the Benefits

By— S. Egalahewa , Attorney- at -Law

A labour tribunal, however, is not bound by any predetermined compensation formula and is free to make a "just and equitable computation".....

The commissioners decision not to include the monitory value of various benefits and pre- requisites (car leases, rental , professional subscriptions , club subscriptions , telephone charges , subsidized meals , gift pack free holiday bungalow, medical benefit etc) workman was entitled to in addition to his normal salary, when computing the quantum of compensation payable to the workman under the termination employments of workman special provision Act No. 45 of 1971, was challenged by way of a writ application in the case *Dissanayake Vs Uniliver Ceylon Limited* decided on 29/3/2006 2006 BLR (volume 11 , 127).

The Court of Appeal held that the commissioner's decision, to not include to the salary monitory value of the several extra benefits a workman was entitled to cannot be considered as ultra vires or unreasonable as these benefits are incidental benefits.

However in *Jayasuriya Vs Sri Lanka State Plantations Cooperation* decided on 6/5/1991 (1995) 2 SLR 379 . A case arising out of an appeal from an order of a labour tribunal, the supreme Court held that "in determining compensation what is expected is that after a weighing together of a evidence and probabilities in the case, the Tribunal must form an opinion of the nature and extent of the loss, arriving in the end at an amount that a sensible person would not regard as mean or extravagant but would rather consider to be just and equitable in all the circumstances of the case. There must eventually be an even balance of what the scales of justice are meant to remind us".

The court in this case went on the basis of " lost of earnings " stated that the workman is entitled to be compensated for the loss of future earnings and benefits. In dealing with financial loss Justice Dr. Amarasinghe stated in his judgment that " with regard to financial loss, there is, first the lost of earning from the date of dismissal from the termination of the matter before the court...The phrase " loss of earnings" for this purpose would be the dismissed employees pay , allowances bonuses, the values of the sue of a car for private purposes, The value of the residence domestic servants and all other perquisite and benefits having a monetary value to which he was entitled ".

NOTE : Although the decision in the two cases appear to be contradictory, they can be easily distinguished. The first case decided recently is on a matter raised in writ application challenging the jurisdiction of the Commissioner under the termination act. The second one is a decision in exercising the courts appellate jurisdiction on an order of a labour tribunal. Labour tribunal orders can be challenged in an appeal on a question of law and order with legal flaws can be corrected by an appellate court but an order made by the commissioner under the Termination Act is final can conclusive and cannot be challenged in any court of law. (Section 2 (f)). In writ application the merits of a case will not be evaluated. The court will only examine whether the decision of the administrative tribunal confirms to the rules of judicial review. Accordingly the court in Dissnayakes case decided that the commissioner had acted within his powers in deciding to exclude the monitory value of various benefits in computing the compensation as the manner of computing is well within his jurisdiction. This issue is now statutorily solved as according to an amendment brought to the Termination Act by amending act No.12 of 2003 (Section 6 (d)) the Commissioner has no discretionary power with regard to computation of compensation. He is bound by the compensation formula published in the government gazette