Legal Judgments

Regasamy Mahendran v Attorney-General and another

CA Application No. PA 55/2009

Before: W. L. Ranjith Silva J and A. W. A. Salam J

Decided on 24/02/2010

This was an application for the revision of an order made by the High Court concerning the applicability of the Bail Act to Emergency Regulations.

The Petitioner sought the revision of the High Court order for dismissal of the bail application on the basis that given that the charges against the Petitioner were based on the Emergency Regulations, bail could not be granted except with the consent of the Attorney-General.

The Petitioner and the 2nd Respondent were employed as driver and assistant storekeeper, respectively, of an international NGO named Norwegian People's Aid. The lorry in which the Petitioner and the 2nd Respondent were traveling was stopped at a checkpoint and found to be carrying 69 bullet-proof vests on 3rd January 2008. The Petitioner and the 2nd Respondent were arrested and detained under the Emergency Regulations, produced before a Magistrate's Court and thereafter remanded. On 10th June 2008, the Attorney-General preferred an indictment to the High Court for alleged offence punishable under Emergency (Restriction on the Procurement of Certain Items) Regulations No. 05 of 20078 published in Government Gazette No. 1508/08 dated 3rd July 2007.

When the matter was taken up for trial, an application for bail was preferred by the Petitioner and 2nd Respondent on the basis that the High Court was vested with absolute discretion under section 403 of the Criminal Procedure Code to release the Petitioner and the 2nd Respondent bail as the Emergency (Restriction on the Procurement of Certain Items) Regulations No. 05 of 2007 under which the Petitioner and the 2nd Respondent were charged did not contain any restrictions or provisions regarding the granting of bail to suspects charged under the said regulations.

It was submitted by the State however that the restrictions regarding the granting of bail to suspects indicted under the Emergency (Miscellaneous Provisions and Powers) Regulation No. 01 of 2005 published in Government Gazette No. 1405/14 dated 13th August 2005 should be applied when considering an application for bail made on behalf of a suspect indicted under the aforesaid Regulations No. 05 of 2007.

Counsel for the Petitioner however argued that since Regulations No. 05 of 2007 were not promulgated as an amendment or supplement to Regulations No. 1 of 2005, the 2007 Regulations were a distinct and/or an independent set of regulations without any nexus or correlation to the 2005 Regulations.

Section 3(1) of the Bail Act No. 30 of 1997 provides

'Nothing in this Act shall apply to any person accused or suspected of having committed, or convicted of an offence under, the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, Regulations made under the Public Security Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such written law.'

The Court also considered the Government Hansard of 7th October 1997 as regards the Bail Act, the determination of His Lordship, Justice Mark Fernando in the Supreme Court (Special Determination) No. 6 of 1998 which considered the Anti Ragging Bill and the applicability of the Bail Act, and also considered the five-Judge bench decision of the Supreme Court in Mohamed Samoon Mohamed Shyam v Attorney General SC Appeal No. 28/2005 and the decision of Attorney-General v Thilanga Sumathipala SC (Appeal) 82/2004 (2006) 2 SLR 126.

Section 2(1) of the Regulations No. 1 of 2005 provides

'In any emergency regulation, unless any other definition is expressly provided therein or unless it is otherwise expressly provided therein or the context otherwise requires— 'emergency regulation' means any of these regulations or any other regulations made under the Public Security Ordinance'

Section 62(2) of the said Regulations further provides

'A person indicted before the High Court under this regulation shall not be admitted to Bail except with the consent of the Attorney General.'

The question before court therefore was if the Petitioner can seek bail from under Article 13(2) of the Constitution on the ground that since Regulations No. 05 of 2005 did not contain any provisions as to bail and therefore the Bail Act does not apply to matters under the Emergency Regulations, the Court must grant bail under Article 13.

Held:

1. There is specific provision as to bail promulgated in the Emergency Regulations No. 1 of 2005 in Section 62

2. Section 2(1) of the said Regulations No. 1 of 2005 extends the applicability of Section 62 to all emergency regulations including Regulations No. 5 of 2007 under which the Petitioner was indicted

2010/06/01

Legal Judgments

Touchwood Investments Ltd v The Sri Lanka Accounting and Auditing Standards Monitoring Board

C.A. Writ 323/2007

Before: Rohini Marasinghe J and Sarath de Abrew J

Decided on 25/01/2010

The Petitioner complained that the SLASMB had acted ultra vires its powers in making a statement that inter alia the Petitioner's financial statements are unreliable and not in accordance with International Accounting Standards IAS 41 Agriculture which the company has purportedly adopted and that the financial statement if prepared correctly would not have shown a net profit for relevant financial periods and releasing the same as public information.

The SLAASMB further announced that the matter is referred to the Attorney-General and that the Board will also be investigating the auditor's compliance with auditing standards in the audit of the Petitioner's financial statements.

The Respondents submitted that the Financial Statements of the Petitioner for the years 2004/2005 were not inconformity with IAS 41.

Held:

1. SLASMB established under Act No. 15 of 1995 had in terms of section 23 and 24, within the scope and object of its enactment the authority to monitor compliance by specified business enterprises with Sri Lanka Accounting Standards and the Sri Lanka Auditing Standards.

2. The Act in terms of section 6 and section 25, required every business enterprise registered in Sri Lanka to prepare its financial statements in compliance with SLAS with the object of presenting a true and fair view of the financial performance and financial condition of such enterprise and auditors to comply with section 7

3. In the absence of SLAS to deal with a particular type of transaction relating to the activities of that Company, it has to resort to best practice. In this respect they may use an International Accounting Standards, if there is any provision of which may be considered the best practice.

4. Non-compliance with the said sections permits the SLAASMB with the power only to deal with the Petitioners under section 27(1) (a), (b), (c), section 27(2), section 29 and section 30 (a) and (b)

5.Given that there are express and specified sections that deal with the power of the SLAASMB for non compliance in the Act, the Board's decision to release the document determining that the Petitioner's statements were unreliable, for Public Information was ultra vires the Act

6. SLAASMB has no mandate to protect the public or Protect the interest of the investors but rather to monitor that the specified public enterprises maintained a uniform and high standard in the preparation and presentation of accounts of business enterprises.

7. As to whether the SLAASMB must protect the market or on its own initiative cancel or impose conditions on the license of the enterprise for non compliance, the Board is empowered to bring the act of non compliance to any authority which empowered to regulate or supervise the activities by such specific business enterprise.

8. The law permits the authority to undertake tasks that are 'reasonably incidental' to the achievement of statutory purposes provided they do not contradict any statutory power. The Board would be contradicting its statutory power if it imposes any sanction or penalty other than those prescribed by the Act.

9. As to whether the Petitioner was entitled to comply with IAS was not contended but rather that Petitioners compliance with IAS was not complete. The SLAASMB in terms of sections 2 (1), 2 (2), 3(1), 3 (2), 4(1), 4(2) of the Act, was empowered to monitor compliance with accounting standards adopted under section 2(1) of the Act and every Sri Lankan Accounting Standards or Sri Lanka Auditing Standards adopted by the SLAASMB should be published in the gazette and be effective form the date of such publication.

10. Since there was not gazette reproduced by the SLAASMB to show that they have adopted IAS 41 as a Sri Lankan Accounting Standards or Sri Lanka Auditing Standards, SLAASMB had no power to make any determination or hold any investigation on an Accounting Standard not adopted by the Act.

11. Board had not statutory power to challenge the valuation of the Petitioner on non compliance with IAS 41

Application is allowed.

2010/06/02

Sri Lanka Shipping Company Ltd. v The Director General of Customs and 3 others

CA App/No. 438/2001

Before: Sathya Hettige PC J. P/CA and Anil Goonaratne J

Decided on 26/04/2010

The Petitioner was a company registered in Sri Lanka and engaged in the business of owning and operating ships, acting as shipping agents and other activities relating to shipping.

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The Petitioner owns four vessels namely 2 boats and 2 tug vessels named Mahanuwara and Mahaweli. The Petitioner purchased the Mahanuwara and Mahaweli for consideration in Rotterdam Holland by virtue of Letter of Credit through the Commercial Bank of Ceylon from the Bahamas and in Commercial International Del Atun (Panama) after payment was made in Spain. The vessels were on-station at Colombo for offshore operations, international shipping lines and salvage regularly entered and left Sri Lankan waters during the course of operations.

The Petitioner complained that over a year later (2 years in respect of the Mahanuwara) certain offices of the Port Clearance Audit Branch of the Customs Department entered the office of the Petitioner and informed that the Petitioner had not paid certain sums said to be due under the Goods and Services Tax and National Security Levy for the purchase of the vessels.

The Lankan Association of ship owners on behalf of the Petitioner and the National Chamber of Commerce thereafter addressed letters of protest on the basis that Sri Lanka Customs or Department of Inland Revenue should not levy GST and nSL charges from ship owners whose ships are registered under Sri Lanka flag and that the act of registering a vessel under Sri Lanka flag should not be construed to be importing a vessel which has been purchased outside Sri Lanka.

The Petitioner complains that there is no warrant in law in terms of the Goods and Services Tax Act No. 34 of 1996 as amended and the National Security Levy Act No. 52 of 1991 as amended read with the Customs Ordinance to impose GST and NSL levies upon purchase and registration of petitioner company vessels and the proposed imposition of levies constitutes a sudden and unwarranted departure from established and accepted norms both local and international.

The Petitioner sought writ of prohibition to restrain the 1st and 2nd Respondent from proceeding with the purported customs inquiry and from recovering or instituting any measures to recover any sums alleged to be due from the petitioner in connection with the non-payment of GST and NSL and other fiscal levies in respect of the alleged purchase of the vessels.

The Petitioner further submitted that for the reason that these ships were used for international transportation the ships are specifically exempted from all duties and therefore the Customs has no basis in law or in fact to proceed against the Petitioner.

The Petitioner also submitted that the Customs Ordinance as it presently stands does not contemplate that an ocean bound ship/vessel could be considered as imported in to Sri Lanka and very clearly there is no provision in the Customs Ordinance which contemplates an ocean bound ship/vessel being imported into Sri Lanka.

Held:

1.The Petitioner company appears to rely on the judgment of the Supreme Court in Vallibel Pvt. Ltd. v Director General of Customs (26/2008) wherein the identical issue has been dealt with and determined by the Supreme Court. However both counsel agreed this court will make a determination on the applicability of the Supreme Court in the Vallibel case

2.A person is required to make a declaration under section 47 only where (a) the relevant article is imported into Sri Lanka and (b) such article is brought to Sri Lanka on board a ship. And a ship in which the goods are imported is excluded from the ambit of the section for custom purposes.

3.The decision in the Vallibel case is applicable and binding on this court

Application allowed.

2010/06/03

Kotagala Plantations Ltd. and Lankem Tea & Rubber Plantations (Pvt) Ltd v. Ceylon planters Society

SC APPEAL 144/2009

Before: J.A.N. De Silva CJ, Sripavan J and Ekanayake J

Decided on: 15/12/2010

This case concerned an application made to the Labour Tribunal by the Ceylon Planters Society on behalf of a Planter (Workman), alleging that the services of the said Workman had been terminated wrongfully and unjustifiably. The Society sought the reinstatement of the Workman with back wages or in the alternative compensation in lieu of reinstatement.

After the Labor Tribunal dismissed the application on the basis that termination was justified, on appeal, the High Court held that termination was unjustified and awarded compensation to the Workman.

At the inquiry before the Labour Tribunal, since the termination of the services of the Workman was admitted by the Employer, evidence was led by the Employer regarding the act of misconduct of the workman and also his service record.

The Workman had allegedly assaulted a field officer and the field officer had in turn subsequently together with 3 others

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attacked the Workman. The Employer had also taken steps to terminate the services of the said employees who had attacked the workman. Two persons who had witnessed the event gave evidence regarding the assault. The field officer himself, being the victim of assault, had not been called to give evidence on the assault. It transpired in the course of the evidence before the Tribunal that Jayakody and three others had also been dismissed for having assaulted the workman in this case soon after the assault by the workman on Jayakody had taken place.

The President of the Labour Tribunal considered all this and also the past record of service of the Workman as well as the fact that he had done work outside the scope of his duties for others (i.e. by managing another property for his relations), and arrived at a finding that the acts of misconduct of the Workman were established by the Employer before the Tribunal.

The High Court held that the past record of the workman was irrelevant and extraneous and related to inefficiency, which was not relevant as the termination of the workman had been based on assault. The High Court also held inter alia that the Employer had breached its duty to provide a safe place of work for the employee.

Held:

1. An appeal lies from an order of a Labour Tribunal only on question of law. A finding on facts by the Labour Tribunal is not disturbed in appeal by an Appellate Court unless the decision reached by the tribunal can be considered to be perverse. It has been well established that for an order to be perverse the finding must be inconsistent with the evidence led or that the finding could not be supported by the evidence led. (Vide Caledonian Estates Ltd. v. Hillman 79 NLR 421 .) It is not for an Appellate Court to view the evidence and come to a different conclusion regarding the facts of the case unless the finding on the facts by the Tribunal was against the weight of the evidence

2. The Employer could not turn a blind eye on the act of misconduct of the workman when he had complained of an attack on him by other employees of the Estate. All those who had acted in that manner which was subversive and detrimental to the maintaining of discipline on the estate had been dealt with by the employer in the same way.

3. Evidence regarding past conduct of a workman is relevant to show how a workman has performed during his period of employment, his attitude towards, work, efficiency, conduct, discipline etc, as these contributing factors influence an employer when dealing with promotions, increments, granting of benefits to a workman. Matters relating to misconduct and inefficiency are not condoned just because no immediate action is taken against an employee when such matters occurred. An allegation involving misconduct or moral turpitude is a determining factor in proceedings before a Labour Tribunal in order to decide whether the workman is a fit and proper person to be continued in employment in an establishment.

4. The jurisdiction of the Labour Tribunal is intended to produce in a reasonable measure a sense of security in a workman so long as he performs his duties efficiently, faithfully and for the betterment of his establishment and not otherwise. No workman should be permitted to suffer for no fault of his, but on unwanted, dishonest, troublesome workman maybe discharged without compensation for loss of his employment. The workman in those circumstances has to blame himself for the unpleasant and embarrassing situation in which he finds himself.

Order of High Court set aside and Order of Labor Tribunal affirmed

(For full judgment please log on to www.supremecourt.lk)

2010/06/04

Senarath Pathiranalage Gunathilake Vs. S.P. Sunil Ekanayake

SC Appeal No 26/2009

Before: J.A.N. De Silva CJ, Sripavan J and Ekanayake J

Decided on 15/12/2010

This was an appeal to set aside a judgment given by the Civil Appellate High Court in Anuradhapura concerning a declaration of title and eviction.

When the case had proceeded to trial, the District Court in Polonnaruwa was informed that the Plaintiff had passed away. The Court made an order for substitution and the Attorney-at-Law for the Plaintiff filed a Petition and an Affidavit before the District Court to have the present Appellant substituted in the room of the Plaintiff.

The Respondent objected but the substitution was allowed. The District Court held in favor of the Substituted Plaintiff and subsequently when the Respondent appealed, an application was made by the substituted Plaintiff for a writ pending appeal, which when granted was unsuccessfully appealed against to the Court of Appeal and to the Supreme Court.

The final appeal was fixed before the Civil Appellate High Court of Anuradhapura where the substituted Plaintiff had filed a proxy as well as papers for substitution. In appeal the Respondent took up a preliminary objection that there had been a failure to file a proxy on behalf of the substituted Plaintiff and therefore there was no proper application before Court to substitute him or to represent him by an Attorney at law.

The substituted Plaintiff objected on the basis that an objection on the ground of a valid proxy not being filed had not been taken at any stage previously and that such an objection cannot be raised for the first time in appeal. The

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substituted Plaintiff also submitted that the failure to object coupled with the subsequent filing of a proxy cured any defect which may have invalidated the proceedings.

The Civil Appellate Court held that no valid proxy had been filed and therefore, judgment of the District Court was null and void.

The Court considered inter alia whether the default of not filing a proxy could be cured by the belated filing of proxy in view of the authority given by contract previously to the proctor to appear and make applications on the client's behalf.

The Court considered the cases **Paul Coir v. Waas** 2002 (1) SLR 13, **LJ Peiris & Co Ltd v Peiris** 74 NLR, **Tillekeratne v. Wijesinhe** 11 NLR 270, **Nelson De Silva v. Casinathan** 55 NLR 121, **Udeshi v. Mather** 1998(2) SLR 12, **Kadirgamadas v. Suppiah** 56 NLR 172 and in **AG v. Silva** 61NLR 500

Held:

1) It is not the proceedings thereunto that are rendered a nullity, but all appearances and applications made by the proctor or the counsel as his agent.

2) The loss of force for a proxy in section 27(2) does not affect the validity of the proceedings. If a proxy is revoked or an Attorney is suspended or removed, the consequence is that the Attorney is incompetent to represent the Client which translates into the Client being from thereon unrepresented. Not only can proceedings continue on that footing but the loss of force of the proxy would not affect the validity of the proceedings that have already transpired. Therefore it stands to reason that even in the case of an Attorney when he is incapable of appearing or making application due **to the total failure to file proxy**, such default should not in any way affect the validity of the proceedings.

3) Even though section 27(1) makes no indication that any objections as to a defective proxy should be raised at the first available opportunity and if so whether the failure to raise an objection at that time estoppes the raising of the objection later, if the Respondent's argument that a defective proxy renders proceedings a nullity is to stand, defective proxies would have to be treated like absence of jurisdiction and would have to be raised as a preliminary objection if at all.

4) The fundamental question to be asks is whether the proctor had in fact the authority of his client to do what was done although in pursuance of a defective appointment.

5) The facts of the case including the Attorney's continued presence in court and retention in the Civil Appellate Court provides a sufficiently strong indication that the substituted Plaintiff had at all material times granted Mr. Iddawela **the authority to appear and make applitions on behalf of him**, despite the substituted Plaintiff not filing a proxy as an overt manifestation of the granting of such authority.

6) The substituted Plaintiff by virtue of filing a proxy belatedly, has succeeded in ratifying the appearances and applications of the registered Attorney and thereby supplying all such acts with legal validity.

Appeal allowed.

(For full judgment please log on to www.supremecourt.lk)

2010/06/05

G. M. Vidyalankara v Rent Board of Review and 10 others

CA Writ Application No. 100/08

Before: Sathya Hettige PC, J P/CA, Anil Goonaratne J

Decided on 20/11/2009

The Petitioner stating he is the owner of the premises in question, sought to quash an order of the 1st Respondent Board of Review which allowed the 11th Respondent to deposit rent as the statutory tenant of the said premises, which were business premises.

The 11th Respondent is the son of the original tenant who came into occupation of premises prior to the enactment of the Rent Act and passed away in 1973. The said tenant ha a widow who became the tenant of the premises. After the death of the said widow, the Petitioner refused to accept rent from the 11 Respondent, who was the child of the deceased original tenant and the deceased widow.

The Petitioner sought to quash the Board of Review Order on the basis that

a) the Rent Board and Board of Review have misinterpreted the provisions contained in section 36(2) of the Rent Act No. 7 of 1972 as amended by Act No. 26 of 2002.

b) both the Rent Board and the Board of Review erred in law in interpreting section 36(2) of the Rent Act without considering the real meaning and intention of the legislature as regards the second limb of the proviso of section 36(2).

The Court considered that the question to be decided is whether the Respondent is entitled in law to be the statutory tenant under section 36(2)(B) of the Rent Act as amended by Act No. 26 of 2002 Section 36(2) provides.

"Any person who in the case of business premises is the surviving spouse or child or child of the deceased tenant where such spouse or child carries on in such premises the business carried on by the deceased tenant shall subject to any order of the board hereinafter provided be deemed for the purposes of this Act to be tenant of the premises."

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"Provided however, no surviving spouse, child, parent, brother, sister, as the case may be shall be deemed to be the tenant of the premises of the deceased tenant of the premises under subsection 2 if such person
(i) was the owner of such premises on the date of the death of the deceased tenant and,
(ii) is not the surviving spouse, child, parent, brother or sister of the original tenant."

It was submitted by counsel for the Respondent that the Petitioner's argument is that section 36 does not envisage the inclusion of a second generation.

The Courts considered whether such an issue is relevant for the purpose of determining statutory tenancy in respect of business premises.

Held:

1. The succession of original tenant's spouse to tenancy cannot be a legal bar to the child's succession to the tenancy under section 36(2)(B) of the Rent Act as amended. The language in the said section is plain and clear.
2. There are 3 classes of persons entitled to succeed to tenancy recognized under section 36(2) of the Rent Act in respect of business premises. However after the Amendment Act No. 26 of 2002 the scope of provisions in section 36(2) has been limited to certain persons namely surviving spouse, child, parent, brother, sister of the deceased tenant.
3. Where the spouse or child is concerned, the further criteria should be satisfied that such person is carrying on the business carried on by the deceased tenant for the purpose of being eligible. There is no prohibition against the spouse or the children from carrying on the business in partnership or in collaboration with an outsider. The question is whether the spouse or child are carrying on substantially the same business as was carried on by the deceased tenant. (Abdul Kalyoom v Mohamed Mansoor (1986) 1 SLR 361, S. N. Silva J)
4. The 11th Respondent is the child of the deceased original tenant as well as the child of the deceased tenant. As such the issue of second generation does not arise. Both the surviving spouse and the 11th Respondentwere carrying on the business of the original tenant in the premises in suit.
5. The 11th Respondent is eligible to become the statutory tenant of the deceased tenant in view of the provisions of section 36(2) of the Rent Act as amended by Act No. 26 of 2002.
6. The Rent Board and the Rent Board of Review have acted within the law

Application dismissed. **2010/06/06**

Seminar on Condominium Property:

Will be held in January 24th at 2.00 p.m.
Please contact Mr. Sarath Wijesiri,
Administrative Secretary -BASL, Tel : 011 2447134

Members completing 50 years at the Bar

The Bar Association of Sri Lanka recognizes and felicitates the achievements of members who have completed 50 years at the Bar.



HON. JUSTICE G.P.S DE SILVA, FORMER CHIEF JUSTICE OF SRI LANKA

Justice G. P. S. de Silva was educated at Richmond College and at St. Thomas's College, before pursuing his tertiary education at the University of Ceylon to read a Degree in Bachelor of Arts and graduating with First Class Honors at Sri Lanka Law College. After a distinguished career in the Attorney-General's Department, Justice G. P. S. de Silva was elevated to the Bench and became a Judge of the Supreme Court of Sri Lanka in 1989, and being the senior most Judge was appointed as Chief Justice in October 1991.



MR.S.H.M. MAHAROOF, PRESIDENT'S COUNSEL

Educated at St. Anthony's College Kandy, Mr. Maharoof was enrolled as an Advocate on 11thAugust 1960.He was appointed as a President's Counsel in 1993. Formerly a member of the University Grants Commission and panel member of the Sri Lanka Lawyers Disciplinary Committee, he was also a member of Public Services Commission of the Central Province from its inception up to October 2003. Mr. Maharoof also served as President of the Central Province Muslim League. Married to Ayesha, he has three children who are graduates, two of whom are Attorneys-at-Law.



MR. A.B.M. DE ALWIS

Educated at St. Joseph's College, Colombo, St. Patrick's College, Jaffna and St. Anne's Kurunegala, Mr. de Alwis was admitted to the Bar on 11th of December 1958 before Justices H.N.G. Fernando and T.S. Fernando. He has served as an Unofficial Magistrate. Married to Shirani in 1962, Mr. de Alwis has two daughters. Mr. de Alwis has been in practice for 52 years at the Kuliyapitiya Bar.