Legal Judgments

Kaluwahum Purage Somapala v The Commission to investigate Bribery and Corruption (CA (PHC) APN. 37/09)

Before W. L. R. Silva J and A. W. A . Salam J
Decided on 03/02/2010

This case concerned a revision application as regards an order made by the High Court Judge as regards the resumption of a criminal trial that was partly heard by his predecessor in office when a petition was made by the accused to take up the trial de novo.

The Respondent Commission argued that the application for revision was bad in law for non-joinder of a necessary party and the remedies prayed for were misconceived in law by the Petitioner.

It was argued by the Commission that the Petition was put on notice of being indicted by the Director-General of the Commission in terms of section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 and therefore, the Director-General is a necessary party.

A comparison was done between indictments served by the Director-General of the Commission and the Attorney-General on the basis that the latter delegates his powers to facilitate the forwarding of indictments through his subordinates but that in bribery cases, the legislature has clearly intended that indictments should necessarily go out under the hands of the Director-General and not the subordinates.

These arguments were supported by referring to section 13 (2) of the 1994 Act and the decisions in CA (PHC) APN 18/2009 and CA 63/2008

Counsel for the Petitioner argued that a close scrutiny of section 11 of the 1994 Act indicates that the sole authority to decide on the institution of criminal proceedings as regards bribery matters is vested with the commission and that the Director-General is merely an officer who is authorized to sign indictments under the relevant Act and merely carries out the direction of the Commission which he is legally bound to give effect to by instituting criminal proceedings in the appropriate court.

The court also considered the permissibility of a trial de novo by considering section 48 of the Judicature Act No. 2 of 1978.

The principal provision of the section, which has remained unchanged reads

> " In the case of death...or other disability of any judge before whom...any prosecution...has been instituted or is pending such prosecution may be continued before the successor of such judge who shall have the power to act on the evidence already recorded or partly recorded or partly recorded by his predecessor and partly recorded by him or if he thinks fit, to re-summon the witnesses and commence the proceedings afresh."

The Court noted that unlike the earlier proviso, which was repealed, empowered either party to demand that witnesses be re-summoned and reheard and that when such a demand was made, the succeeding judge had no choice but to recommence trial afresh i.e. the proviso read

'either party may demand that the witnesses be re-summoned and reheard, in which case the trial shall commence afresh'.

The new proviso however reads

'provided that where any criminal prosecution, proceeding or matter (except on inquiry preliminary to committal to trial) is continued before the successor of any such judge, the accused may demand that witnesses be re-summoned and reheard.'

Held:

the ratio decidendi of the cited authorities for non-joinder has no application to the present matter

since the Petitioner has made the Commission a party to the action there is no need for the Director-General also to be made party

as regards the trial de novo, the new proviso applied only as regards criminal prosecutions and the right to have witnesses re-summoned and reheard was only extended to the accused and not either party.

in spite of the continued use of the word 'demand' even in the new proviso, the intention of the legislature to not impose a mandatory obligation of the court to heed the demands of the accused was manifested by the deliberate abolition of the words ' in which case the trial shall commence afresh.'

As such when section 48 is carefully looked at, the trial de novo is allowed under the present law only when the judge makes up his mind on his own if he thinks fit, to re-summon the witnesses and commence the proceedings afresh.

The demand of the Petitioner purportedly made under section 48 was misconstrued in law

Obiter: in as much as the accused has a right to make a demand, he has the unfettered right to know the reason for complying or not complying with his demand as well.

Revision Application dismissed

2011/01/01

Legal Judgments

The Flight Attendants' Union v H. M. C. Nimalasiri and 3 Others

(CA/Writ/App/No. 664/2002)ctd.

Circulated by way of an Aviation Safety Notice and published in Sri Lanka Civil Aviation Publication 12211 and Rule 10.4 read together with Rule 21.2 of the said Publication fixes the maximum permissible Flight Duty Period that can be served as a member of operating crew, including the Cabin Crew members,.

Although the regulation was formulated on the UK model, the flight duty period was extended by agreement between the Flight Crew and the management of 3rd Respondent, than that was prescribed by the notice issued by the UK Civil Aviation Authority. In the above premises, the rules relating to cabin crew members were formulated in order to neturalize the 1 hour that had already been increased in the Sri Lankan notice vis-à-vis the British one and that is the reason the 1st Respondent had in the regulations laid down that the maximum permissible period, which an operator may fly, a member of its Cabin Crew shall be the same as that prescribed in respect of the Flight Crew.

The Petitioners submitted that it had become aware that the 3rd Respondent had purported to utilize Cabin Crew members outside of the abovementioned guidelines by submitting for approval to the Department of Civil Aviation Authority, a purported Operator's Scheme.

The Department of Civil Aviation Authority refused to authorize the Operator's Scheme on the basis that instead of the earlier authorized 1hour excess, the said Scheme proposes 2 hours in excess of the limitations that apply, and the Department effected a system until Sri Lankan Airlines submits a scheme which is acceptable to the Directorate.

The Petitioner contended that the said approval of the 1st Respondent deviates from the said Rules in the Publication 1211 and is ultra vires the powers of the Assistant Director (Operation) of the Department of Civil Aviation and that the said deviation have been made without permitting the Petitioner an opportunity of being heard on behalf of its members solely at the instants of the 3rd Respondent and therefore is in violation of the principles of natural justice.

The Petitioner sought to have the said decision quashed so far as it provides that Cabin Crew members could be employed one hour in excess of the limitations that apply to Flight Crew members and the adaptation of a four grid as opposed to the earlier agreed five grid system and sought to compel the 1st Respondent to comply with the Rules in the Publication 1211.

The Respondent submitted that the Flight Crew and Cabin Crew are two essential components to ensure a safe flight and that the Cabin Crew's function to make sure everything is in place to provide the passengers a safe and hassle free flight is more time consuming than the pre-flight function of the Flight Crew and it is due to his reason that international airlines all over the world have uniformly accepted that a cabin crew has to work an extra hour than the flight crew for a given flight.

The Respondent submitted that the Publication has a typographical error that a 'flying duty period of a cabin crew member can be no longer than that permitted for flight crew members,' when it should have read ' flying duty period of a cabin crew member can be one hour longer than that permitted for flight crew members.' The Respondent further submitted that the fact that the flying duty period applicable to cabin crew was different to flight crew was evident because of the exceptions provided in the Publication i.e. if the flying duty period was the same for cabin crew and flight crew, there would be no need for exceptions.

Held

Respondents have neither denied nor given an explanation to the allegation that the flight duty period of the Flight Crew was extended by one hour as per the agreement between the Flight Crew and management of the 3rd Respondent

The authority that issued the Sri Lanka Civil Aviation Publication 12211 is empowered not only to correct a printing mistake but also to amend it in such a manner to be in line with the current aviation policy and in keeping with international standards

The limitations for flight time, duty periods and rest periods for flight crewmembers and cabin crewmembers in aircraft/ airline registered in Sri Lanka for public transport is now governed by the aviation safety notice published on 15th May 2002 and came into effect on 1st June 2002. This notice permits the flying duty period of cabin crewmembers one hour longer than that permitted for flight crew members

The Sri Lanka Civil Aviation Publication dated 15th March 2002 supersedes Sri Lanka Civil Aviation Publication 12211

Therefore this Court cannot issue a mandamus compelling the 1st Respondent or his successor to enforce compliance by the 3rd Respondent the said Publication 12211

Application dismissed.

2011/01/02

Legal Judgments

Harshani S. Siriwardana v. Malsiri J. Seneviratne, Secretary, Ministry of Health, Indigenous Medicine and 4 Others

S.C. (FR) Application No. 589/2009

Decided on 10/03/2011

The petitioner was a Matron at the Seth Sevana State Elders Home at Mirigama and had commenced her duties on 15.10.1996.

The Court considered inter alia whether the petitioner had a legitimate expectation founded on the basis of paragraph 3 of the Gazette Notification dated 08.12.2006, that she would be appointed to the next available vacancy.

The said paragraph 3 is as follows:
"03. Number of vacancies existing –
(1) Bellantara Specialized Children's Home - 01
(2) Gangodawila House of Detention - 01

Although the number of vacancies calculated at present is as indicated above, the said number of vacancies is likely to be more or less depending on exigencies of the service at the time of recruitment. The decision of the Western Provincial Public Service Commission with regard to the number of vacancies that would be filled will be final and conclusive."

Learned Counsel for the petitioner contended that he relies on the phrase that 'although the number of vacancies calculated at present is as indicated above, the said number of vacancies is likely to be more or less depending on the exigencies of the service at the time of recruitment' and therefore that the petitioner had a legitimate expectation that she would be recruited for the next vacancy in December 2008 based on the results of the examination held on 23.06.2007.

The Supreme Court considered the decisions of Lord Denning, in **Schmidt v Secretary of State for Home Affairs** ([1969] 1 All E.R. 904), **Breen V Amalgamated Engineering Union** ([1971] 1 All E.R. 1148), **Re Westminster City Council** ([1986] A.C. 668) and **Attorney General of Hong Kong v Ng Tuen Shiu** ([1983] 2 All E.R. 346), **Council of Civil Service Unions v Minister for the Civil Service** ([1984] 3 All E.R. 935) and **Union of India v Hindustan Development Corporation** ((1993) 3 S.C.C. 499), on the scope of the doctrine of legitimate expectation.

In **Ng Tuen Shiu** (supra), the legitimate expectation was based on a promise given by the Government, whereas in **Council of Civil Service Unions** (supra), whereas in the decision was based on the legitimate expectation that arose out of a regular practice. In the circumstances, a mere hope or an expectation cannot be treated as having a legitimate expectation.

Held:

A careful consideration of the doctrine of legitimate expectation, clearly shows that, whether an expectation is legitimate or not is a question of fact. This has to be decided not only on the basis of the application made by the aggrieved party before Court, but also taking into consideration whether there had been any arbitrary exercise of power by the administrative authority in question.

Accordingly, the question that would have to be looked into would be as to whether there was a promise given to the petitioner or a regular procedure that future vacancies would be filled on the basis of a previously held examination on which there had been selections made on the results of the said examination.

As stated earlier, a plain reading of the words in paragraph 3 of the Gazette Notification clearly shows that the number of vacancies would depend on the exigencies of the service at the time of recruitment. When the examination was held on 23.06.2007, in terms of the Gazette Notification, there had been only two (2) vacancies. The petitioner had not disputed this position. Admittedly, those two (2) vacancies had been filled in terms of the Gazette Notification of 08.12.2006 (A) and the subsequent examination held on 23.06.2007. The impugned vacancy had arisen in December 2008 and as has been shown, by that time, the vacancies which had arisen in December 2006 had been filled by the respondents. It is not disputed that at the time the vacancies were advertised by way of the Gazette Notification dated 08.12.2006 (A), and thereafter when the examination was held on 23.06.2007, there was no vacancy for the post of Social Welfare Superintendent at the State Elders Home at Mirigama. By the Gazette Notification (A), steps were taken to fill up the two (2) existing vacancies, which were clearly stipulated in the said Gazette Notification. In the event, if there were to be other vacancies that should have been taken into consideration in filling up on the basis of the examination that was held on 23.06.2007, they should have been vacancies that would have arisen '**on exigencies of the service at the time of recruitment**'. Accordingly, beyond the point of recruitment, the results of that examination cannot be considered for any other appointment. The interpretation suggested by the learned Counsel for the petitioner, that the petitioner had a legitimate expectation that she would be appointed for the next available vacancy, since she was placed 3rd in the order of merit at the examination cannot be accepted, as such an interpretation to paragraph 3 of the Gazette Notification of 08.12.2006 (A) would give rise to uncertainty in filling future vacancies. Moreover, that would create an unreasonable and irrational procedure in filling up future vacancies as that would prevent persons, who would be eligible to apply for the said positions.

For the reasons aforesaid, I hold that the petitioner has not been successful in establishing that her fundamental right guaranteed in terms of Article 12(1) of the Constitution had been infringed by the respondents. This application is accordingly dismissed. I make no order as to costs.

2011/01/03

Legal Judgments

Panagoda Vidanelage Ariyasena Hemalal v. Lanka Phosphate Ltd and 7 others

(CA Application No. 836/09)

Decided on 22/02/2010

Before:
Hon. Sathya Hettige PC, J, President of the Court of Appeal
Hon. Anil Goonaratne J, Judge of the Court of Appeal

The Petitioner, confirmed in the position of senior lecturer in mining engineering at the Moratuwa University, had applied and was selected for the post of General Manager of the 1st Respondent Company. A request was made by the Secretary of the Ministry of Industrial Development to the Vice Chancellor of the Moratuwa University to obtain the services of the Minister for a period of 2 years on a contract basis with effect from 12/12/1996.

The letter of appointment of the 1st Respondent Company of the Petitioner was on a permanent basis and provided that the Petitioner's retirement age is 55 years i.e. on 12/12/2009. The Petitioner submitted that the Petitioner applied for an extension of his services on 13/10/2009 for a further one year but was informed by the 1st Respondent Company that he was due to retire s per the conditions of the letter of appointment and the company regulations.

The Petitioner complained that he has fulfilled the requirements contained in Public Administration Circular No. 05/2002 and other Public Enterprise Circulars and is entitled to his extension.

It was argued against the Petitioner that the Petitioner does not qualify as a 'public officer and Public Administration Circular No. 05/2002 which is an amendment to the Establishments Code is not applicable.

It was also submitted that the Public Enterprise Circular No. 52 the extension of services beyond the retirement age of 55 years was a discretion to the Board of Management of a Public Enterprise and is not a mandatory obligation.

Held:

Prerogative Writes are not issued as a matter of course and it is in the discretion of the court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. (P.S. Bus company v Ceylon Transport Board 61 NLR 491, Sinnathamby J)

The central principle of administrative law , ultra vires, is a Latin phrase meaning simply 'acting beyond ones power of authority. ' In this application the Petitioner has not established that the Respondent has acted outside the scope of their authority (Prof. Wade)

Application dismissed.

2011/01/04

Merchant Bank of Sri Lanka Ltd. v Jatila Punyasiri Wijayawardena and 3 others

(CA Revision No. 81/2006 APN)

Before
Sathya Hettige PC J, President of the Court of Appeal
Anil Gooneratne J, Judge of the Court of Appeal

The preliminary objection arose in this revisionary application whether the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 affected revisionary jurisdiction of the Court of Appeal.

Held:

Under section 5 of the 1996 Act, the right of appeal from judgments or orders of the High Court is to be preferred to the Supreme Court

Before the 1996 Act it was the Court of Appeal that entertained appeals from High Courts

The law in this regard is settled in Australanka Exporters Pvt Ltd v Indian Bank (2001) 2 SLR 156

The Supreme Court has exclusive jurisdiction to hear such appeals and the Court of Appeal cannot exercise even revisionary powers in this regard

Preliminary objection upheld

2011/01/05

Indian Bank, Vs. Acuity Stock Brokers (Pvt) Limited Formerly Forbes ABN AMRO SECURITIES (PVT) Ltd.

SC Appeal No.11/2001 (CHC) , CHC No: 181/97(1)

Before
S. Tilakawardane J,
N. G. Amaratunge J,
R. K. S. Suresh Chandra J.

Decided on 18 February 2011

This is an appeal from the judgment of the Commercial High Court whereby the action of the Plaintiff-Appellant was dismissed.

The Plaintiff-Appellant instituted action in the Commercial High Court against the Defendant Respondent to recover a sum of Rs.5,558,841/- with legal interest thereon.

(Ctd on pg. 8)

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(Ctd from pg. 7)

A customer of the Bank maintained a current account and was also a customer of the Respondent who carried on business as a stockbroker, on shoes behalf the Respondent bought and sold shares and held such shares on behalf of and for the account of the said customer.

When requesting the Appellant to lend and advance monies to him by way of an Overdraft facility granted on his current account, the customer had held out and assured the Appellant that (a) the Respondent held the shares listed therein and (b) that the Respondent shall credit all the sale proceeds of these shares to the current account of the customer with the Appellant Bank.

It was on the basis of this assurance given by the Respondent that the monies were advanced. When the customer failed and neglected to repay a sum of such monies which was due and owing to the Appellant, the Appellant requested the Respondent to ensure that the sale proceeds of the shares were credited to the aforesaid current account.

On or about the 21st of December 1994, the Appellant had become aware that the Respondent had acted in breach of the agreement and undertaking given by them and that the respondent had failed and neglected and was unable to credit the sale proceeds of the shares to the aforesaid current account. The monies remained due and owing to the Appellant.

The Respondent took up the position in its answer that the letter dated 21st January 1994 was issued on the specific instructions of the said customer in that they had received instructions that the shares held for the customer are to be sold and the monies be remitted to Seylan Merchant Bank, thereby countermanding the instructions to credit the Appellant Bank's account with sale proceeds of shares and/or stocks of customer. After the remittance to Seylan Merchant Bank, a tripartite agreement was entered into between Seylan Merchant Bank, the customer and the Respondent.

After trial the Commercial High Court dismissed the action of the Appellant on the ground that the Respondent was bound to act on the instructions of the customer and that P3, document P3, which was the undertaking given by the Respondent to the Appellant Bank to remit proceeds of sale of the shares of the customer to the Appellant, was enforceable. The learned High Court Judge has assumed that it is the English Law that applies by stating that 'consideration' is a requisite of a contract and concluded that a perusal of document P3, shows that there is a total lack of consideration and hence unenforceable.

The main argument of learned Counsel for the Appellant was that the Roman Dutch Law applied and that the said document P3 was enforceable against the Respondent and that even under the English Law as developed in later times it would be so.

The Civil Law Ordinance No.05 of 1865 introduced the English Law relating to Banks and Banking. But there are many transactions where the Banks are parties which do not come within the realm of Banking Transactions and regarding which the Roman Dutch Law applies.

The Supreme Court held it is the Roman Dutch Law that would apply to the transaction engulfed in the document P3

The Court further held that although an agreement had been entered into by the Respondent and the Appellant, the Respondent did not take steps to inform the Appellant Bank that their client, the customer, had countermanded the said agreement with the Appellant by giving new instructions and had instead without informing, sold the shares and remitted the monies to Seylan Bank.

The Respondent had informed the Appellant Bank about the countermanding of the agreement only after the Appellant Bank had sent letter dated 17th December 1994 (P8) requesting the Respondent to sell the shares and remit the proceeds to the Appellant Bank as agreed in P3 on account of the sums that were due and owing from the customer. In reply to this request in P8 the Respondent had for the first time informed the Appellant Bank by letter dated 21st December 1994 (P9) that their client had entered into a tri-partite agreement with another Bank and that action had been taken according to the said agreement and that there were no shares held by the customer in his share trading accounts

The aforesaid conduct on the part of the Respondent was definitely a breach on the part of the Respondent of the undertaking given to the Appellant Bank in P3. This breach was confirmed by the Respondent by the aforesaid letter P9 when the Respondent stated very clearly and assertively that the earlier instructions were **countermanded and/or revoked.** Countermanding means cancelling or reversing a previously issued command, instruction or order.

Held

(i) On a consideration of authorities (like Jayawickreme v Amarasuriya 20 N.L.R. 289 and Edward Silva v De Silva 46 NLR 510)the courts held inter alia thatP3 was an enforceable contract and that the Respondent had breached same and

(ii) that the learned High Court Judge was in error in assuming that English Law applied without considering the nature of the transaction between the parties and dismissing the action of the Appellant.

2011/01/06

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