It is worthwhile to quote what Andrew Jackson said on the independence of the judiciary:

> *"All the rights secured to the citizens under the Constitution are worth nothing and a mere bubble, except guaranteed to them by an independent and virtuous judiciary."*

Archibald Cox, former Solicitor General of the United States and the first Special Prosecutor in the *Watergate Case* notes three reasons for judicial independence:

1. *To guard against abuse of executive power;*
2. *To halt legislative erosion of fundamental human rights;*
3. *To provide assurance to the public that judges are impartial and fair in their decision making processes.*

The Constitution of South Africa, categorically and strongly spells out what the judicial authority entails:

> *The courts are independent and are subject only to the Constitution and law which they shall apply impartially and without fear, favour or prejudice;*
>
> *No person or Organ of the State shall interfere with the functioning of the Court;*
>
> *Organs of the State, through legislative and other measures shall assist in protecting the court to ensure the independence, impartiality, accessibility and effectiveness of Court.*

In 1995 the Constitutional Court of South Africa, in an application for judicial review, struck down a proclamation of the President in an electoral boundary delineation matter, as being unconstitutional. President Nelson Mandela on the same day appeared in the media and said that he honestly believed that the Parliament had given the power of proclamation to him. Since the Constitutional Court found otherwise, he said he respects the decision of the Court. He further said that:

> *"This decision clearly demonstrates that, in the Republic of South Africa, even the President is subject to the law."*

Bertrand Russell observed that: *"Government can easily exist without law, but law cannot exist without Government."*

It is pertinent to remind what Michael Tamplet said about the Rule of Law: *"We have a problem when the same people who make the law get to decide whether or not they themselves have broken the law."*

Mahatma Gandhi in his wisdom touching upon justice said that:

> *"There is a higher court than the court of justice and that is the court of conscience. It supersedes all the other courts."*

Irrespective of whatever one might say, or interpret, I daresay that:

> ***"When independence of the judiciary is lost or endangered, people do not own anything in that country."***

It is against that background that Your Lordship has assumed this onerous office. While the Bar has the fullest confidence in Your Lordship's ability to hold the scales evenly, we assure our unreserved support and corporation to Your Lordship in the discharge of your duties and functions.

May the blessings of the Triple Gem be lavishly upon Your Lordship!

JUDGMENTS

Effect of an Order of the Magistrate's Court in proceedings before the Labour Tribunal

SUPREME COURT

Pussellawa Plantations Ltd. and Others* v. *Ceylon Estate Staffs Union (on behalf of Tissa Nanayakkara)

SC Appeal No. 30/2008
SC/LA (SPL) LA No. 17/2007
HC Appeal No. 45/2006
LT Application 19/AV/696/93

Decided on: 17-02-2012

Decided by: **Hon. R. K. S. Suresh Chandra, J.**; Hon. N. G. Amaratunga, J.; Hon. S. Marsoof, J.

The Applicant to the Labour Tribunal was a Field Officer working on an estate. His services were terminated on an allegation that he threatened to assassinate the Superintendant and his family. The Labour Tribunal dismissed the Applicant's application. The Provincial High Court set aside the order of the Labour Tribunal and ordered that the Applicant-Appellant-Respondent be reinstated with back wages. The case had been laid by in the Labour Tribunal pending the Magistrate's Court case relating to the incident. The Applicant was acquitted in the Magistrate's Court.

On appeal the Supreme Court held that the finding of the Provincial High Court that the Labour Tribunal was bound to follow the decision of the Magistrate's Court is erroneous, and that the Labour Tribunal had only to take the decision of the Magistrate's Court into consideration in arriving at a finding. The Supreme Court, however, held that the High Court Judge's setting aside of the Order of the Labour Tribunal can be justified as the evidence against the Applicant was unsatisfactory and did not establish the charges against him.

The Supreme Court having stated that the Applicant would be around 55 years of age by now considered whether the relief of reinstatement with back wages was the appropriate relief to be granted to the Applicant. The Supreme Court having considered the evidence was of the view that it would not be in the best interests of justice to grant to the Applicant the relief of reinstatement. The Supreme Court determined the question of compensation that should be granted to the Applicant, and held as follows:

"In granting compensation it is necessary to consider whether the Respondent has proved to the Tribunal the monetary loss caused to him by the termination of his services - vide Jayasuriya v Sri Lanka State Plantations Corporation 1995 2 SLR 379. He has not made an attempt to prove his loss although the burden was on him to do so. His salary had been Rs.3418/- at the time his services had been terminated. On being probed about his income he had stated that he earned about Rs.3000/- per month when he gave evidence before the Tribunal in 2004. Taking into account all the circumstances of the case and the inflation that has taken place since the time of his dismissal, it would be just and equitable to grant him compensation in a sum of Rs. 615,240/- on the basis of his last drawn salary of Rs.3418/- for 15 years as this case has taken 18 years to reach a conclusion." (*vide* page 6 and 7)

Accordingly, the Supreme Court varied the Order for reinstatement with back wages with an Order only for compensation in a sum of Rs. 615,240/- to be paid to the Applicant by the Respondents-Respondents-Appellants.

01 / 10-11 / 2012

Rule 8(3) and 8(5) of the Supreme Court Rules (1990)

SUPREME COURT

Batugahage Don Udaya Shantha* v. *Jeevan Kumaranatunga, Minister of Lands and Land Development and Others

SC (SPL) LA No. 49/2010
CA (WRIT) No. 277/2008

Decided on: 29-03-2012

Decided by: **Hon. S. A. Bandaranayake, CJ**.; Hon. K. Sripavan, J.; Hon. P. Dep PC, J.

An Application for special leave to appeal was filed on 22-03 -2012 against a Judgment of the Court of Appeal dated 10-02 -2010 dismissing an Application for writs of certiorari and mandamus to quash the Order made in Gazette Notification dated 23-10-1991 and an Order directing the 1st Respondent to divest the Petitioner's land. The Petitioner did not tender the Notices on the Respondents along with his Petition filed on 22-03-2010 in terms of Rule 8(3) of the Supreme Court Rules (1990). The Petitioner's position was that General Elections were scheduled to be held on 08-04-2010, and that the Parties to the Application who were holding public office would cause cease to hold such office. On 21-09-2010 the Petitioner had filed a Motion seeking permission to file amended caption and tender Notices along with the amended caption. A single Judge sitting in Chambers had granted the Petitioner such permission on 01-10-2010. Thereafter, the Petitioner had filed another motion on 14-10-2010 with amended caption and sought a date to support the Application. A single Judge sitting in Chambers had given a date to support the Application with Notice to the added Respondents. On 25-10-2010, Notices were served on the Respondents for the first time after the Application was filed on 22-03-2010.

On 10-11-2010 the Respondents had filed a Motion stating that the Petitioner had not complied with Rule 8(3) of the Supreme Court Rules (1990), and that the Application should be dismissed *in limine*. A single Judge sitting in Chambers permitted Counsel for the Respondents to support the motion in open Court on the date it was fixed for support. When the matter came up for support it was decided to first consider the preliminary objection raised by the Respondents.

The Supreme Court by its Judgment dated 29-03-2012 upheld the preliminary objection raised by the Respondents that Rule 8(3) had not been complied with, and dismissed the Petitioner's application for special leave to appeal.

Her Ladyship the Chief Justice said as follows:

"It is therefore clear that at the time the Special Leave to Appeal application was filed on 22-03-2010 neither the notices were tendered nor a motion was filed in terms of Rule 40 of the Supreme Court Rules, 1990, moving for an extension of time to tender notices.

Rule 8(3) referred to earlier states that the notices that have to be sent to the respondents should be tendered along with the application filed in the Supreme Court. Accordingly, the petitioner should have tendered his notices on 22-03-2010.

Learned President's Counsel for the petitioner took up the position that he had moved this Court by way of a motion for an extension of time to issue notices and that had been tendered as stated earlier on 21-09-2010. Rule 40 provides for an extension of time in tendering notices as required by Rule 8(3), which should be considered by a single Judge in his Chambers.

The question that arises at this juncture is that whether an extension of time to issue notice could be obtained under and in terms of Rule 40 of the Supreme Court Rules, 1990 after a lapse of six (6) months from the date of filing of the application for Special Leave to Appeal.

The answer to this question could be found in Rule 8 (5). After the petitioner files notices in the Registry along with his application in terms of Rule 8(3) it is necessary that he attends at the Registry of the Supreme Court after two weeks of the filing of the application and before three weeks of such filing, to verify that such notices have not been returned undelivered. In the event, if there are notices which have been returned undelivered, the petitioner should take steps to furnish the correct addresses for the purpose of serving notices on such respondents.

The objection of Rule 8(5) is two fold. Firstly it makes provision to ascertain as to whether the notices have been tendered to the respondents. Secondly it also provides in a situation where notices have been returned, for the re-issue of the notices on the respondents. By this process it is en-sured that not only the respondents are notified that there is a Special Leave to Appeal application filed by the petitioner against the decision of the lower Court, but also that they are so notified immediately after the petitioner had filed such an application in the Supreme Court. This is for the purpose of giving adequate time for the respondents to be prepared to object to the application made by the petitioner.

It is in this background that the time period for an extension of time to issue notices on the respondents in terms of Rule 40 should be ascertained.

As stated earlier, it is necessary to file notices along with the petition and affidavit and in terms of Rule 8 (5) the petitioner should ascertain as to whether the notices have been served on the respondents within a period not less than two (2) weeks and not more than three (3) weeks after the lodging of the application. Rule 8(3) read with Rule 8(5), clearly indicates that an extension of time would be required either at the very outset of the filing of the application in terms of Rule 8(3) or at a time the notices had been returned due to a defect in the given addresses as stated in Rule 8(5). It would therefore be necessary for the petitioner in both such instances to tender notices forthwith for the Registrar to issue them on the respondents.

Supreme Court Rules, in its totality, has made provision to ensure that all parties are properly notified without any undue delay in order to give a hearing for all parties so concerned. Therefore if a petitioner needs to move for an extension of time in terms of Rule 40, such a motion should be filed either at the time the application is filed in the Supreme Court or else after attending at the Registry between the period of 2-3 weeks after lodging the application in the Registry in terms of Rule 8(5).

It is therefore quite evident that a petitioner who had not complied with the provisions stated in Rule 8(3) cannot seek for an extension of time in terms of Rule 40, after a long period of time of the filing of the application. If a petitioner is seeking to obtain further time to comply with Rule 8(3) by making an application under and in terms of Rule 40, such an application should be made
immediately after filing an application or else after complying with the provisions laid down in Rule 8 (5) of the Supreme Court Rules.

It is not disputed that the petitioner had not taken any steps to issue notices on the respondents at the time of the filing of this application for Special Leave to Appeal on 22-03-2010. Moreover he had not taken steps to issue notices until 21-09-2010. Therefore it is clearly evident that the petitioner had not complied with Rule 8(3) of the Supreme Court Rules, 1990." (*vide* pages 10 - 13)

02 / 10-11 / 2012

Section 46(2) and Section 754(2) of the Civil Procedure Code / Order "having the effect of a final judgment

SUPREME COURT

Pattiya Dewage Madilin Nona and Others* v. *Glakissa Dewage Suneetha Ranasinghe and Another

SC Appeal No. 03/09
SC (HC) LA No. 147/08
HCCA/COL/18/08/LA
DC Colombo Case No. 19976/L

Decided on: 16-03-2012

Decided by: **Hon. P. A. Ratnayake PC, J.**; Hon. R. K. Suresh Chandra, J.; Hon. P. Dep PC, J.

The Plaintiff sought a demarcation of the boundaries of the corpus, and ejectment of the Defendant. The Defendant prayed for a dismissal of the case, and for ejectment of the Plaintiff by way of a claim-in-reconvention.

At the trial the Defendant moved that the issue as to the maintainability of the case be tried as a preliminary issue. The District Court by Order dated 08-02-2008 decided the preliminary issue in favour of the Defendant and dismissed the Plaintiff's action, and fixed the case for further trial on the Defendant's claim-in-reconvention.

The Plaintiff sought leave to appeal from the said Order of the District Court from the Civil Appellate High Court. The Defendant took up a preliminary objection that no leave to appeal lies from the said Order of the District Court, and that the Plaintiff should have sought relief by way of a final appeal. The Civil Appellate High Court has by its Order dated 08-10-2008 rejected the preliminary objection of the Defendant. The Defendant appealed to the Supreme Court.

The question was whether the said Order of the District Court was a final order or an interlocutory order. The Supreme Court took the view that the said Order of the District Court did not have the effect of a final judgment, and dismissed the Appeal.

P. A. Ratnayake J. said as follows:

> *A Divisional Bench of this Court consisting of 5 Judges pronounced a judgment in S. Rajendran Chettiar and Two others vs. S. Narayanan Chettiar SC. Appeal No. 101A/2009 on 10th June 2010 where it decided that the correct procedure of appeal in a case where a plaint had been rejected in terms of Section 46(2) of the Civil Procedure Code was the procedure set out in Section 754(2) of the*

Civil Procedure Code and as such the order rejecting the plaint is not an order "having the effect of a final judgment." (vide page 6)

In the instant case, the District Court is to continue the hearing of the case based on the counter claim of the Petitioner. If there was no counter claim of the Petitioner but the Court has dismissed the preliminary objection of the Petitioner, the case would nevertheless continue. Accordingly, in terms of the reasoning of the Supreme Court in the case of S. Rajendran Chettiar and two others vs. S. Narayanan Chettiar (supra), the procedure to be followed is the procedure laid down in Section 754(2) of the Civil Procedure Code for the reason that such an order is not one "having the effect of a final judgment". (vide page 7)

03 / 10-11 / 2012

Partition Law / partition of a larger land

SUPREME COURT

Adhikaram Mudiyanselage Punchi Amma Adhikaram* v. *Sirima Shanthi Mendis

SC Appeal No. 169/2010
SC (HC) CA/LA No. 198/2010
NCP/HCCA/ANURADHAPURA/298/2007
DC Anuradhapura Case No. 290/Partition

Decided on: 23-02-2012

Decided by: **Hon. P. A. Ratnayake PC, J.**; Hon. Dr. S. A. Bandaranayake, CJ.; Hon. N. G. Amaratunga, J.

The dispute in this case was with regard to the identity of the corpus sought to be partitioned. There was no dispute with regard to the allotment of shares. The Defendant's position was that certain portions of another land possessed by the Defendant have been included in the preliminary plan, and accordingly she has objected to the land described in the preliminary plan being considered as the corpus of the case. The Defendant also prayed for a dismissal of the action and for an order that a fresh survey be done for the purpose of properly identifying the corpus and excluding the disputed portion of the land possessed by the Defendant.

There was no dispute about the description of the lands in schedules 'A' and 'B' of the amended Plaint. But the dispute was in respect of the land described in the amended plaint after the schedules 'A' and 'B' which was the land depicted in the said preliminary plan. The extent of each allotment described in schedules 'A' and 'B' was given as 1 *Pela* of 6 *Seers/Lahas*. But the extent of the amalgamated lands depicted in the preliminary plan was given as 2 Acres 1 Rood and 13.12 Perches, and as stated above the description of the amalgamated land depicted in the preliminary plan was given after the schedules 'A' and 'B' in the amended Plaint.

The Supreme Court found that the southern boundary of the allotment described in schedule 'A' and the northern boundary of the allotment described in schedule 'B' in the amended Plaint are not the same, and that the surveyor has not explained how in the circumstances he showed in the preliminary plan the allotments in schedules 'A' and 'B' as contiguous allotments.

P. A. Ratnayake J. observed as follows:

> *"It was the duty of the surveyor to have explained as to how this has happened. Parties including the Respondent have also failed in their duty by not questioning the surveyor on this important aspect. But such failures on the part of the surveyor and the parties will not absolve the duty of the Court to consider this matter. This is a serious lapse that has occurred in the District Court proceedings and overlooked in the judgment."* (*vide* pages 6 and 7)

The District Judge did not issue a commission to the Surveyor-General under section 18(3) of the Partition Law to have the corpus properly identified although the surveyor who did the preliminary plan has sought directions from the Court because of the differences in the extent of the amalgamated land depicted in the preliminary plan and the allotments described in schedules 'A' and 'B' in the amended Plaint and other factors observed in the report.

The Supreme Court further held that in view of the substantial difference in the extent of the amalgamated land depicted in the preliminary plan which was much larger than the allotments of land described in the schedules 'A' and 'B', steps should have been taken to file a fresh *lis pendens* to cover the additional extent of land. But this has not been done. The Supreme Court stressed the importance of strictly observing the provisions of the Partition Law because of the finality which attaches to a partition decree in terms of section 48(1) of the Partition Law.

The Supreme Court endorsed the decision in *Richard and Another* v. *Seibel Nona and Others* [2001] 2 Sri L. R. 1 where it was held that when a larger land is sought to be made the subject matter of the action *lis pendens* affecting such larger land must be registered, and the Court must proceed with the action as though it has been instituted in respect of such larger land after taking necessary steps under sections 16, 17, 18 and 19 of the Partition Law.

The District Judge in this case ordered a partition of the larger land. But the Civil Appellate High Court of the North Central Province set aside the Judgment of the District Court, and ordered a retrial. The Supreme Court was of the view that the Civil Appellate High Court had not misapplied the *ratio* in *Richard and Another* v. *Seibel Nona and Others*.

The Supreme Court found that not only has the identity of the corpus not been established but also that *lis pendens* has not been registered in respect of the larger land sought to be partitioned. In the circumstances, the Supreme Court found no basis to interfere with the judgment of the High Court, and dismissed the appeal.

04 / 10-11 / 2012