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BASL, LAW & REFORMS

ATTORNEY-AT-LAW REPRESENTATION AT POLICE STATIONS

BASL delegation headed by Deputy President Mr. Saliya Pieris and Mr. U.R. De Silva, made representations to Hon. the Attorney General and the Minister of Justice to further enhance the right of lawyers to represent their clients at police stations beyond the scope of the proposed section 37(a) to the Code of Criminal Procedure Act. A 'Closed Door Meeting' was also held on 18th October 2016 with the officers of relevant parties including the Ministry of Justice, Police Department, Attorney General's Department and the Judiciary.

UPCOMING AMENDMENTS TO THE CIVIL PROCEDURE CODE AND THE CODE OF CRIMINAL PROCEDURE ACT

The Minister of Justice has appointed two separate committees headed by Mr. Ikram Mohamed, P.C. and Justice Buwaneka Aluvihare,P.C. respectively, with regard to the proposed amendments to the Civil Procedure Code and the Code of Criminal Procedure Act. BASL is engaged in continued discussions and representations with the two committees.

CONSTITUTIONAL REFORMS

BASL submitted its observations to two Parliamentary Select Committees on Judiciary and, Law and Order.

CUSTOMS LAW REFORMS

A special committee chaired by Mr. Faisz Musthapha,P.C. was appointed by the BASL to look into the proposed Customs Law reforms. The Minister has appointed a 15 member Technical Committee for this purpose, out of which two members have been appointed from the BASL.

AMENDMENTS TO THE NOTARIES ORDINANCE

The Notarial Practitioners' Committee chaired by Mr. S. Bagiradan and Mrs. Senehelatha Perera with the Convener Ms.Nirodha Kalansooriyahas made representations on behalf of the BASL and also has met the Minister regarding the proposed amendments.

PRESCRIPTION (SPECIAL PROVISIONS) ACT NO. 05 OF 2016

The Prescription (Special Provisions) Act No. 05 of 2016 was enacted in April 2016 to enable special legal provisions to be made in respect of persons who were unable to pursue their rights in courts for the recovery of any immovable property including lands, due to the activities of militant terrorist groups which prevailed in Sri Lanka during the period commencing on 1 May 1983 and ending on 18 May 2009.

Interested members of the Bar can obtain trilingual electronic copies of the Act which are available on the official website of the Ministry of justice at www.moj.gov.lk. Please be advised that if any person is desirous of bringing a claim for property by way of this legislation, such claim ought to be brought before 26 April 2018.

SIGNIFICANT RECENT JUDGEMENTS

Civil Procedure
Supreme Court
P.A.HEMA DAMATANTHIE V. W.M.CHANDRA KUMARI PALAMAKUMBURA
SC/Appeal/47/2012
Decided on-9th March 2016
Chandra Ekanayake J, Eva Wanasundera PC. J and Buwaneka Aluwihare PC.J

Respondent instituted the action seeking title to a land in extent of 2acres and 2 roods on the strength of a permit issued under the Lands Development Ordinance. The Appellant disputed the Respondent's title stating that the Respondent borrowed money by mortgaging the land in dispute and the Appellant was in possession since 1980. During the trial it was transpired that it was the Respondent's father who was given the permit who had nominated the Respondent as the successor. The Respondent's father had passed away in 1974 leaving the permit holder's wife who passed away in 1998. The Respondent admitted during the trial that apart from the nomination, no application had been made by the Respondent seeking the transfer of the property.

Court held that, in terms of section 68 (2)(ii) of the Ordinance, the successor does not get any title to the property where a permit holder nominates a successor but dies leaving behind the spouse, and the successor does not enter into the possession of the land with in a period of six months from the demise of the failure of such spouse to succeed to the land or of the death of such spouse.

BASL Ref-01/03/2017

Sale of Goods Ordinance
INDUSTRIAL AND COMMERCIAL DEVELOPMENT PRIVATE LIMITED VS INTERNATIONAL CEMENT TRADERS PVT LTD AND ANOTHER
SC.CHC APPEAL NO 33/2009
Decided on-17th February 2016
S.E.Wanasundera,PC.J, Anil Goonaratne J, K.T.Chitrasiri J

The Plaintiff-Respondent instituted the action to recover a sum of Rs.3.088,074.51 from the 1st Defendant-Appellant in respect of supply of bulk cement. The Appellant in his answer while denying the liability raised an objection under section 8 of the prescription ordinance claiming that the Respondent's claim is prescribed in law.

The court held that when goods sold and delivered are movables then the value of the goods according to the price they have agreed would become due to the seller upon completion of the delivery of such goods. Thus soon after the delivery of the goods to the buyer the money becomes due to the seller and not upon the demand being made. The last invoice has been issued on the 18-10-2005 and the action has been filed on the 26-10-2005 clearly after a lapse of one year and thus action is prescribed.

BASL Ref-02/03/2017

Civil Procedure
S.M..HEENMENIKE AND TWO OTHERS V. SURAWEERA ARATCHILAGE MANGALIKA MALKANTHI AND ANOTHER
SC Appeal No.41/2012
Decided on-1st April 2016
Priyasath Dep, PC.J, Sisira De Abrew J, Anil Gooneratne J.

The Plaintiff-Respondent-Respondents instituted this action against the Defendant Appellants. During the trial the 2nd Defendant passed away and the 1st Defendant filed substitution papers seeking to substitute the 1st Plaintiff in the room of the deceased. Upon permission been granted, though the Court directed the 1st Plaintiff to file an amended caption the 1st Plaintiff failed. At the end of the trial the judgment was delivered in favour of the 1st Plaintiff and the 1st Defendant appealed. In the appeal the 1st Plaintiff raising an objection in terms of section 755 (1) of the Civil Procedure Code took up the position that the both the notice of appeal and the petition of appeal is bad in

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law for naming deceased persons as parties.
Court held that the failure to comply with section 755 (1) of the Civil Procedure Code by not citing the 2nd Substituted Plaintiff as a Respondent in the Notice of Appeal and in the Petition of Appeal is curable defect under section 759 (2) and section 770 of the Civil Procedure Code.
BASL Ref-03/03/2017

Recovery of Loans by Banks Act No. 4 of 1990, Interim Injunctions
SARANGI CHARIKA KURUPPU V. DFCC BANK PLC
SC Appeal No. 194/2011
Decided on- 28th March 2016
Chandra Ejanayake J, Priyasath Dep, PC. J, Buwaneka Aluwihare, PC. J
The Plaintiff Appellant instituted the action seeking an order to nullify the resolution passed by the Respondent bank under and in terms of Section 8 of the Recovery of Loans by Banks Act No. 4 of 1990 to sell by a public auction the property co owned by the Appellant. The Appellant also sought a permanent injunction preventing the Respondent from proceeding further in terms of the resolution passed. It was the Appellant's contention that the mortgagor who is entitled to only a partition of 2/6th share of the property is not entitled in law to execute a mortgage bond for the entirety of the property. The Learned Commercial High Court Judge by order dated 13-05-2011 dismissed the application for interim injunction.
In appeal the Court held that in order to grant an interim injunction, first the court has to satisfy that there is a serious question to be tried at the hearing and that there is a probability the Plaintiff is entitled to the reliefs claimed. The Appellant's main contention is that entire property has been mortgaged inclusive of her undivided shares who was not a party to the mortgage bond. This alone would suffice to arrive at the conclusion that there is a serious question to be tried pertaining to the Appellant's rights. The Respondent's objection that the question at hand does not arise out of a commercial transaction has no merit as the entire transaction as a whole has arisen out of a commercial transaction.
BASL Ref-04/03/2017

Servitudes
R.M.JINASENA V. TELEPHIX TECHNOLOGIES PVT LTD
SC Appeal 239/2014
Decided on-31st March 2016
Eva Wanasundara PC, J, Buwaneka Aluwihare PC, J, Sisira De Abrew J.
The Plaintiff-Appellant-Respondent instituted this action seeking inter alia a declaration that he is entitled to a right of servitude of light and air for its building and a permanent injunction preventing the Defendant-Respondent – Appellant from obstructing servitude right of light and air for the building of the Plaintiff and from constructing building on the south western boundary of the land in issue.
Admittedly the parties are the owners of adjoin lands and there is a common canal in between the two premises. It was the Plaintiff's contention that the Defendant is not entitled to build in his land encroaching on to the common canal as it would deprive the Plaintiff's light and air.
The court held that, when two persons became owners of adjoining premises one cannot acquire a servitude right of light and air by prescription over the other's land by mere enjoyment of light and air for a long period and that mere fact that the neighbor has not constructed a building on his land for any length of time does not give a right to the owner of the other land to acquire a servitude right of light and air. The owners of the adjoining premises who has not so far constructed a building on his land has a right to construct a building approved by the Local Authority on his land which may obstruct the light and air that the adjoining building has been receiving.
BASL Ref-05/03/2017

Recovery of Loans by Banks, Civil Procedure
DFCC BANK PLC V. FATHIMA RUZANA FAKURDEEN AND ANOTHER
SC Appeal No. 133/2014
Decided on-24th March 2016
Sisira De Abrew J, Priyantha Jayawardena J, K.T.Chitrasiri J
The Plaintiff–Respondent instituted this action against DFCC Bank PLC inter alia seeking an order preventing the bank from auctioning the property in suit in terms of Recovery of Loans by Banks Act. The Defendant bank raising an objection took up the position that the Plaintiff have named two legal entities as Defendants in the case merely seeking reliefs against one entity. The Defendant also stated that no reason has been given by the Plaintiff for naming two entities and thus the plaint is defective and should be dismissed in limine. The Learned trial judge despite such objections granted the interim injunction. In appeal the Supreme Court held that, in terms of section 6 of the CPC, a cause of action upon which an action is instituted must necessarily give rise to an enforceable claim. When the person against whom the claim is mad is not been correctly identified in the plaint, then the reliefs sought in the pliant will not become enforceable. Thus the claim in such plaint should necessarily fail. Even though the section 14 and 15 of the CPC describe the manner in which the defendants can be joined, the Plaint does not show on what basis such joinder has been made and thus the plaint filed in this case is defective.
In terms of the Act, there are two ways for a borrower to prevent the auction being held, (a) by paying the unpaid portion of the loan together with interest and the cost incurred thereto (b) by paying the installment in respect of which default has been made with the monies and cost recoverable by the Bank and then to request the Board to halt the auctioning o the property mortgaged using is discretion. In the present case no material is found to establish that the Plaintiff have paid at least the unpaid installments up to the time of this action is instituted, enabling them to fall under section 10 of the act and thus the Plaintiff is not entitled to the reliefs. Interim injunction is set aside.
BASL Ref-06/03/2017

Fundamental Rights,Criminal Procedure
AMUHENKANDE KANKANAMLAGE JAYASENA VS KAMAL PERERA, CHIEF INSPECTOR OF POLICE, OFFICER IN CHARGE, UNIT NO 4 – FRAUD BUREAU COLOMBO AND 6 OTHERS.
SC. FR Application No. 350/2013
Decided on-3rd October 2016
Sisira J De Abrew J, Priyantha Jayawardene PC J, K T Chitrasiri J.
The Petitioner entered into an agreement to sell his house to a buyer for a sum of Rs 7.5Million. Both parties signed the agreement on 20.8.2011 and the Petitioner accepted a sum of Rs. 3 Million as an advance payment on two occasions. Though the Petitioner agreed to sell the house to the other party within six months from 20.8.2011 upon accepting the balance amount, subsequently by three separate agreements, the time period is extended up to 16.6.2013. However the petitioner fails to sell the house as agreed in spite of the buyer's readiness with the balance payment. The buyer complains to the Fraud Bureau upon which, the petitioner is arrested and produced in the Magistrate's court. The Petitioner insisted that failure to perform his obligation was purely a civil dispute arising out of the agreement to sell and as such, the officers of the Fraud Bureau could not have arrested him and that the arrest and the filing of the B Report against him violated his fundamental rights guaranteed under Article 12(1) and 13(1) of the Constitution.

Court held that: in a case of breach of agreement by one party, although the party affected has recourse to civil remedy, if the police have reasonable grounds to believe that the violating party in violating the contract had entertained dishonest intention, the Police, on a complaint made by the affected party, has the right to take legal action against the violating party under and in terms of the Criminal Procedure Code including the arrest and producing the violating party in the Magistrate court. Later it becomes the duty of the learned Magistrate to decide whether or not the charge is proved beyond reasonable doubt. In such a situation Police cannot be found fault with for arresting and producing the violating party in court.
BASL Ref-07/03/2017

Compiled by Lasantha Thiranagama