

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC  
OF SRI LANKA**

University of Colombo, Sri Lanka  
College House,  
Colombo 3.

C.A 732/1998 (F)  
D.C. Colombo 4981/M

**PLAINTIFF**

Vs.

1. Don Chritha Rathnayake  
formerly of 16/2, Hampdon Lane,  
Colombo 6.

Now of 1325/3A, Bogahawatte  
Road, Pannipitiya.

2. Don Susathe Rathnayake  
152, Uduwela Road,  
Ampitiya Road,  
Kandy.

3. D. M. Thalagala  
15/3, Wijithapura,  
Thalawathugoda Road,  
Pita Kotte.

**DEFENDNATS**

**AND BETWEEN**

1. Don Chritha Rathnayake  
formerly of 16/2, Hampdon Lane,  
Colombo 6.

Now of 1325/3A, Bogahawatte  
Road, Pannipitiya.

2. Don Susanthe Rathnayake  
152, Uduwela Road,  
Ampitiya Road,  
Kandy.
3. D. M. Thalagala  
15/3, Wijithapura,  
Thalawathugoda Road,  
Pita Kotte.

**DEFENDANT-APPELLANTS**

Vs.

University of Colombo, Sri Lanka  
College House,  
Colombo 3.

**PLAINTIFF-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** K. G. Jinasena for Defendant-Appellants  
Ashan Fernando S.S.C., for the Plaintiff-Respondent

**ARGUED ON:** 31.7.2012

**DECIDED ON:** 04.12.2012

**GOONERATNE J.**

Plaintiff, the University of Colombo, filed action in the District Court of Colombo against the 1<sup>st</sup> Defendant-Appellant and 2<sup>nd</sup> and 3<sup>rd</sup>

Defendant-Appellants who were the principle debtor and guarantors to an agreement and Bond respectively, to recover a sum of Rs. 223,014/20. The Agreement and Bond annexed to the plaint are marked 'A' and 'B' (P1 & P2 in the court proceedings). The 1<sup>st</sup> Defendant-Appellant a Laboratory Technician of the Plaintiff-Respondent was awarded a study programme abroad on a full pay basis. Study leave granted from 22.7.1998 for a period of 1 year and was extended up to 21.9.1979. 1<sup>st</sup> Defendant-Appellant reported for duty on 17.9.1979. In terms of the above bond 1<sup>st</sup> Defendant-Appellant should serve the University of Colombo for a period of 7 years after resumption of duties. 1<sup>st</sup> Defendant-Appellant was sent vacation of post notice on or about 1983.

Parties proceeded to trial on 17 issues and 3 admissions. Several grounds are urged in the Petition of Appeal as the grounds of appeal (paragraph 15 of the Petition of Appeal). I have noted it's contents. Trial Judge entered judgment in favour of Plaintiff-Respondent on 11.9.1998. I have also noted the contents in paragraph 10 of the Appellant's written submission in which Appellant seeks to challenge the judgment of the District Court.

It was the position of the 1<sup>st</sup> Defendant-Appellant that he could not report for work due to ill health on 20<sup>th</sup> & 27<sup>th</sup> January 1983, but allege

that it was covered by a medical certificate. The position of the 1<sup>st</sup> Defendant-Appellant was that he was willing at all times to work and made several attempts to resume work but the authorities did not heed to such request. The Appellant had explained by the several words in his written submissions blaming the authorities for not accepting his request to resume work and state the Plaintiff party acted illegally (supported by D4, D5, D6 & D7).

The Appellant party has made an effort to demonstrate by legal submission that there was an error on the part of University on the face of the record. i.e disciplinary procedure is not vested on the Respondent Registrar and refer to certain regulations as follows:

It is submitted that the 1<sup>st</sup> Appellant was prevented from continuing with the employment, with the Respondent University by the wrongful, unlawful, unreasonable and unjustifiable conduct of the Respondent. As explained below it was illegal and unreasonable for the Respondent University to act in the said manner:

- (i) As per letter "D3", which received by the Appellant on 1<sup>st</sup> February 1983, the decision to serve the said vacation of post notice had been taken by the Registrar of the Respondent University;
- (ii) However in terms of Section 45 (2) (xii) of the Universities Act No 16 of 1978 no disciplinary power of the Appellant has been vested on the Registrar of the Respondent University;
- (iii) As per the said Section 45(2) (xii) of the Universities Act disciplinary power has been vested with the Governing Council and that may be delegated only to the Vice Chancellor but not the Registrar of the Respondent University;

(iv) As stated in Section 45 (2) xii) viz

“To appoint persons to and to suspend dismiss or otherwise punish persons in the employment of the university.

Provided that except in the case of Officers and teachers, these powers may be delegated to the Vice Chancellor.”

(v) In terms of Section 34 (4) of the said Act “... it shall be the duty of the Vice Chancellor to give effect or to ensure that effect is given, to the decisions of the Council...”.

(vi) In terms of Section 37 (5) of the said Act “The Registrar shall, subject to direction and control of the Vice Chancellor, be responsible for general administration of the University and the disciplinary control of the non-academic staff”

(vii) However the Respondent University had failed to lead any evidence to the effect that the said letter “D3” had nay approval, prior or after, from the Vice Chancellor or from the Governing Council of the Respondent University in terms of Section 45 (2) (xii) of the University Act.

I have to observe that this is an appeal. The difference between and appeal and review relates to the subject matter of the courts jurisdiction. The Appellate Court will have powers to decide whether the judgment of the lower court under appeal was ‘right’ or ‘wrong’. In a matter of review a court exercising supervisory powers may only decide whether the decision or order under review was ‘legal’ or not. As such the matters which is before this court is an appeal. Further the points urged by the 1<sup>st</sup> Defendant-Appellant were never put in issue? I cannot accept the above contention of 1<sup>st</sup> Defendant-Appellant.

In *Nicholas Vs. Macon Marker Ltd.* 1985 (1) SLR 13 at 139..

“In this application, the function of this Court is to make a judicial review of the order made by the Rent Board of Review. There is fine distinction between, ‘appeal’ and ‘judicial review’. When hearing an appeal is the court is concerned with the merits of the decision in appeal. The question before the court is whether the decision subject matter of the appeal is right or wrong. In the case of judicial review the question before the court is whether the decision or order is lawful, that is according to law. As such, in this application for a writ, it is not the function of this court to decide whether the order of the Rent Board is right or wrong. The function of this court in this instance is to decide whether on the principles applicable to judicial review, the order of the Rent Board of Review should be allowed to stand or should be set aside.”

It is also noted that some of the documents marked in evidence had been objected to by the Appellant. However at the close of the plaintiff’s case when the documents were read in evidence there had been no objection lodged by the opposing party. If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the *curius curiae* of the Original Civil Courts 1981 (1) SLR at 24.

The letters P4 & P5 explains the 1<sup>st</sup> Defendant’s role in not consistently reporting for work. There seems to be a period of 91 ½ days as in document P4. In 1982 there had been 108 days of late attendance. This conduct cannot be condoned by any employer. Though some objection seem to have been taken on P1 & P2, one cannot take advantage of it to evade

payments. All amounts due need to be paid since the documents have become law and evidence for all purpose of the case. The 1<sup>st</sup> Defendant in law is bound to repay the Plaintiff-Respondent university.

There is also an argument advanced that the action is prescribed. This court cannot entertain that argument in view of Section 6 & 5 of the Prescription Ordinance where limitation of time would be 6 years and 10 years respectively. It would be unnecessary to give any further clarification on that issue and the learned District Judge cannot be faulted.

The trial Judge has dealt with all relevant primary facts. This court will not disturb those findings of the trial Judge. The judgment of the District Court is affirmed. Appeal dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL