

S.C. Spl. L.A. No. 37/2012

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

**S.C. Spl. L.A. No. 37/2012
C.A. [PHC] 84/2010
H.C. Nuwara Eliya -CP/HC/NE 26/2010
Primary Court, Nuwara Eliya -99342**

In the matter of an application for
Special Leave to Appeal from the
judgment of the Court of Appeal
under Article 128 [2] of the
Constitution.

Leon Peris Kumarasinghe,
No. 23, Church Road, Nuwara Eliya.
Respondent-Petitioner-Appellant-
Petitioner

Vs.

Samantha Weliveriya,
Director General,
Sri Lanka Broadcasting Corporation,
Torrington Square,
Colombo 07.
Applicant-Respondent-Respondent-
Respondent

**BEFORE : TILAKAWARDANE. J.
SRIPAVAN. J. &
WANASUNDERA. P.C. J**

**COUNSEL : Faiz Musthapha, P.C., with Ms. Thushani Machado
Respondent-Petitioner-Appellant-Petitioner
D.S. Wijesinghe, P.C., with Priyantha Jayawardane, P.C., and K.
Molligoda for the Applicant-Respondent-Respondent-Respondent**

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instructed by Athula de Silva.

ARGUED ON : 08.11.2013

DECIDED ON : 12.11.2013

TILAKAWARDANE. J.

Having heard the submissions of the respective Counsel in this case we see no reason to grant Special Leave to Appeal and the Application is accordingly dismissed.

The next matter that requires consideration of this Court is the award of costs. There are several salient matters in this case which have been drawn to our attention during the arguments and the narrative that was unfolded by the respective Counsel.

S.C (S.P.L) L.A No. 37/2012 (hereinafter referred to as the Present Supreme Court Case) was an Application for Special Leave that arose out of the decision by the Magistrate's Court of Nuwara Eliya in Case No. 99342, dated 16.06.2010. This Court finds it imperative to narrate the manner in which the Present Supreme Court Case developed out of the Judgment dated 16.06.2010 in Case No. 99342 in order to ascertain the costs to be awarded.

This Case, heard by the Magistrate's Court of Nuwara Eliya, concerned an Order of Ejectment pursued by the Sri Lanka Broadcasting Corporation [hereinafter referred to as the Respondent] in terms of **Section 5** of the *State Lands [Recovery of Possession] Act No. 7 of 1979* as amended, which was granted by the Learned Magistrate on 16.06.2010. Aggrieved and dissatisfied by this Order, the Respondent-Petitioner-Appellant-Petitioner (hereinafter referred to as the Petitioner) had admittedly filed two actions: a direct Appeal bearing No. CP/HC/NE/42/2010(A) to the High Court of the Central Province Holden at Nuwara Eliya [hereinafter referred to as the High Court] on 17.06.2010, and a separate Revision Application

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bearing No. CP/HC/NE/26/2010(R) which was filed on 21.06.2010 [however, it was dated 17.06.2010] before the same court, which also requested Court to grant interim relief. In considering the Revision Application, Court rejected the request for interim relief on 30.06.2010. With regard to CP/HC/NE/42/2010(A), Court dismissed the Appeal on 13.10.2010 and further refused an Application praying for Leave to Appeal to the Supreme Court from the said dismissal on 03.11.2010.

Furthermore, it has been brought to the attention of this Court that a direct Appeal to the Supreme Court against the order dismissing Petition to Appeal Application bearing No. CP/HC/NE/42/2010(A) has been filed on 14.10.2010 [However, it was dated 13.10.2010], which the Petitioner admitted to have filed erroneously and withdrew the said direct Appeal on 29.10.2010. In the Revision Application bearing No. CP/HC/NE/26/2010(R), the existence of the direct Appeal CP/HC/NE/42/2010(A) was not disclosed to the Court by the Petitioner. The Revision Application was subsequently dismissed on 17.09.2010. Dissatisfied with this Order, the Petitioner instituted an Appeal to the Court of Appeal bearing No. CA (PHC) 84/2010 on 29.09.2010 [however, the Petition is dated 23.09.2010], praying for an order to set aside the Order for Ejectment and to set aside the order dismissing the Revision Application. CA (PHC) 84/2010 was dismissed by the Court of Appeal on 17.02.2012 subsequent to which the Petitioner filed an Application on 27.02.2012 before this Court praying for Special Leave to Appeal.

It is also noteworthy that the Petitioner has filed a Writ Application bearing No. HC/NE/Writ/01/2009 on 14.12.2009 challenging the Notice to Quit filed by the Competent Authority dated 27.11.2009. It is noted by this Court that if there was a challenge as to whether the land was state land or not it should have been filed (by way of a Writ) in accordance with the statutory provision contained in **Section 9** of the *State Lands Recovery of Possession Act No. 7 of 1979* as amended. Be that as it may, the Petition filed in the Writ Application was amended by the Amended Petition filed on 16.03.2010, and was later, on 08.09.2010, withdrawn by the Petitioner.

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Having listed out this narrative, the most pertinent issue before the Court is the matter of costs to be awarded. This Court now considers the case law where the terms 'punitive damages' and 'punitive costs' are used synonymously. The fundamental role of punitive damages, as enunciated in **Wilkes v. Woods (1964)** (98 ER 489) is that they are 'Designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceedings for the future.' In awarding said costs, the Court takes into account the plethora of actions that has arisen from the Order of the Learned Magistrate and focuses on punitive costs in particular. With regard to such punitive costs, the Supreme Court of U.S.A. in **Smith v. Wade (1983)** (461 U.S. 30), noted that the primary justification for such an award is punishment and to deter similar actions in the future. This Court further notes the cases of **Kwan v Kaplan (2012)** (ZAGPJHC 36) and **Mohapi and Others v Magashule and Others (2007)** (ZAFSHC 45), where it was held that a punitive costs order would serve a dual role: to hold the Petitioner accountable and to serve as a mark of the disapproval and displeasure of the Court with regard to the conduct of the Petitioner.

Such damages have been granted under several circumstances as follows in foreign jurisdictions: in **Makuwa v Poslson (2007)** (3 SA 84) (TPD), the Court awarded punitive damages for wilfully ignoring court procedure while in **Khan v Mzovuyo Investments (Pty) Ltd (1991)** (3 SA 47) (TK), punitive damages were awarded for instituting proceedings in a haphazard manner and in **Washaya v Washaya (1990)** (4 SA 41) (ZH), such damages were awarded for presenting a case in a misleading manner. This Court makes further reference to the established decision of the House of Lords in **Rookes v. Barnard (1964)** (UKHL 1) that influenced the Indian Case of **Rustom K. Karanjia and Anr. v Krishnaraj M.D. Thackersey and Ors (1970)** (72 BOMLR 94), which held that punitive damages (in tort actions) were restricted to when the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the executive and when the defendant's conduct has been calculated to make a profit for himself.

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In deciding whether to award such punitive costs, the Court considers the manner in which an Appeal was made from the decision of the Learned Magistrate when there was no right of Appeal as **Section 10(2)** of the *State Lands (Recovery of Possession) Act No. 7 of 1979* clearly states the following:

“No Appeal shall lie against any order of ejectment made by a Magistrate under subsection (1)”.

The Court notes this conduct to constitute a willful ignorance of Court procedure, for two simultaneous Applications in the form of a Petition of Appeal and a Revisionary Application were filed, when there was clearly no right of Appeal. As held in **Gunarathna v. Thambinayagam (1993)** (2 SLR 355), the right of Appeal is a statutory right which must be expressly created and granted by Statute. Therefore, given that a statutory provision which explicitly allows for an Appeal does not exist and instead, the relevant Act includes a provision that explicitly disallows it, this Court finds sufficient grounds to grant punitive damages.

Furthermore, the appropriate remedy for a party that is dissatisfied with a Notice to Quit is to institute a Writ Application. However, though the Petitioner instituted such an Application bearing No. HC/NE/Writ/01/2009 on 14.12.2009, he withdrew the same on 08.09.2010. The Notice to Quit cannot now be challenged by the Petitioner via collateral proceedings as he has waived his right to challenge the said Notice by withdrawing the Application. I have to emphasize that a relief that has been waived by the Petitioner cannot be taken up subsequently in other proceedings as this would amount to an abuse of the process of Court. Such a course of action on the part of the Petitioner not only impedes the due administration of justice but undermines the work of the Courts as well. Thus, this Court finds sufficient grounds to grant punitive costs.

Court also takes into account the plethora of Appeals and actions that have been instituted in the High Court, the Court of Appeal and the Supreme Court, in particular the two parallel proceedings by way of an Appeal bearing No. CP/HC/NE/42/2010(A) and a Revision Application bearing No. CP/HC/NE/26/2010(R), notwithstanding the Writ Application bearing

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No. HC/NE/(Writ)/01/2009 and the direct Appeal to the Supreme Court filed before the High Court, and notes the haphazard manner in which action has been instituted. This Court further notes that when the Petition of Appeal [CA (PHC) 84/2010] was filed before the Court of Appeal, the Appeal bearing No. CP/HC/NE/42/2010(A) was still pending before the High Court. Thus, two separate Appeal Applications were pending before two separate Courts simultaneously, though both arose from the same Order of Ejectment, thereby squandering valuable time and resources available to the legal system and this Court feels that this too justifies the awarding of punitive costs.

This Court is further perturbed to note that when the Revision Application bearing No. CP/HC/NE/26/10(R) was filed, the Appeal bearing No. CP/HC/NE/42/2010(A) has not been adverted to even in the Jurisdictional Note though reference was made to the aforesaid Writ Application CP/NE/Writ/01/2009. Thus, the Petitioner invoked both the Appellate and Revisionary jurisdiction of the High Court in respect of the same Order for Ejectment made by the Magistrate's Court. Had this been adverted to by the Counsel appearing in Court for the Petitioner, as is the normal practice, the Revision Application and the Appeal could have been combined and heard together and disposed of in one and the same order thus avoiding a plethora of actions through which the Petitioner appears to have abused the process of Court. The failure to disclose the parallel Petition of Appeal filed in the High Court becomes all the more evident as, on page 7 of the Petition of Appeal filed in the Court of Appeal dated 23.09.2010, the Petitioner has admitted that he had failed to disclose the fact that an Appeal had been filed. He furthermore stated that '*The Appeal Petition had been filed simultaneously with this Revision Application in the Magistrate's Court and it was not numbered nor signed by the Magistrate at that time when this Revision Application was tendered and therefore unable to mention in the Petition, was not considered by the Learned Judge although such submissions were made by the Counsels for the Appellant.*' However, in fact the Revision Application had been filed 4 days after the filing of the Appeal. No document whatsoever was tendered to this Court to explain why the Petitioner had waited till 23.09.2010 to disclose for the first time the fact of filing simultaneous Appeal and Revision Applications to Court. This conduct of misleading the Court constitutes yet another ground upon which an award of

punitive costs is justified.

What is apparent to the Court is a blatant abuse of the process of Court by the Petitioner by filing multiple actions that has caused an unnecessary delay in the deliverance of justice, a poor allocation of the resources at the Court's disposal and involving the Respondents in an unnecessarily costly and time consuming exercise which arose out of an Order of Ejectment from which no Appeal can be sustained in the first place.

The Court notes that the time has come for the Supreme Court to affirmatively determine the utility of punitive costs with the primary view of deterrence. The decision to award punitive damages is consistent with similar decisions in foreign jurisdictions including [but not limited to] the Indian Case of **Reliance Mobile v Hari Chand Gupta (2006)** (*CPJ 73 NC*), where punitive damages were awarded, for the production of a false affidavit, with the intention of preventing such actions in the future and **Polye v Papaki and Another [2001]** (*1 LRC 170*), where the Supreme Court of Papua New Guinea determined that the jurisdiction of the Supreme Court was invoked without reasonable cause and amounted to a misconduct on the part of the Appellant which resulted in unnecessary expenditure by the Respondents and granted punitive damages accordingly.

This Court cannot over emphasize the need to appropriately deal with litigants who attempt to abuse the process of Court and thereby cause unnecessary delay and costs to other parties in order to ensure that, in the future, litigants will not be tempted to indulge in such ill-conceived practices. Thus, considering the conduct of the Petitioner and the fact that he has abused the process of Court by filing several applications in different Courts at different times without vacating from the land and premises in question for more than three years, we direct the Petitioner to pay a sum of Rs. 200, 000 as costs to the Director General, Sri Lanka Broadcasting Corporation within a period of one month from today.

The Court also feels that such an award would further mark the displeasure of the Court with regard to the reprehensible conduct of the Petitioner and would serve as a powerful deterrent

against the institution of such multiple Applications in the future.

JUDGE OF THE SUPREME COURT.

SRIPAVAN. J

I agree.

JUDGE OF THE SUPREME COURT

WANASUNDERA.P.C. J

I agree.

JUDGE OF THE SUPREME COURT